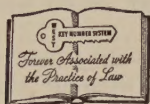


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MAGEE v. BRENNEMAN et al. (L. A. 6519.)

(Supreme Court of California. March 31, 1922. Rehearing Denied April 27, 1922.)

1. Attorney and client ☞63—Evidence held sufficient to support finding of existence of relationship of attorney and client.

In a suit to foreclose a mortgage, evidence held sufficient to support a finding of the existence of the relation of attorney and client between the mortgagors and the mortgagee.

2. Attorney and client ☞123(1)—Protection of client against unfair contracts with attorney applies to administrator of an estate.

Civ. Code, § 2235, providing that transactions between a trustee and his beneficiary by which the trustee obtains any advantage from his beneficiary are presumed to be without consideration, and under undue influence, applies to the relation between an attorney and his client who is administrator of an estate, regardless of Code Civ. Proc. § 1616, providing for payment of an administrator's attorney out of the estate.

3. Attorney and client ☞123(1)—Procuring note by attorney from his client held to put burden of proof that proceedings were fair on assignee suing on it.

Under Civ. Code, § 2235, providing that transactions between a trustee and his beneficiary, whereby the trustee obtains any advantage from the beneficiary are presumed to be entered into by the beneficiary without sufficient consideration, where an attorney procured a note signed by two defendants, secured by property worth \$50,000, in exchange for an unsecured note signed by one of them, an assignee suing on the note had the burden of proving that the transaction was fair and regular, and was entered into by defendants voluntarily with a full knowledge of the facts.

4. Attorney and client ☞123(1)—Evidence held to sustain a finding that the amount of a note was an unreasonable charge and that the note and mortgage securing it were not executed and delivered voluntarily.

In a suit to foreclose a mortgage securing a note given for an attorney's fees, evidence held sufficient to support a finding that the amount of the note was an unreasonable charge, and that the note and mortgage securing it were not executed and delivered voluntarily.

5. Attorney and client ☞123(1)—Court held to have power to find what was a reasonable fee.

In a suit to foreclose a mortgage securing a note given for an attorney's fee, where plaintiff failed to rebut the presumption arising from execution of the note and mortgage, while the relation of attorney and client existed between the parties that the note was executed under undue influence, the contract evidenced by the note was voidable at the instance of defendants, and the court had power to find what was a reasonable fee.

6. Appeal and error ☞843(3)—Where evidence supports findings which support judgment, considering insufficiency of evidence as to other findings is unnecessary.

Where evidence is insufficient to support findings which support a judgment, considering alleged insufficiency of evidence to support other findings is unnecessary.

7. Attorney and client ☞123(1)—Evidence held to support a finding that payments of interest on note were made while relation of attorney and client existed and were not made voluntarily.

In a suit to foreclose a mortgage securing a note given for an attorney's fee, evidence held sufficient to support a finding that payments of interest on the note were made while the relation of attorney and client existed between the parties, and were not made voluntarily.

8. Equity ☞84—Defendants held not guilty of laches in setting up defense against note.

In a suit to foreclose a mortgage securing a note for an attorney's fee given by defendants acting under undue influence, defendants are not barred by laches to set up the defense of undue influence, since it was a matter of defense to be set up when suit was brought on the note.

9. Attorney and client ☞123(1)—Determination of reasonable attorney's fee in prior action held not error.

In a suit to foreclose a mortgage securing a note given by defendants for an attorney's fee in a will contest, where it was alleged the note was given as the result of the undue influence of the attorney, the determination by the court of a reasonable fee in the will contest was necessary to show whether the contract between the attorney and defendants was fair and regular.

In Bank.

Appeal from Superior Court, Riverside County; Wm. D. Dehy, Judge.

Suit by Henry C. Magee against Clayton B. Brennehan and others. From judgment for defendants, plaintiff appeals. Affirmed.

Kemp, Mitchell & Silberberg, of Los Angeles, Miguel Estudillo, of Riverside, Alex W. Davis, of Los Angeles, and Walter C. Davison, of Riverside, for appellant.

Fredericks & Hanna, and Harold C. Morton, all of Los Angeles, for respondents.

LAWLOR, J. This is an appeal by the plaintiff, Henry C. Magee, from a judgment in favor of the defendants Clayton B. Brennehan and Friletta G. Brennehan, his wife, in an action tried by the court, sitting without a jury, to foreclose a mortgage given by the said two defendants to secure a promissory note for \$10,000 executed by the said parties in favor of appellant's assignor, one Miguel Estudillo. It was found that certain fictitious persons, joined as defendants, were not served with complaint or summons, and were found to have no interest in the property.

It appears that, on July 18, 1911, the said Miguel Estudillo, who is an attorney, was retained by Brenneman to represent him in securing letters of administration upon the estate of his mother, Rebecca E. Brenneman, deceased, and thereafter, on July 21, 1911, to represent him in contesting a purported will of the deceased. For several years before this time Estudillo had acted as Brenneman's attorney in various legal proceedings. The contest of the will was successful and as a result Brenneman as heir obtained about \$63,000 from the estate instead of a \$5,000 legacy which he would have received under the purported will. Estudillo acted as Brenneman's attorney in the matter until the latter's discharge as administrator on August 1, 1913, and it was shown that for some time after this he continued to handle legal matters for him.

Before the trial of the will contest, Brenneman paid Estudillo \$1,500 as a retainer fee. After the trial and on June 12, 1912, he paid him \$5,000 more and gave him his promissory note in the sum of \$10,000, to run for one year. The evidence as to what the agreement was with regard to the fee at the time Estudillo was engaged is involved in conflict. Estudillo testified that Brenneman agreed to give him half the amount recovered in the suit to contest the will. Brenneman testified there was no amount agreed upon until the \$5,000 was paid and the note given. Both parties testified that the \$6,500 in cash and the promissory note for \$10,000 constituted the entire fee for the services in contesting the will.

On May 31, 1913, at Estudillo's request, the respondents executed a note and mortgage in favor of Estudillo in the sum of \$10,000, which was given to Estudillo in exchange for Brenneman's note of June 12, 1912. This note and mortgage of May 31, 1913, was assigned to the plaintiff and is the one upon which this action is brought. The respondents have paid \$4,000 on the principal and \$1,080 interest upon the said note and mortgage and in their answer contest plaintiff's claim for the remaining \$6,000 upon the grounds that they executed the note and mortgage "in form only"; that there was no consideration for its execution; that its execution was not the voluntary act of the respondents, but was brought about by the demand, the threatening attitude of Estudillo and the feeling of terror and bewilderment which these acts inspired in respondents. It was also alleged that the note of June 12, 1912, was executed by reason of Brenneman's belief in Estudillo's honesty, integrity, and good faith; by reason of Brenneman's weak mental condition; and by reason of the importunities and request of Estudillo and the relation of confidence existing between them at that time; that they had paid Estudillo in all the sum of \$13,185 for his services in con-

nection with the contest of the will; that \$7,500 would be a reasonable fee for such services; and that any sum in excess of that amount would be oppressive, unconscionable, and exorbitant. The defendants do not seek the recovery of the amount they have paid beyond what is alleged to be a reasonable fee.

The court made findings of fact and conclusions of law and decreed that the note and mortgage be declared null and void and that plaintiff take nothing by his action. Judgment was entered in favor of the respondents, and from that judgment this appeal is taken.

1. Appellant contends certain findings of the court are unsupported by the evidence. These findings are to the effect that the note and mortgage were executed by respondents without any consideration; that for many years prior to the execution of the note and mortgage Estudillo had been continuously acting as attorney for both respondents in various matters; that on May 31, 1913, and for a long time prior thereto, Estudillo was the attorney and confidential adviser of respondents; that they reposed implicit confidence in him and in all matters acted as he advised them; that Estudillo continued to act as attorney for respondent Clayton B. Brenneman in the matter of the estate after May 31, 1913; that on May 31, 1913, and subsequent thereto, respondent Frilletta G. Brenneman was weak and feeble mentally and unable to withstand the importunity of a person of normal mentality; that Frilletta G. Brenneman was unsophisticated in the knowledge of business transactions; that respondents did not have sufficient mentality to realize the consequences of making payments upon the principal and interest of the note and mortgage, or of delaying objections to the note and mortgage; that the payments on principal and interest were not made voluntarily, but by reason of the influence exercised by Estudillo, and while Estudillo was their attorney; that neither Estudillo nor appellant has been injured by the delay of respondents in questioning the validity of the note and mortgage; that Estudillo appeared before the board of supervisors, sitting as a board of equalization, in behalf of respondents, in 1917; that the sum of \$11,580 paid to Estudillo is ample compensation for the reasonable value of his services in the matter of the will contest, and that any sum in excess of that amount would be unreasonable, oppressive, and exorbitant.

The further contentions are made that by making payments on the note and mortgage after the relation of attorney and client had ceased, respondents ratified the contract; that respondents have been guilty of laches; that the court had no authority to determine what was a reasonable sum for the services Estudillo rendered; and that certain findings

are in conflict and are insufficient to support the judgment.

[1] The finding that the relationship of attorney and client existed between Estudillo and respondents on May 31, 1913, on which day the note and mortgage were given, is sufficiently supported by the evidence. At that time Brenneman was still acting as administrator of his mother's estate, and Estudillo represented him in that capacity. Estudillo testified he procured Brenneman's final discharge as administrator of his mother's estate; that he represented Brenneman in other matters, and that he drew the wills of both respondents subsequent to May 31, 1913. Brenneman testified he went to see Estudillo from time to time on legal business after May 31, 1913, and that Estudillo acted as his attorney in various matters all during the time up to January 15, 1915. Appellant particularly insists the evidence does not show that Estudillo was Mrs. Brenneman's attorney. Respondents do not contest this, but claim the finding is immaterial. However, Mrs. Brenneman testified on cross-examination, in response to questions as to whether she had any business of her own with Estudillo prior to May 31, 1913, that she "had a little business with him when my sister died." In view of this it cannot be held the court could not have concluded that the relationship had not been terminated on that date. Apart from this, we think it clear that the testimony hereinafter referred to in connection with appellant's contention that the transaction was fair and regular, would have warranted a conclusion that Mrs. Brenneman entered into the contract as the result of undue influence without regard to the relationship of attorney and client.

[2] Appellant contends respondents should not be allowed to claim the benefit of this relation of confidence, because, on the particular date in question, Estudillo represented Brenneman, if at all, in the latter's official capacity as administrator only. He has cited section 1616 of the Code of Civil Procedure. *Estate of Hite*, 155 Cal. 448, 101 Pac. 448, and *Malville v. Kappeler*, 4 Cal. Unrep. Cas. 843, 37 Pac. 934, as supporting this position. These are authorities for the rule that an attorney may be retained by a client both in an official and a private capacity and that he must look for his compensation to the client in the respective capacities, but they are not authority for the proposition that, where an attorney is retained by the administrator of an estate, the latter as an individual is not entitled to the protection afforded by the relation of attorney and client. Section 2235 of the Civil Code draws no such distinction, but applies to all cases of attorney and client, where any contract is made whereby the attorney receives an advantage.

It having been shown that the relation of attorney and client existed between the par-

ties, we shall next consider whether the dealings between them were fair and regular. In *Metropolis Trust & Savings Bank v. Monnier*, 169 Cal. 592, 598, 147 Pac. 265, 268, the court declared:

"The relation of attorney and client is of a fiduciary character, and the Civil Code (sec. 2235) clearly provides that all transactions between a trustee and his beneficiary during the existence of the trust, by which he obtains any advantage from his beneficiary, 'are presumed to be entered into by the latter without sufficient consideration and under undue influence.' This does not mean that a trustee may not deal with his beneficiary. But if he does deal with him in such manner as to obtain an advantage, the trustee has the burden of showing by evidence that the transaction was fair. Certainly the obtaining of a note for \$20,000, secured by a mortgage, is an advantage, and the attorney, or those claiming under him, cannot safely rest, as they did in this case, without affirmative proof of the facts surrounding the transaction."

It is further pointed out in that case that a consideration may be shown to exist for such a note, and also that if such a note is found to have been given as a result of undue influence, it is merely voidable and not void. In *Kisling v. Shaw*, 33 Cal. 425, 91 Am. Dec. 644, it was held that the beneficiary in such a case must show some damage resulting to him from the transaction. The court declared, in *Shirk v. Neible*, 156 Ind. 66, 59 N. E. 281, 83 Am. St. Rep. 150, that:

"These attorneys having agreed with their client during the progress of the confidential relation as to the amount of their fees, and demanded and taken a negotiable note and mortgage therefor, the law presumes the transaction to be fraudulent, and the fee excessive, and the burden is laid upon the attorneys to show by clear proof that it was fair, and the amount agreed upon but a reasonable compensation for the services which they had performed or would be called upon to perform under their employment."

In *Cole v. Wolfskill* (Cal. App.) 192 Pac. 549, a physician brought suit on a note given him by a patient in payment for services rendered, and it was held that the fact that the contract was in writing was sufficient to rebut the presumption that an agreement between parties occupying a confidential relation was entered into without a sufficient consideration, the consideration being presumed from the writing. Section 1614, Civ. Code. The case of *Dimond v. Sanderson*, 103 Cal. 97, 37 Pac. 189, was there cited to the point that it was not sufficient to show merely that a confidential relation existed, but that it must also be shown that such a relation was used to obtain an unfair advantage. In *Dimond v. Sanderson*, supra, the court said:

"We think that, before the presumption contemplated for can apply, it must appear that plain-

tiff, in obtaining the note sued upon, obtained some advantage over the defendant, and that the possession of the note is not of itself evidence that any advantage has been obtained."

The court plainly held that the contract there was not shown to be one in which an advantage was obtained by the party occupying the position of trust, and therefore it did not fall within the rule of section 2235 of the Civil Code. The case of *Cole v. Wolfskill*, supra, therefore cannot be considered authority for the proposition that the burden of proof is shifted to the beneficiary in cases where the attorney has received an advantage. To place the burden on the beneficiary would be to put such contracts in the same category as those between parties occupying no relation of trust, to ignore the provisions of section 2235 of the Civil Code, and to deny this added protection to one whose confidence has been abused.

[3] The procuring of the note signed by both respondents, secured by property which the record shows to be worth about \$50,000, in exchange for an unsecured note signed by Brenneman alone, was certainly an advantage to Estudillo. In addition, the evidence shows that the transaction was carried out at Estudillo's request. It therefore, under the authorities cited above, devolved upon appellant to show that the transaction was fair and regular and was entered into by respondents voluntarily with a full knowledge of the facts; and upon respondents to show that they had suffered damage as a result of the undue influence. There can be no doubt that the foreclosure of the mortgage involved in this suit, as well as the payment of an excessive fee, would be damaging to respondents.

[4] Appellant has sought to meet the burden of proof resting upon him, first by showing the amount agreed upon was a fair, reasonable charge for the services performed. The trial court concluded appellant failed to sustain this burden. It was found the amount of the note was more than a reasonable charge, and that the note and mortgage—

"were not made, executed, or delivered freely or voluntarily, by said defendants or either of them, but such said note and mortgage were so made, executed and delivered against the wish and will of said defendants, and each of them, and by reason of the request, demand, and importunities of said Miguel Estudillo, and by reason of the power and influence of said Miguel Estudillo over said defendants, and over each of them."

We cannot say these findings are not warranted by the evidence. Expert testimony was received on the subject of the value of Estudillo's services, and under all the circumstances the court found that the sum of \$11,580 was "ample compensation for the rea-

sonable value" of the services he performed. Although the court might consider any fee within certain limits not to be so unreasonable as to characterize the transaction as unfair, some sum which would be a reasonable fee must necessarily be fixed as a specific amount by the judgment. The record shows Estudillo conducted the will contest with energy and diligence, but although appellant has cited cases in which as high as one-third or one-half of the property involved in the action was held to be a reasonable contingent fee, it cannot be held, upon the evidence before us, that the trial court erred in concluding that \$11,580, amounting to almost a fifth of the property involved, was a reasonable compensation for contesting the will.

The evidence does not show that the note and mortgage, though for more than a reasonable amount, were executed while the parties were acting upon an equal footing. Estudillo testified it was given simply at his request, with no discussion except as to the amount of interest. On the other hand, Brenneman stated he did not know what the extent of the property included in the mortgage was until foreclosure proceedings were begun; that "my wife was frightened and is to this day. She was afraid of Estudillo. He forced us to do it, he would not let us go out of his office." Mrs. Brenneman stated that Estudillo "acted like he was angry and I thought he was, because his face got so red. He raised up that way and leaned over the drawer. I was afraid of him. I signed the note and mortgage because I thought I had to. He told me I had to and I thought I had to"; that "I always had confidence in Mr. Estudillo, and I thought he was all right as an attorney, and I thought whatever he told me to do I had to do." She testified further:

"Q. Why did you go to Mr. Estudillo's office on May 31, 1913? A. Because I thought I had to. Mr. Estudillo sent for me to come.

"Q. Did you think you had to go every place Mr. Estudillo sent for you to go? A. I felt that I had to do everything that Mr. Estudillo told me to do then."

Both respondents stated that they continued to consult Estudillo because they feared he would be insulted if they did not, and because they believed he would eventually "do right" in the matter of the will contest. There was other evidence to the same effect.

[5] It thus appears the contract was entered into while the relation of attorney and client existed and was advantageous to the attorney, Estudillo. This raised a presumption of undue influence and cast the burden on appellant to prove the transaction was fair and regular. Appellant failed to show that the transaction was fair and regular, or that the agreement was for a reasonable amount. Thus the presumption that it was

entered into under undue influence was not rebutted. Under these circumstances the contract was voidable at the instance of respondents. Hence, the court could have found, as it did, what was a reasonable fee for the services performed. The finding is that an amount equal to such a fee had already been paid. It follows there was nothing more due to him, and the conclusion and judgment in favor of respondents must therefore be upheld.

[6] Since the evidence sustains the findings above referred to, and those findings support the judgment, it becomes unnecessary to consider the alleged insufficiency of the evidence as to the others. *Wheat v. Bank of California*, 119 Cal. 7, 50 Pac. 842, 51 Pac. 47.

[7] 2. Appellant's next contention is that:

"Defendants by their act in paying through Mr. Estudillo's stenographer \$4,000 on the principal, voluntarily as the evidence shows, ratified and confirmed the note and mortgage of May 31, 1913."

The court found that certain payments on interest on the note and mortgage were made between February 6, 1914, and September 22, 1915, and that \$4,000 was paid on the principal January 15, 1915; that:

"Said payments were not made freely or voluntarily, but were made under the circumstances and by reason of the influence and motives in these findings mentioned, and at times when the relation of attorney and client continued to exist between said Miguel Estudillo and said defendants."

Appellant insists this finding is not supported by the evidence, in that at the times the payments were made Estudillo was not acting as attorney for either of respondents. Inasmuch as it was not shown how long a period the various services covered, or what interval elapsed between them, it cannot be said the court was not justified in concluding that Estudillo was acting continuously as Brenneman's attorney at the times the payments were made. With reference to the payments, Brenneman stated that he paid interest on the note and mortgage for a while, but that he let Estudillo ask him for it; that he did not want to pay it very much, but that he did pay it; that he paid "because I had to do it. That is the reason. He would not leave me off." He also testified that all the interest payments were made by him. Such testimony as this amply supports this finding.

[8] 3. Appellant contends that respondents have been guilty of laches, and that a finding of the court to the effect that neither Estudillo nor appellant has been injured by the delay of respondents in questioning the validity of the note and mortgage is not supported by the evidence. This contention cannot be maintained. In *Estate of Cover* (Cal. Sup.) 204 Pac. 583, it was said that:

"While it is the rule generally that a cause of action grounded in fraud must be instituted within three years from the time of the discovery of the fraud, that rule does not apply to a defense interposed upon the ground of fraud in a case where it is affirmatively sought to have declared valid and enforceable a contract claimed to have been conceived and consummated in fraud. In such a case, neither the limitation of the statute nor the doctrine of laches will operate to bar the defense of the invalidity of the agreement upon the ground of fraud, for, so long as the plaintiff is permitted to come into court seeking to enforce the agreement, the defendant may allege and prove fraud as a defense. In short, it is not incumbent upon one who has thus been defrauded to go into court and ask relief, but he may abide his time, and when enforcement is sought against him excuse himself from performance by proof of the fraud. [Citing cases.]"

Respondents here are not suing to rescind the agreement, but are interposing the defense of undue influence. This case is therefore analogous to *Estate of Cover*, supra, and respondents are not barred by any delay in seeking relief, but were entitled to plead their defense whenever appellant sought to recover.

[9] 4. The next contention is that the court erred in assuming to determine what was a reasonable compensation in the matter of the will contest. Inasmuch as it was alleged the contract was entered into by respondents through undue influence, it was necessary for the court to determine whether or not the fee charged was reasonable, as showing whether the contract was fair and regular. Appellant has cited certain authorities to the effect that, in an action for attorney's fees, where both parties have full knowledge of all the facts, the jury is not empowered to go behind the agreement between attorney and client to decide whether, in addition to being free from undue influence, the agreement is for a reasonable fee. In view of the fact that the contract here was found to have been entered into under undue influence, it is unnecessary to consider those cases.

5. Three of the findings are claimed by appellant to be in conflict. These are to the effect that the note and mortgage were executed without any consideration whatsoever; that the note and mortgage were executed and delivered instead of and in place of the promissory note of June 12, 1912; and that the note and mortgage were executed in partial payment of the attorney's fees claimed by Estudillo to be due, and for no other consideration. One of the allegations of the answer was that there was no consideration for the note and mortgage. Appellant claimed that the note of June 12, 1912, in exchange for which the note and mortgage were given, was a valid consideration even if there were no other. Since the conclusion we have

reached does not involve the question of consideration, it will not be necessary to pass on this assignment of error.

The judgment is affirmed.

We concur: SHAW, C. J.; WILBUR, J.; SLOANE, J.; SHURTLEFF, J.; LENNON, J.

(188 Cal. 536)

In re DUFFILL'S ESTATE. (L. A. 6929.)

(Supreme Court of California. March 29, 1922.
Rehearing Denied April 27, 1922.)

- 1. Appeal and error** ⚡1071(1) — **Erroneous finding as to value of property in hands of trustee harmless to beneficiary where trustee's commission based on income.**

An erroneous finding, by the superior court, as to the value of certain stock included in the corpus of a trust estate, was not prejudicial to the beneficiary appealing from a decree fixing the compensation of the trustee, where the finding showed that the court recognized the value therein stated was excessive, but stated it as the value at which the property was delivered to the trustee by the executor, and where the trustee's compensation was fixed as a percentage of the gross income.

- 2. Trusts** ⚡315(2)—**Court had judicial discretion in fixing trustee's compensation.**

Under Code Civ. Proc. § 1700, directing that the trustee shall be allowed such compensation for his services as the court may adjudge to be just and reasonable, the fixing of the amount allowed the trustee is within the judicial discretion of the court to be exercised not arbitrarily, but with due and proper consideration of the nature and extent of the services actually rendered.

- 3. Trusts** ⚡316(2)—**Seven and one-half per cent. of gross income allowed to trustees held not excessive fee.**

An allowance to the trustee of seven and one-half per cent. of the gross income collected by it during the period was not an excessive fee, where the only witness testified that such allowance was common, though his hasty calculation of the amount such percentage would produce was erroneous.

- 4. Trusts** ⚡316(2)—**Trustee may be allowed fee larger than executor of property of same value.**

Since the trustee is required to invest the money received by him under the trust by Civ. Code, § 2261, and must pay interest thereon if he fails to do so, under section 2262, he is subject to greater responsibilities than a personal representative of a deceased person of an estate of equal size, and may be allowed for his services a fee largely in excess of the commissions which could be allowed under the statute to an executor.

- 5. Attorney and client** ⚡140—**Factors governing determination of reasonable fee for attorneys of trustee stated.**

In determining what constitutes a reasonable attorney's fee for the attorneys of trustee,

the court will consider the nature of the litigation, its difficulty, amount involved, the attention given, and the success or failure of the attorney's efforts.

- 6. Attorney and client** ⚡166(3)—**Expert testimony as to reasonable attorneys' fees is not binding but may be considered.**

While the testimony of other attorneys as experts, as to reasonable fees for services rendered by attorneys for trustee, is not binding upon the court, which has power to fix the amount to be allowed independent of such testimony, the court need not wholly exclude the testimony from its consideration.

- 7. Appeal and error** ⚡932(1)—**Presumed that court did not consider contingent nature of attorney's services for trustee.**

If attorneys for trustee are not entitled to have the court consider, in fixing their fees, the fact that they would recover nothing if they were unsuccessful, there is a presumption that the court disregarded such fact in fixing the fees, especially where the amount as fixed by the court was smaller than that stated as reasonable by expert witnesses, who did consider the contingent nature of the employment.

- 8. Attorney and client** ⚡141—**Services in connection with controversies incidental to sustaining of trust held proper to be considered.**

In determining the reasonable amount of fees to be allowed attorneys for trustees whose services resulted in preserving the trust estate, the services rendered by the attorneys in connection with controversies as to certain features of the trust, as to which they were unsuccessful except to the extent of securing a decision that those features did not invalidate the entire trust, may be considered.

- 9. Appeal and error** ⚡984(5)—**Allowance of fees for attorneys of trustees can be reversed only for abuse of discretion.**

The allowance of fees for attorneys of trustees will not be interfered with except in case of plain abuse of discretion.

- 10. Appeal and error** ⚡984(5)—**\$75,000 allowed attorneys of a \$1,000,000 trust held not excessive.**

An allowance of \$75,000 to attorneys for trustees for their services in preserving, during litigation, a trust estate amounting to substantially \$1,000,000, which involved trial and briefing of the case below, and on appeal as to intricate questions of law raised by the litigation, though larger than Supreme Court might have allowed if it were fixing the fee in the first instance, was not so excessive as to show an abuse of discretion justifying a reversal of the allowance.

- 11. Trusts** ⚡227—**Trustee can be allowed attorney's fee for preserving trust, notwithstanding interest of one beneficiary in defeating it.**

A trustee can be allowed a reasonable attorney's fee for his services in preserving the trust against litigation, which fee is to be paid out of the entire trust, even though it was to the interest of one beneficiary that the trust be defeated, because that beneficiary would

have received a greater share under the intestate laws.

12. Trusts *§*274(3)—Attorney's fee for preserving trust in litigation may be charged against the corpus of the estate.

The allowance to attorneys for their services in preserving the trust in litigation, attacking its validity, is an extraordinary expenditure which may properly be charged against the corpus of the trust estate.

13. Trusts *§*325—Evidence held to show attorneys' services were rendered for trustee, notwithstanding formal appearance for other beneficiaries.

Evidence at a hearing on settlement of trustee's account held to show that the services rendered by attorneys for the trustee in defending the trust against litigation by one beneficiary, were rendered under employment by the trustees and for them, though the same attorneys also entered a formal appearance on behalf of other beneficiaries of the trust.

In Bank.

Appeal from Superior Court, Los Angeles County; Lewis R. Works, Judge.

In the matter of the estate of Eugenie A. Duffill, deceased. From a decree settling the account of the trustee and allowing fees to the trustee and its attorney, Harry Duffill, one of the beneficiaries of the trust, appeals. Affirmed.

See, also, 180 Cal. 748, 183 Pac. 337.

Gibson, Dunne & Crutcher and Hunsaker, Britt & Cosgrove, all of Los Angeles, for appellant.

Kemp, Mitchell & Silberberg, of Los Angeles, James P. Sex, of San Jose, and Alex W. Davis, of Los Angeles, for respondent.

SHURTLEFF, J. Eugenie A. Duffill, a resident of the county of Los Angeles, this state, died on January 7, 1916, leaving a last will and testament, which was duly admitted to probate by an order of the superior court of said county. By the terms of this will the testatrix, after making a number of specific bequests, bequeathed and devised the residue and remainder of her estate, real and personal, to the Los Angeles Trust & Savings Bank, one of the respondents, in trust for certain enumerated purposes. Those material to this inquiry were: To invest and reinvest said property in productive and income-bearing property, and to apply and distribute the income and principal as follows: Pay to Albert Duffill, a minor, a grandson of testatrix, and son of Harry Duffill, a son of testatrix, the sum of \$3,000 per annum, to be paid until he reaches the age of 21 years; to the said Harry Duffill the sum of \$4,000 per annum, to be paid until Albert attains the age of 21 years, or, in the event of Albert's death before reaching that age, until the date Albert would have been 21 had he lived, each of

said payments to be made in the amounts and in the manner directed in the will. It was further provided that, in the event Harry Duffill should marry one Mrs. Alice McNamara, then and in that event said trustee shall pay to him thereafter "only the sum of \$2,000 per year instead of \$4,000 per year." The testament also directed that when Albert attains the age of 21 years the trustee shall—

"segregate said trust fund, and *any accumulations thereof*, into two equal parts, and transfer and convey one of said parts to my son, Harry Duffill, provided, however, that in the event my said son, Harry Duffill, shall have married Mrs. Alice McNamara prior to the date when said Albert Duffill shall have attained the age of 21 years, then and in that event the said trustee shall at said time distribute to my son, Harry Duffill, one-half of the balance of the estate in the hands of said trustee after withdrawing therefrom all of the stock of the Grasselli Chemical Company." (Italics ours.)

Parenthetically, it should be said that the will provided that the last-mentioned stock, which constituted a large part of the estate and the value of which, as will presently appear, is involved in this appeal, should not be sold by the trustee. The will, after making provision for the distribution by the trustee to Albert, upon attaining the age of 21 years, of his share, provided that in the event of the death of Harry "prior to the distribution to him of his portion of the trust estate," distributable to him in accordance with the terms of the will and which terms were part of the trust created thereby, the trustee "shall distribute all of said trust fund" to Albert "in the same manner, and upon the same trusts as are provided for the portion of said trust fund" directly distributable to him (Albert) under the trust. In the event of the death of Albert while there remains undistributed to him any portion of the trust fund, distributable to him under the terms of the trust, the trustee forthwith shall distribute to Martha Duffill (wife of Harry and mother of Albert) "one-fourth of the entire trust estate and accumulations then in the hands" of the trustee, and the remaining three-fourths shall be distributed to Harry, "said distribution to be made at the same time that * * * Albert Duffill would have reached the age of 21 years had he lived." In the event of the death of both Harry and Albert "while any portion of said trust estate remains in the hands of the trustee and undistributed," upon the death of the last survivor of them, the trustee shall forthwith distribute the entire trust fund undistributed at that time as follows: An undivided one-fourth thereof to Martha Duffill; an undivided one-fourth thereof to Mrs. Ida Ireland, and the remainder thereof, share and share alike, to the children of Mrs. Daniel Bailey living at the time of

the death of the last survivor of Harry and Albert. The will nominated the said Los Angeles Trust & Savings Bank the executor thereof, and requested that while acting in the capacity of either trustee or executor, it "retain as its attorney John M. Kemp." The order admitting the will to probate included the appointment of said Los Angeles Trust & Savings Bank as executor, and as such executor it administered the estate of said Eugenie A. Duffill, deceased. Ultimately a petition for the distribution of the estate was filed by the executor, which, although not incorporated in the record, unquestionably asked for distribution in accordance with said terms of the will. The appellant, Harry Duffill, upon the hearing of said petition, presented a number of objections to distribution in conformity with the will, which, with one exception, were based upon the contention that the testamentary provisions objected to were illegal and void. The portions assailed were, briefly, the following:

(1) The provision for the accumulation of the income to be paid adult persons; (2) the part of the will reducing Harry's annuity of \$4,000 and the one-half of the trust fund which he would otherwise receive, should he marry Mrs. Alice McNamara. Harry further claimed that the destruction of these enumerated features of the will, by reason of their illegality, involved a disposition of the estate of the decedent contrary to her will so that her intent failed, the result of which was to invalidate the trust in its entirety. He made the further contention that certain large stock dividends declared and paid during administration by the Grasselli Chemical Company, constituted income. All of the foregoing claims of Harry Duffill were resisted by the Los Angeles Trust & Savings Bank as executor, as trustee named in the will, as guardian for Albert, of whom it was apparently the legally appointed guardian, and Martha Duffill, all of whom were represented by the same firm of attorneys. The superior court sustained all of said contentions upon the part of Harry, except the one that the entire trust was invalidated. A decree of final distribution was entered accordingly, which was on appeal affirmed by this court. Estate of Duffill, 180 Cal. 748, 183 Pac. 337.

The particulars of the appeals, two having been prosecuted, will be discussed in the course of this opinion.

The decree of distribution, which became final August 31, 1919, distributed certain property to the respondent Los Angeles Trust & Savings Bank in trust, the possession of which it as executor, pursuant to the terms of said decree, transferred to itself as trustee on September 8, 1919.

On February 20, 1920, said Los Angeles Trust & Savings Bank, as such trustee, filed its "first account current and report showing the administration of the trust estate" in-

cluding, among other things, receipts and disbursements "since the 8th day of September, 1919 (the date of the transfer of the trust property to it), to the 22d day of January, 1920." It was alleged in said report, which was in the nature of and is frequently herein called a "petition," that, during the administration of the estate of Eugenie A. Duffill, deceased, and after the filing of the petition for final distribution therein, Harry Duffill filed objections, and to which we have just referred, to the distribution prayed for, and sought to have the entire trust, as provided in the will of deceased, declared invalid, and the whole of her estate immediately distributed to him, which necessitated the employment by the trustee of attorneys to defend the will and trust by it created, and that it employed the firm of Kemp, Mitchell & Silberberg to render that service. It was further alleged that had all the objections of Harry been sustained, the trust would have been rendered invalid and there would have been no property in the hands of the trustee to pay said attorneys, since all of the property of the deceased would, pursuant to the laws of succession, have been distributed directly to Harry, her only child and sole heir, and Albert would have received nothing "under said will, either presently or in the future." The report also averred that the petitioner (Los Angeles Trust & Savings Bank) made an agreement with the said attorneys (Kemp, Mitchell & Silberberg) whereby it was agreed—

"that, in case said Harry Duffill succeeded in declaring the said trust invalid, that the said attorneys should receive nothing for their compensation, and that their fees should be wholly contingent upon the successful termination of the said litigation, * * * that, if said attorneys were successful in sustaining the said will and the trust provisions thereof, that it would be necessary that the court should allow such fees as would be reasonable under all of the circumstances and that any fee paid to them should be approved by this court" (superior court of the county of Los Angeles).

The report further alleged the filing by Harry of said objections to the distribution of the estate of deceased as prayed, the various hearings and arguments in the matter; the filing of voluminous briefs; the rendering of an opinion by the trial court sustaining the trust and ordering a decree in accordance with such opinion; the reopening and reargument of the matter; the preparation of additional briefs resulting in the court again upholding the trust, and a decree to that effect filed and signed on July 17, 1918; that Harry appealed to this court from said decree of final distribution; the argument in such appeal; the preparation and filing of briefs, and the preparation of an answer to Harry Duffill's petition for rehearing after the affirmation of said decree by this court, and the denial of such peti-

tion. It also alleged that the litigation which ensued by reason of Harry's said objections "covered a period of nearly three years"; that the value of the trust estate was approximately \$1,000,000, and that the gross income from the estate since the death of said Eugenie A. Duffill, which, as has been said, occurred January 7, 1916, had (on February 20, 1920), amounted to about \$400,000"; that there are two principal beneficiaries of the said trust estate (assuming that the minor Albert Duffill lives to the age of 21 years), and that when the said Albert Duffill shall attain the age of 21 years, the corpus of the said estate, according to the terms of said decree, will be divided equally between said minor and the said Harry Duffill, and that it is just and proper that the entire fee for sustaining the said trust and will should be paid from the corpus of the said trust estate. It was shown by the report and account that the accumulations for the benefit of Albert amounted to \$195,083.80. The prayer asked that the account be settled and allowed; for reasonable compensation to the attorneys for the trustee for their services in connection with "litigation involving the validity of the will of the deceased and of the said trust"; that a reasonable sum be allowed the trustee as compensation to the date of filing the account and report (February 20, 1920), which shall also include a reasonable amount to be allowed the attorneys for the trustees "for the preparation and filing of this account and for legal services in the administration of the said trust to this date" (February 17, 1920). To this account and report, the appellant, Harry Duffill, filed a number of objections, but those material to this inquiry were: (1) That the valuation of \$190 per share of the Grasselli Chemical Company was too large, and that its true value was \$170 per share and no more; (2) to the allowance out of the trust estate of a fee (by Harry called a "contingent fee") to the trustee for its attorneys. It should be noted that Harry did not object, and never has objected, and does not now object, to the allowance of reasonable compensation to the attorneys for petitioner, or of a "reasonable sum * * * as compensation" to the Los Angeles Trust & Savings Bank, as trustee. Harry does, however, as will subsequently be developed, contend that the respective sums allowed in response to the application were not reasonable.

Upon the hearing, the account, with certain corrections with which we are not concerned, was allowed and approved.

The court in the main found that the allegations of the report were true, that on September 8, 1919, the date upon which it was delivered to the Los Angeles Trust & Savings Bank as trustee, and up to and including January 22, 1920, the date to which the account is brought, the value of common

stock of the Grasselli Chemical Company was \$170 per share, and not \$190 per share as shown in the account and report, "but that said stock is carried at \$190 per share as a matter of bookkeeping for the reason that the final decree of distribution in the above-named estate (Eugenie A. Duffill, deceased) fixed a value on said stock of \$190 per share," which valuation was allowed and approved by the decree.

The court further found that, had the objections of Harry Duffill to distribution of his mother's estate been entirely sustained, the result would have been to extinguish the trust and that there would have been no property in the hands of the trustee from which to pay attorney fees; the employment by the trustee of the firm of Kemp, Mitchell & Silberberg as its attorneys and the agreement between said attorneys and the trustee to the effect that their fees should be wholly contingent upon the preservation of the trust, and that, in the event "the trust should be sustained, it would be necessary that the court should fix and allow such fees as would be reasonable under all of the circumstances, and that any fee paid to them (attorneys) should be approved by the court"; that various hearings were had of said objections of Harry to the decree of distribution.

The court further found "that the said Los Angeles Trust & Savings Bank, as trustee, the said Albert Duffill by his guardian, Los Angeles Trust & Savings Bank, and Martha Duffill, as beneficiaries under said trust, defended the validity of the said trust; that Kemp, Mitchell & Silberberg represented said Los Angeles Trust & Savings Bank as trustee, Martha Duffill, and Albert Duffill by Los Angeles Trust & Savings Bank, his guardian"; that evidence was taken and the matter argued and briefed by the respective parties, and the court rendered its decree, and, as heretofore stated, distributed the estate accordingly, and adjudged that the said provision for accumulations, except the one for the benefit of Albert, and the condition in restraint of marriage, were, and each of them was, void, and that the trust declared in the will was otherwise lawful and enforceable; that Harry Duffill appealed from that portion of the decree adjudging the trust valid, and that "the Los Angeles Trust & Savings Bank as trustee and executor, Albert Duffill by his said guardian, and Martha Duffill appealed [to this court] from the whole of said decree"; that briefs were prepared and filed and thereafter the decree was affirmed (180 Cal. 748, 183 Pac. 337); that the estate was distributed in accordance with said decree, and that the Los Angeles Trust & Savings Bank, as trustee, received "as of September 8, 1919, properties of the value of \$1,000,000." The court further found:

"That Kemp, Mitchell & Silberberg rendered their services to said trustee pursuant to said

contract and agreement; that said services were rendered in the defense of the validity and in protection of the trust itself, and for the purpose of preserving and protecting the validity of the said trust for the benefit of the beneficiaries thereof and inured to the benefit of said entire trust; that the reasonable value of said services of Kemp, Mitchell & Silberberg is the sum of \$75,000 and the said sum is hereby allowed to said trustee for the said services of said attorneys. It is further ordered that the said sum of \$75,000 be paid ratably out of the corpus of the said trust estate and from the fund accumulated for the benefit of Albert Duffill, a minor, as the same was distributed to and received by the said trustee from the said executor; that said trustee rendered further services in the handling of the said estate after the same was distributed to it, and there is hereby allowed to said trustees for said services the further sum of \$3,449.72, as compensation to said trustee for its services from September 8, 1919, up to and including the filing of this account."

It is from parts of this decree that this appeal is taken. The particulars in which appellant seeks a reversal, each upon the ground of the insufficiency of the evidence to justify it, are the following: The fixing of the value of the capital stock of the Grasselli Chemical Company at \$190 per share; the amount (\$3,449.72) allowed the trustee as compensation for its services performed between September 9, 1919, and January 22, 1920, both inclusive, and the allowance to the trustee of \$75,000 for the services of its attorneys.

[1] We cannot see in what respect the appellant is injured by that portion of the decree which allows and approves Schedule "B" attached to the account in which the value of the common stock of the Grasselli Chemical Company is shown to be \$190 per share, in view of the fact that the decree declares that, during the period covered by the account, its value was in fact \$170 per share. Such valuation was in accordance with the stipulation of the parties made at the hearing "that as of the date the decree became final * * * the actual value of the Grasselli Chemical Company stock was \$170 per share," and it was also of that value at the time this account was filed. It was likewise stipulated that the stock was worth \$170 a share as of the date January 22, 1920. The valuation of \$190 was the one fixed in the decree of distribution of the estate of Eugenie A. Duffill, deceased. We think the language of the decree is the equivalent of a finding that the real value of the stock at the time indicated was \$170 per share. The decree in terms declares that "said stock is carried at \$190 per share as a matter of bookkeeping." While it must be conceded that the \$190 per share valuation increased the volume of the corpus of the trust estate in the sum of about \$82,620, this was of no moment and in no wise injured or prejudiced

any one interested in the estate so far as fixing the fee of the trustee was concerned, since the allowance to the trustee, as stated by appellant, "was 7½ per cent. of the *gross income* shown by the [trustee's] account" (*italics ours*), and not upon the value of the corpus of the trust estate.

[2, 3] The next contention of the appellant is that the allowance of \$3,449.72 to the trustee for its services from September 8, 1919, to January 22, 1920, both dates inclusive, a period of 4 months and 14 days, was excessive and unreasonable. Our Code directs that the trustee shall be allowed "such compensation for services as the court may adjudge to be just and reasonable" (Code Civ. Proc. § 1700), which in effect leaves the fixing of the amount thereof to the judicial discretion of the court, to be exercised, not arbitrarily, but always with due and proper consideration of the nature and extent of the services actually rendered. These services fairly include not only what might be termed physical services such as collecting and distributing the income, care of the property, making investments and the like, but in addition the responsibilities arising from and ever attending the faithful and profitable administration of the trust. Doubtless the amount of compensation awarded to the trustee in this instance was, in a measure, based upon the testimony produced by respondent, the appellant having offered none upon that issue, which, in substance, was that the usual charge for services of trustees similar to those involved here is 7½ per cent. of the gross income of the trust, and that an amount so ascertained is a reasonable allowance to the trustee in this instance. The trustee's trust officer, when testifying touching the compensation to be awarded the trustee, said:

"That [7½ per cent. of the gross income] is the usual charge made by trustees under such circumstances, and that is a reasonable amount. In this instance, I do not recall how much that would figure, but I think it will run \$1,500 or \$1,600."

We think it entirely clear from the context that the witness intended to and did adopt the percentage mentioned as the controlling basis for his opinion, and that the figures given were errors attributable to a hasty computation. It appears that the estate in the hands of the trustee and respondent consisted of 4,131 shares of the capital stock (common) of the Grasselli Chemical Company, a beneficial interest in a trust with the Citizens Trust & Savings Bank of orange and walnut groves; rented property in the city of Los Angeles, and an undivided one-half interest in acreage in Los Angeles county; add to the value of these properties the income from the trust, and you have an estate approximating \$1,000,000 in value, the care of which gave rise to cor-

responding responsibilities, properly to be taken into consideration by the court when determining the fee of the trustee.

[4] Appellant draws our attention to the fact that the sum allowed the respondent, as compensation for its services, is largely in excess of what its commissions would have been under our statute regulating the same, had it received cash in an amount equal to said gross income in the capacity of an executor. But, in our opinion, the value of the services of the respondent, under the circumstances of this case, should not be determined by comparing them with those of an executor or administrator. A trustee of a trust, such as we are considering, is subject to greater responsibilities than a personal representative of a deceased person of an estate of equal size. It is incumbent upon the trustee to invest the money received by him under the trust (Civ. Code, § 2261), and if he omits to do so, he must pay simple interest thereon if the omission is merely negligent, and compound interest if willful (Civ. Code, § 2262); not so with the personal representative, whose legal duty is, in the main, confined to assembling, taking possession of, and protecting the property of the deceased, and holding it for administration. He is not obliged to invest any part of it, and if he does so it is at his peril, except in cases, and they are few in number, where the statute permits it to be done with the approval of the court.

In view of what precedes, we cannot say that the court abused its discretion in making said award to the trustee, or that it was unreasonable.

Appellant's objection to the allowance of \$75,000 to the trustee for the services of its attorneys, and to its payment "ratably out of the corpus of the estate and from the fund accumulated for the benefit of Albert Duffill," as the same was distributed and received by it, presents a more difficult question. Appellant concedes that the attorneys should receive a reasonable fee, but stoutly contends that \$75,000 is "grossly excessive" and unreasonable.

[5] The court found, in accordance with the allegations of the report previously mentioned, that the trustee entered into an agreement with its said attorneys—

"that their fees should be wholly contingent upon the preservation of the trust, * * * that it would be necessary that the court should fix and allow such fees as would be reasonable under all of the circumstances, and that any fee paid to them should be approved by the court."

This agreement, so far as the trust was concerned, did not, in our opinion, provide for a contingent fee as commonly understood, since, under any and all circumstances, the compensation was by its terms to be fixed by the court and be reasonable in amount. Obviously, if the trust was invali-

dated, there would be no funds with which to liquidate the fee, and it was therefore unnecessary to provide for such a contingency. In our judgment the contingent feature of the arrangement looked more to the protection of the trust company from the possibility of being obligated to pay a fee in the event of Harry's attack upon the trust being in all respects successful. The attorneys did not agree to advance the costs of the litigation, neither did the trustee undertake, without the approval of the court, to give them any portion of the estate or any amount whatever. Indeed, the agreement left the amount of the fee precisely where the law places it—in the discretion of the court, the same in any event to be reasonable. In California Jurisprudence (vol. 3, § 96, p. 698) it is said:

"In determining what constitutes a reasonable [attorney's] fee, the court will take into consideration the following factors: The nature of the litigation, its difficulty, the amount involved, * * * the attention given, [and] the success or failure of the attorney's efforts,"

—authorities being cited from our appellate courts in support of each of these enumerated elements. The amount involved in the several controversies, in connection with which the services under review were rendered, was large, the nature of the litigation intricate, and in some of its aspects, difficult. It was skillfully conducted, and in its most particular part—the preservation of the trust scheme—successful. The record furnishes abundant proof of the learning, ability, and industry of the attorneys representing the different interested parties, although it is the professional services and ability of the attorneys for the respondents with which we are immediately concerned.

The proof of the services performed by the attorneys for the trustee was both documentary and oral, the former consisting of a brief filed by respondent in the matter of the estate of Eugenie A. Duffill, deceased, pending in the said superior court of the county of Los Angeles, upon the hearing of Harry Duffill's objections to distribution of said estate as asked in the petition for distribution, to which we have heretofore referred, copies of the transcript, briefs, petition for rehearing, and reply thereto, filed in this court in the appeal of Harry Duffill from the decree of distribution in said estate (Estate of Eugenie A. Duffill [L. A. No. 5907] 180 Cal. 748, 183 Pac. 337), a typewritten transcript, copies of appellant's opening brief and respondent's reply thereto, filed in this court in the appeal of Albert Duffill (a minor), Martha Duffill, and the said Los Angeles Trust & Savings Bank from the decree of distribution. (Estate of Eugenie A. Duffill [L. A. No. 5886] 180 Cal. 748, 183 Pac. 337). A comparison of said two briefs shows that the one filed by respondent's attorneys in

said appeal No. 5886 was taken almost in its entirety from the one they filed in the superior court of Los Angeles county, in the matter of Harry Duffill's objections to distribution in accordance with the will, so that it may be said that the real work of preparing both of said briefs was performed when the first was written. The subject-matter of the brief, filed by the attorneys for respondent in No. 5907, consisting of 75 pages, was new, and in the main not found in any prior brief offered in evidence. The oral testimony was mainly that of John W. Kemp, a member of the firm of Kemp, Mitchell & Silberberg, to which the fee in question will, if approved, be paid. He testified touching the services rendered by him and his associates as follows: The proceeding which, in effect, called for the interpretation of the will (of Eugenie A. Duffill) was filed on February 5, 1917, after the petition for distribution had been filed, and raised three questions, 1, that the provisions for accumulations were void, the other, that the inhibition of Harry's marriage to Mrs. McNamara was void, and the third, that the trust failed as a whole because of these alleged illegal provisions. Later in the litigation there arose the question as to whether or not certain stock dividends, which had been declared by the board of directors of the Grasselli Chemical Company, constituted principal or income. After the settlement of the preliminary matters, the objections came on for hearing in July, 1917, and the taking of evidence and oral arguments, according to the recollection of the witness, consumed "three or four or five days." The matter was argued at great length by counsel for Harry Duffill, and "on behalf of the trustee by myself [John W. Kemp] and Mr. Mitchell," and the matter was finally submitted on briefs, Harry Duffill filing a brief of some 95 pages of typewritten matter. We answered with a printed brief of over 100 pages. Later, in the summer of 1917, the other question in regard to stock dividends was raised, and the witness thinks, although not positive, re-argued orally. In any event, the question was submitted on briefs. We took evidence as to the conditions of the Grasselli Chemical Company and its surplus on hand at various years prior to that time and up to the time of the declaration of these dividends. The matter was decided in the spring of 1918, but the decree was not agreed upon and signed until the 17th of July, 1918. After the decree was signed, we had several conversations with the attorneys for Harry Duffill, looking towards an adjustment by accepting the decree as it was. A settlement not being accomplished, both parties appealed, the particulars and results of which appeals have been previously stated. In this litigation I represented the trustee under the will, the Los Angeles Trust & Savings Bank. We were attorneys for the executor

originally. We also represented the trustee, and we also appeared formally for the Los Angeles Trust & Savings Bank as guardian of the estate of Albert Duffill, and for Martha Duffill, one of the beneficiaries under the will. The time consumed in the litigation extended over a period commencing February 1, 1917, and ending September 1, 1919—

"two years or thereabouts, and it took a good deal of time, necessarily, both myself and one other member of the firm—a great deal of our time—and at times other members of the firm and employees. It was a very important case, one involving large interests, and we spent all the time that was necessary upon it—that we thought necessary. The value of the estate, based upon the valuation of \$170 a share [capital stock of the Grasselli Chemical Company], at the date of the trustee taking it over was \$1,001,160. That was the value of the corpus of the trust estate turned over to the trustee, which included the accumulations for the benefit of Albert Duffill, which at that time were worth \$180,103.80. The corpus of the main trust for the benefit of both Albert and Harry was at that time \$821,056.71."

The corpus of the trust estate was held jointly for the benefit of the two beneficiaries, Albert Duffill and Harry Duffill. Expert testimony was produced by respondent touching the reasonable value of the services performed by the attorneys for the trustee, but no evidence upon that branch of the controversy was offered by appellant in rebuttal. Mr. Bradner W. Lee, basing his opinion upon the testimony relating to the services rendered, all of which testimony was heard by him, declared that a reasonable fee would be "any where from 10 to 15 per cent. of the amount recovered to the trustee." Upon cross-examination he stated the basis for his opinion in these words:

"The trustee is charged with the duty of sustaining the trust. * * * He starts * * * to recover by an action a certain fund which would not come to the trust except from his activities in the discharge of that duty, and he recovers the fund. I think then the percentage should apply on the fund so received. * * * There was nothing, as I understood the testimony [that] would have come into the hands of the trustee except for his activity * * * the fee being upon a contingent basis I should say that, in an estate of this size, * * * that a fee of from 10 to 15 per cent. under those circumstances would not be unreasonable."

Mr. J. W. Anderson, after stating that he had heard the testimony touching the services of said Kemp, Mitchell & Silberberg to the trustee in sustaining the trust, said:

"Basing my answer upon that evidence, I would say 10 per cent. of the gross amount received by the trustee or saved to the trust would be a reasonable fee to be allowed such attorneys for that litigation as a contingent fee."

[6] Both Mr. Lee and Mr. Anderson are eminent members of the bar of California and thoroughly qualified to testify concerning the value of legal services. While, as contended by appellant, their testimony was not binding upon the trial court, which had the unquestioned power to fix the amount to be allowed for attorneys' fees, without, and independent of, expert testimony (*Estate of Dorland*, 63 Cal. 281; *Spencer v. Collins*, 156 Cal. 298-307, 104 Pac. 320, 20 Ann. Cas. 49; *Zimmer v. Kilborn*, 165 Cal. 523-525, 132 Pac. 1026, Ann. Cas. 1914D, 368), it does not follow that the court should have wholly excluded this testimony from its consideration. The record discloses that the allowance made by the court was in fact less than that named by either of them.

[7] *Walbridge v. Barrett*, 118 Mich. 433, 76 N. W. 973, and *O'Neill v. Crane*, 65 App. Div. 358, 72 N. Y. Supp. 812, mentioned in appellant's brief, substantially hold that the value of an attorney's services could not be augmented by the fact that they were to be performed gratuitously in the event the side of the litigation they represented was unsuccessful. Accepting, for the purpose of discussion, the pronouncement of these cases as the law, the fee allowed here does not fall within it. There is no presumption that the court gave any consideration to the contingent feature of the agreement. If such agreement contravenes the law, the presumption is that the court disregarded it. "The fact that the award happened to concur in part with the terms of the contract does not necessarily imply an enforcement of the contract." *Estate of Willard*, 139 Cal. 501, 506, 73 Pac. 240, 64 L. R. A. 554. While we must assume that the experts took into consideration the contingent element of the agreement and gave their opinion accordingly, the fact that the court fixed a less amount than named by them, respectively, would indicate that it was not controlled by their figures, and eliminating its contingent aspect, adopted an amount which in its judgment was reasonable, which could be done without wholly rejecting the testimony of Messrs. Lee and Anderson.

In *Freese v. Pennie*, 110 Cal. 467, 470, 42 Pac. 978, 979, this court said:

"It is well, and it is the law, that the court should temper this kind of evidence [of attorneys testifying as experts] with its own calm judgment, based upon the amount and kind of labor performed, and to thereupon make its decree. When a court has done this, this court, as an appellate court, only has the right to interfere with its judgment when a plain and palpable abuse of its discretion (for it has a large discretion in such matters) has occurred."

The amount allowed in that case was \$80,000.

Counsel for appellant cite *Estate of Page*, 57 Cal. 238, holding that an administrator is without authority to make a contract with

an attorney to give him an interest in the property of the estate as compensation for recovering it. *Estate of Willard*, 139 Cal. 501, 73 Pac. 240, 64 L. R. A. 554, where this court refused to enforce a contract between an administrator and a real estate broker with respect to the amount the latter was to receive for his services, but, held, which is important, that the court could nevertheless, in its discretion, make an allowance to the administrator for a reasonable compensation. These cases are easily distinguishable from the one at bar. Here, as previously stated, there was no contract for a definite amount, the only contingent feature of the arrangement being that, unless successful, the attorneys would not be compensated, and, above all, the amount of the fee was expressly left to the court.

[8] Nor can we agree with appellant that the controversy concerning the accumulations, the condition in restraint of marriage, and the disposition of the stock dividends, had nothing to do with the trust or its protection, or the preservation of its property, and therefore should not be considered when ascertaining the fee. The two first-mentioned conditions were among the provisions of the trust contained in the will, and the last was one of construction of the terms of the trust. It is our opinion that the trustee was not only justified in employing, but it was its duty to employ, competent attorneys to represent it upon the hearing of each of these important matters. The fact that in certain branches of the litigation the trustees were unsuccessful does not necessarily exclude the services performed by its attorneys in connection therewith from the consideration of the court when fixing the attorneys' fees.

[9, 10] While the allowance we are considering impresses us as large—larger, perhaps, than we would have named had the fixing of it in the first instance been with us—nevertheless, in view of all the circumstances of the litigation, in connection with which it was allowed, its importance, the amount involved, and the extent and character of the services, we cannot say that there is present here a "plain and palpable abuse of discretion." In *Estate of Parker*, 200 Pac. 620, very recently decided, in speaking of an allowance made to an attorney for an executor for extraordinary services, we said:

"But the allowance of attorney's fees for such services rendered in the probate of an estate rests largely in the discretion of the court in the first instance, and will not be reversed or modified, unless this court can plainly see and unequivocally say that the order under review is absolutely and unqualifiedly an abuse of discretion."

To the same effect is *Estate of Conrad Iser* (Cal. App.) 198 Pac. 1014. This court, in *Freese v. Pennie*, *supra*, gave expression to the following, which embodies and adequate-

ly expresses the conclusion we have reached touching the fee here assailed:

"While the fee allowed in the present case [Freese v. Pennie] is a very large one, still we think the judgment must stand. It appears that the allowance made is less than the estimate of any witness who testified, and such fact indicates that the trial court did not consider itself absolutely bound by the expert testimony presented. Under these circumstances we cannot say that the allowance is clearly and palpably too great."

To the same effect is Estate of Adams, 131 Cal. 415, 418, 63 Pac. 838, 839, where it is said:

"The order of the lower court as to attorneys' fees will not be interfered with, except in case of a plain abuse of discretion."

[11] The appellant urges that the trial court was wrong in deciding that the services performed by the attorneys for the trustee—

"were rendered in the defense of the validity and in protection of the trust itself and for the purpose of preserving and protecting the validity of said trust and for the benefit of the beneficiaries thereof, and inured to the benefit of said entire trust."

He concedes that the services rendered in the litigation, to which we have referred, were very valuable to Albert Duffill and Martha Duffill, but affirms they were in the main, if not wholly, opposed to his pecuniary interest, and for that reason to his injury rather than to his advantage. He urges that the compensation of the attorneys for the trustee must be determined and apportioned according as the services helped or injured the different beneficiaries of the trust. Granting that this may be the rule under some conditions, it is not applicable here. The professional efforts and services of the attorneys were in this instance directed to the preservation of the trust in its entirety, a duty imposed upon the trustee, whom they represented, irrespective of whether, if upheld or only partially upheld, the result might be more beneficial to some than to others, who are interested therein; or harmful financially to some of those who are beneficiaries under its provisions, because, if abrogated, they would, under the laws of succession, receive a larger portion of the estate than they take under the trust. The appellant assailed the validity of the entire trust, against which attack it was the duty of the trustee to defend, and which it did defend, with the result that though some of Harry's contentions were sustained, the general scheme of the trust was nevertheless preserved. Under such circumstances, we can see no good reason for holding that the attorneys for the trustee should not be compensated for the entire service. By accepting the trust, which the facts indicate was done here, the trustee became bound to execute it (39 Cyc. 293), and to fulfill the purpose of the trust as declared

at its creation. (Civ. Code, § 2258.) In Pomero's Equity Jurisprudence (3d Ed., § 1085), the rule is thus declared:

"The trustee is entitled to be allowed * * * all expenses reasonably necessary for the security, protection, and preservation of the trust property, or for the prevention of a failure of the trust." (Italics ours.)

In the Estate of Gartenlaub v. Union Trust Co., 198 Pac. 209, 16 A. L. R. 520, we adopted the following, taken from 39 Cyc. 339, as being a correct exposition of the law:

"The rule which has been applied in a great variety of cases affecting the administration and execution of trusts is that a trustee has a right, whenever necessary to the proper administration, *preservation*, and execution of the trust and the prosecution or defense of action, to employ counsel and to be reimbursed from the trust estate for whatever sums he has paid for the services of such counsel. The rule is applicable even though the *cestui que trust* employed counsel to represent the same interests, and although, to a certain extent, the private and personal interests of the trustee may also be involved in the litigation." (Italics ours.)

In view of the duty of the trustee, which it may be said spoke for and represented Eugenie A. Duffill, deceased, the maker of the trust, to uphold and defend the trust as a whole, which includes its several provisions, we are not impressed with appellant's contention that the trustee should not be allowed compensation for its attorneys, to be paid them for services performed in an effort to preserve the trust as a whole, because some one or more features forming part of the entire scheme were held to be invalid.

Our conclusion, therefore, is that there is sufficient evidence to support the finding of the trial court as to the value of the services of, and the allowance made to, the attorneys for the respondent trustee.

[12] Appellant's next point is directed to the legality of that portion of the order requiring said \$75,000 to be paid ratably out of the corpus of the trust estate and from the fund accumulated for the benefit of Albert as the same was received by the trustee from the executor, the result of which was, so appellant affirms, to impose a charge of approximately \$30,000 upon his property rights and interest "for services rendered against him and to that end that those property rights might be destroyed," and in support of his contention appeals to the maxim "he who takes the benefit must bear the burden." Civ. Code, § 3521. The theory is that the trustee's efforts to preserve the trust were exclusively for the benefit of Albert and Martha in that, had it been destroyed in its entirety, they would have received nothing from the estate of Eugenie A. Duffill, deceased, since, under such circumstances, all of her property, with the exception of a few specific bequests, under the laws of succes-

sion would have gone to Harry. We think, however, that the rule applicable here is that the trust estate is chargeable with all expenditures incurred in the interest of the beneficiaries (*Somerset Ry. v. Pierce*, 98 Me. 528, 57 Atl. 888), and that such interest is determined and ascertained, not from what they or any one of them might receive if the trust was destroyed, but by and from what they take under the terms of the trust. Our Code provides that "a trustee is entitled to the repayment, out of the trust property, of all expenses actually and properly incurred by him in the performance of his trust." Civ. Code, § 2273. Unquestionably, when proceedings are commenced, attacking the validity of a trust, it is the right, and, under circumstances (similar to those appearing here, the duty, of the trustee to secure legal assistance, and it is equally beyond doubt that the facilities to command such assistance should not be narrowed, if not entirely destroyed, by any such restriction as that compensation for such assistance is wholly dependent upon, and measured by, the degree of success.

While, under ordinary conditions, the accustomed expenses incurred in the administration of a trust are payable from the income, extraordinary and unusual expenses are payable from the corpus of the trust. *Estate of Gartenlaub v. Union Trust Co.*, supra. In *Cogswell v. Weston*, 228 Mass. 219, 117 N. E. 37, it is said:

"The regular annual or periodically recurring expenses arising in the administration of a productive trust commonly are paid out of the income, while extraordinary and unusual expenses are chargeable against the capital. The costs of litigation generally fall in the latter class."

We are satisfied that the attorney fee here involved was an extraordinary expense. While it is debatable whether any part of the allowance to the trustee of an attorney's fee should have been ordered paid from the fund accumulated for the benefit of Albert Duffill, which, we understand, is made up of his share of the net income, we are not called upon to consider that question, as Albert makes no objection to the apportionment.

We can find no merit in the argument that Harry's interest in the corpus should contribute no part of the fee of the attorneys for the trustee, because he was obliged to compensate his personal counsel, who represented him in his effort to secure the complete annulment of the trust. *Estate of Gartenlaub v. Union Trust Co.*, supra.

Appellant refers to a large number of cases which he affirms reflect the principle lying at the base of, and which sustains, his contention that his interest in the trust should not be burdened with any portion of the attorney fees. The facts of none of those cases are analogous to the facts shown here, and for that reason they are not controlling.

[13] Finally, the appellant insists that the record confirms the claim, which he makes, that in substantially all of the litigation and proceedings in which the trustee participated, and for the conduct or defense of which the trustee employed the attorneys to whom the fee in question will be paid, and in some of which controversies Martha and Albert Duffill appeared, the trustee espoused their cause as against him, and in some instances its attorneys actually represented them in the litigation, and for that reason his interest in the corpus of the trust estate should not be subjected to the payment of any part of the fee. The court found that Kemp, Mitchell & Silberberg represented said Los Angeles Trust & Savings Bank as trustee, Martha Duffill, and Albert Duffill by Los Angeles Trust & Savings Bank, his guardian, in the said proceeding involving the validity of the trust, both upon the trial and in the two appeals from the judgment, but a survey of the entire record satisfies us that in reality the services of the attorneys were exclusively rendered to the trustee, and that their separate appearance on behalf of Martha and Albert was formal and gratuitous—part of the general plan of resistance to Harry's attack upon the trust. Such was the undisputed testimony of Mr. Kemp, who declared that the appearance of his firm for Albert and Martha was merely formal. In response to the question propounded by the attorneys for Harry, if he was not seeking "to have one attorney's fee fixed and settled for all those persons [trustee, executor, Martha and Albert] that you represented," he replied, "we are seeking to have the attorneys' fee fixed for the trustee." The court found the services of said attorneys were rendered to the trustee, and the order of the court recited that the amount allowed to the trustee was "for the said services of said attorneys." *Bailey v. Buffalo Loan, Trust & Safe Deposit Co.*, 213 N. Y. 525, 107 N. E. 1043; *Id.*, 214 N. Y. 689, 108 N. E. 561, cited by appellant to the point that the trustee will not be allowed an attorney's fee, where it joins with certain beneficiaries against another beneficiary who is contesting the validity of the trust and is ultimately successful, while in many of its facts similar to the one at bar, is unlike it in these important and distinguishing particulars, namely, there the trust was wholly abrogated, while here the trust was preserved. There, as said by the court:

"As the attempted trust was invalid, the funds constituting the same passed under the will to the plaintiff as residuary legatee. *As against him, the trust company has no claim or right to the fund*" (italics ours.) (213 N. Y. 525, 107 N. E. 1043.)

—while here the trust was sustained with the result that the funds of the trust remained in the hands of the trustee. There (214 N. Y. 689, 108 N. E. 561) it was declared,

and therein lies the fundamental difference between that case and this:

"As the plaintiff was finally successful, we determined that the action [defending the trust] of the trust company did not justify an award of costs or an allowance to it to be paid by plaintiff, the successful party."

Here the trustee was successful in preserving the trust, which was the main and dominant issue, although some of its specifications and provisions were adjudged to contravene the law.

For the foregoing reasons we hold that the evidence supports the findings and decree of the trial court, and that the record is free from reversible errors.

Judgment affirmed.

We concur: SHAW, C. J.; WASTE, J.; SLOANE, J.; LAWLOR, J.; WILBUR, J.; RICHARDS, Justice pro tem.

188 Cal. 511

PEOPLE v. ESTES. (Cr. 2417.)

(Supreme Court of California. March 28, 1922.)

1. Criminal law $\S$ 419, 420(1), 1169(2)—Admission of hearsay testimony held error but harmless where fact otherwise shown.

The admission of testimony by decedent's sister that the decedent, defendant's wife, had an appointment to meet defendant on the night of the homicide, which had been made by decedent, was erroneous because such testimony was hearsay as to defendant, but not prejudicial where the sister also testified that defendant stated to her, after the homicide, that he kept the appointment, thereby establishing his knowledge thereof.

2. Criminal law $\S$ 1170½(5)—Exclusion of cross-examination as to time defendant bought pistol held harmless.

The exclusion of cross-examination of a witness for the prosecution, who testified he sold to defendant the pistol with which the killing was committed, as to the hour at which he made the sale, was not prejudicial to defendant where the record of sale signed by defendant was in evidence and was not contradicted, though the witness made contradictory statements as to the hour at which the purchase was made, one of which fixed the time at an hour while defendant was at work.

3. Criminal law $\S$ 1035(3), 1166½(12)—Statement witness' opinion was as good as some expert's who would testify, not objected to, held not prejudicial.

In a prosecution for homicide, where the defense was insanity, and defendant intended to introduce expert testimony on that issue, a remark by the court in ruling on an objection to an opinion of the witness as to handwriting that the offer probably was as good as some of the experts that would testify, was not prejudi-

cial to accused as belittling the testimony of his experts, where the experts also testified for the prosecution and where no objection was made to the remark, but it was treated facetiously by counsel for both sides.

5. Criminal law $\S$ 1169(1), 1170½(5)—Allowing surgeon to testify from notes and exclusion of cross-examination as to course of bullets held harmless.

In a prosecution for homicide where there was no dispute that decedent was killed by bullet wounds inflicted by defendant, it was not prejudicial error to allow a surgeon, who held the autopsy, to testify from his notes as to the course of the bullets and to refuse to permit defendant's counsel to inspect the notes and to examine the witness with reference thereto.

5. Criminal law $\S$ 1169(9)—Admission of evidence as to caliber of bullet causing death held harmless.

Admission of testimony by a surgeon as to the caliber of the bullet which caused the death of decedent, without requiring him to qualify as to competency, was not prejudicial to defendant, where the same witness had previously stated the caliber without objection and where there was no denial that deceased was killed by a bullet fired by defendant.

6. Criminal law $\S$ 1166½(12), 1170½(5)—Exclusion of cross-examination to show interest and court's remark witness was interested held harmless.

In a prosecution for homicide, defendant was not prejudiced by the exclusion of cross-examination of the sister of the decedent who testified for the prosecution as to her interest, manifested by her taking notes of the case, nor by the court's query in connection with its ruling thereon: "Why shouldn't she be interested?"

7. Witnesses $\S$ 271(1)—Letter introduced by prosecution does not authorize production of other letters unconnected therewith on cross-examination.

The introduction by the prosecution, of a letter written by defendant, does not justify the production on cross-examination of other correspondence not connected with that letter, but defendant could, as part of his own case, call for and introduce such correspondence.

8. Criminal law $\S$ 466—Exclusion of cross-examination as to opinion based on defendant's appearance held proper.

Where a witness for the prosecution, who had seen defendant shortly after he killed his wife, and while he was semiconscious from a self-inflicted wound, had described defendant's eyes as glazed, with greatly dilated pupils, it was not error to sustain objections to cross-questions whether defendant's eyes did not appear as the eyes of an insane person, and if there was not something abnormal about his eyes.

9. Criminal law $\S$ 479—Medical student held not qualified to state opinion as to insanity.

Where a witness for defendant, who had been a medical student for three years, and who saw defendant in the ambulance shortly after

he had killed his wife and attempted to kill himself, had been permitted to testify to the facts as to defendant's appearance and action, it was not error for the court to refuse to permit him to state his opinion as to defendant's sanity, since he did not qualify as an expert and had not had intimate acquaintance with defendant.

10. Criminal law ⚡456—Nonexperts cannot express opinion as to sanity unless they are intimate acquaintances.

Witnesses who did not qualify as experts cannot express an opinion as to defendant's sanity unless they qualify to express such an opinion under Code Civ. Proc. § 1870, subd. 10, authorizing such opinion if the witness was an intimate acquaintance.

11. Criminal law ⚡1144(10)—Refusal of adjournment to permit preparation of hypothetical questions not presumed, erroneous.

In a prosecution for homicide, where the defense was insanity, the refusal of the court to permit an adjournment to enable defendants to prepare a hypothetical question to ask its experts, even if an abuse of the trial court's discretion, will not be presumed erroneous where such a question was asked his experts, and there was no complaint made that it was insufficient.

12. Criminal law ⚡1170(4)—Exclusion of statement of expert during trial held harmless, in light of testimony.

The erroneous exclusion of a statement made by an expert for the prosecution after the completion of his testimony that defendant might have been insane was not reversible error, where that expert did not testify directly that defendant was sane but only that he did not see any evidence he was insane, and on cross-examination stated that, under the facts in a hypothetical question, defendant might have been insane.

13. Criminal law ⚡823(2)—Instruction on insanity held not erroneous as assuming homicide, in view of other instructions.

In a prosecution for homicide, where the jury had been previously instructed as to presumptions of innocence and necessity of proof of every element of the offense beyond a reasonable doubt, an instruction on insanity, based on the hypothesis defendant committed the act, was not erroneous as assuming that defendant killed deceased, especially where that fact, if not expressly admitted, was inferentially conceded throughout the trial and there was no possible doubt, under the evidence, that he did kill deceased.

14. Homicide ⚡294(1)—Instruction on irresistible influence held proper under the evidence.

Where the defense in a homicide prosecution claimed "confusional insanity," the characteristics of which were a state of mind rendering defendant incapable of knowing the nature of his act, or an uncontrollable impulse to do certain things, it was not error to give an instruction correctly stating the law as to irresistible or uncontrollable influence.

In Bank.

Appeal from Superior Court, Los Angeles County; Frank R. Willis, Judge.

Augustus M. Estes was convicted of murder in the second degree, and he appeals. Affirmed.

Fred H. Thompson, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., Arthur Keetch, Deputy Atty. Gen., and John W. Maltman, of Los Angeles, for the People.

SLOANE, J. This appeal is by the defendant, from a judgment of conviction in the superior court of the county of Los Angeles, of murder in the second degree.

That the defendant committed the act charged as murder in the information is established by the evidence, beyond all controversy. That is, on the 16th day of October, 1920, the defendant shot and killed his wife, Alena Estes, at Fifth street and Broadway, in the city of Los Angeles.

That the killing was under circumstances constituting manslaughter or murder in the first or second degree is only disputed by evidence tendered under the plea of not guilty, for the purpose of establishing the insanity of the defendant to a degree that rendered him incapable of distinguishing between right and wrong, in relation to the act resulting in the homicide.

By its verdict of guilty, the jury found against the plea of insanity.

The uncontroverted facts are that the defendant and the deceased were husband and wife; that they had been living for a long time in a state of domestic infelicity and had several times separated, and were living separate and apart, by reason of the desertion of the wife at the time of the homicide. They had five little children whom the husband was trying to support and who, in the periods of separation, had been consigned to the care of a children's home. The defendant attributed his wife's refusal to live with him to disloyalty on her part to the marriage relation. Whether with or without cause, he believed she was having improper relations with other men. The defendant, shortly before the tragedy, had attempted to induce his wife to return and live with him on account of the little children. This she refused. She claimed to be afraid of him, and there is evidence that he had on several occasions threatened her life. There is no doubt that, at the time of the shooting and for some period previously, the defendant was greatly depressed, extremely nervous, and unbalanced, physically and mentally. The evidence does not disclose the movements of the parties immediately preceding the shooting, or how they came to be together at the time and place of the tragedy. By-

standers were first attracted by the act and noise of the shooting, which was immediately followed by the attempt of defendant to shoot himself. There was some evidence to indicate that they had met in this vicinity by appointment, previously arranged with the defendant.

The evidence of acquaintances as to defendant's conduct preceding the tragedy, and his depressed state of mind, together with the testimony of medical experts that in their opinion he was insane, was doubtless sufficient to have supported a finding that he was irresponsible because of insanity, if such had been the verdict of the jury. It is not questioned, however, that evidence against such degree of insanity was sufficient to support the finding of the jury that defendant was sane, implied in its verdict that he was guilty of murder in the second degree.

The only other ground of attack, upon the conclusiveness of the evidence to support the verdict, arises on the proof of malice sufficient to remove the case from one of manslaughter to that of murder. This element was sufficiently supplied to sustain the verdict by evidence of the feeling existing between the defendant and his wife, his threats to kill her, and the purchase of a pistol of the caliber of the one used in the shooting, on the afternoon of the evening of the tragedy. This statement of the established facts in the case narrows a consideration of the errors assigned on this appeal to the question of a fair trial on the issues of insanity and malice.

Certain alleged errors of the trial court in admitting and excluding evidence over the objection of defendant's counsel are specified as being calculated to prejudicially influence the jury in finding against the defendant in these particulars. We agree with the District Court of Appeal, from which this appeal comes to us on rehearing, that such erroneous rulings occurred, but in the light of all the evidence in the case can it be held that such errors have caused any miscarriage of justice? In other words, is there any shadow of ground for believing that, had the rulings complained of been favorable to the defendant, the jury could or would have been influenced thereby to a different verdict?

Taking first the question of malice, because it is most easily disposed of, the uncontroverted evidence shows that the defendant was desperately tried by his wife's conduct. He found himself unable to induce her to come back to his home. He was shown by competent and unimpeached testimony to have made threats against her life. He had on other occasions sought interviews with her which had been denied. The shooting itself was under circumstances that would imply malice. No evidence was offered excepting that alone of mental ir-

responsibility, which would rebut the implication of malice. The evidence, admitted over defendant's objections, was merely corroborative or cumulative on this point. It merely emphasized what was already sufficiently proved.

[1] The most objectionable ruling affecting the question of malice and premeditation arose on the admission of certain testimony of Inez Jewell, a sister of the murdered woman, as to a prearrangement on the part of defendant to meet his wife at the time and place of the tragedy. On the part of the prosecution this witness was asked:

"Were you to meet the defendant Saturday somewhere? A. Yes, sir. Q. How did you make this arrangement with the defendant to meet him Saturday? A. Over the telephone with her," meaning with the defendant's wife.

This answer in no way connected the defendant with such arrangement, and, if it indicated that such an arrangement had been reached between defendant and his wife, was clearly hearsay. It should have been stricken out on defendant's motion. There was further testimony to the effect that the arrangement was that the witness and her husband were to meet the defendant on this Saturday evening, the night of the murder, at Seventh and Broadway, and that they were later to meet the wife of defendant at Fifth and Broadway.

To the question, "How did you make this arrangement with the defendant to meet him Saturday?" the witness answered, "Over the telephone with her." As evidence of an arrangement between the wife and her sister for a meeting at the time and place mentioned, this testimony was properly admitted. It was incompetent, however, to in any way connect the defendant with knowledge of or agreement to such meeting. The witness, in fact, testified that she had no talk with the defendant about the proposed meeting near the place where the tragedy occurred.

The only evidence that defendant was party to or had knowledge of such an arrangement was that the witness had been so informed by her sister over the telephone, which, as already pointed out, was hearsay and not in any way binding on the defendant.

Of course, if there was such an understanding between defendant and his wife, or if information was conveyed to the defendant of such an arrangement between the witness and his wife, it would sufficiently account for his meeting his wife at the place and time of the shooting, no matter how he heard of it. The witness further testified that she and her husband did go to Seventh and Broadway at 7:30 that evening, but failed to meet the defendant, and were at Fifth and Broadway at 10 minutes after 8, but did not meet the others there. In the ab-

sence of a showing that defendant was in some way informed of the proposed rendezvous, the testimony should have been excluded. It does, however, appear by the testimony of this same witness that, in a conversation with defendant after the shooting, the defendant told her that he did go to Seventh and Broadway and afterwards to Fifth and Broadway at the times mentioned, which would justify an inference that he had received some information of the proposed appointment. But whether the parties to the tragedy met that evening by appointment, or on the sole initiative of the defendant, or by accident, has slight bearing on the question of malice. It is quite clear that he was seeking a meeting with his wife, and just how it was brought about is of little consequence.

[2] Objection is also made to the ruling of the court, restricting the cross-examination of the witness Runge, who testified to having sold to defendant a pistol, of the caliber of the one with which the shooting was done, on the afternoon of the fatal day. The witness had previously testified that the sale was made at 2 o'clock in the afternoon. Later he testified that it was about 3 o'clock. It developed that the defendant was on duty as a motorman on an electric car at 2 o'clock and did not leave his work until about 3, and it was sought on cross-examination to show that the witness changed his testimony as to the time of day the sale was made after learning such fact as to the time defendant quit work. Such cross-examination might better have been permitted, but the witness had, at no time, been positive as to the exact time of the sale, and if it was actually made to the defendant, it was entirely immaterial whether it was at 2 or 3 o'clock.

There was no pretense of disputing the purchase of the pistol by defendant. A record of the sale was introduced in evidence, bearing a signature which the witness testified to be that of the defendant. Defendant's proven authentic signature was before the jury, in relation to another phase of the case, it is true, but it is hardly conceivable if any question existed as to the identity of the person to whom the pistol was sold, that the defense would not have resorted to this obvious means of testing the genuineness of the signature.

We are satisfied that no error occurred on the trial which could have affected the sufficiency of proof of malice to justify the verdict.

The question of defendant's sanity is the sole issue of defense open to review on this appeal. Conceding that under the evidence a verdict of not guilty by reason of insanity would have sufficient support in the evidence, were there any errors in the admission or exclusion of evidence which were calculated

to prejudice this issue against the defendant?

[3] Appellant assigns as error a statement made by the trial judge in the presence of the jury, which it is claimed tended to call in question the credibility of certain of defendant's witnesses.

Upon the examination of a witness for the defendant who was asked to identify a certain signature from his familiarity with the handwriting of the alleged signer, the court, in overruling the objection to his competency, made the remark:

"Well, I think I will let him testify. Probably his opinion is as good as some of the experts we will get here."

As appellant's case rests largely upon the opinions of experts, he thinks that this remark was calculated to have a prejudicial effect on the jury. It was doubtless inconsiderately made, and carried perhaps some sort of an innuendo unfavorable to expert testimony, but it was directed to no particular witness, and both the prosecution and the defense introduced the testimony of experts, and anyway the observation was not in its terms derogatory. The witness was held qualified to testify. There is no reason to suppose that the court questioned his entire competency and credibility, and to say that his opinion was probably as good as that of other witnesses to be heard on the trial bears on its face no implication against the reliability of the testimony of the others referred to. We cannot think that the incident, however interpreted, can have affected the action of the jury. Furthermore, no objection was made at the time. The remark was treated facetiously by counsel on both sides. Had objection been made by counsel for defendant, the court would doubtless have cured any possible error by explanation and instruction to the jury.

[4] Exception was taken to the refusal of the court to sustain defendant's objection to permitting the surgeon, who held the autopsy on the slain woman, to testify from his notes, and in refusing to allow defendant's counsel to inspect the same and examine the witness regarding them before allowing their use as memoranda.

Here, again, it may be conceded that the rulings of the court were erroneous. But all the witness testified to from such notes was as to the location and nature of the wounds upon the person of the victim of the shooting. There is no pretense of a dispute that the wounds, wherever located, caused death, and their location is not otherwise material to the case. In fact, on another assignment of error in which the appellant objected to introducing in evidence the bloody garments which showed the location of the bullet holes, appellant's counsel states that "there was no question as to the course or direction of the bullet." Error in the ad-

mission of incompetent evidence of an uncontradicted and conceded fact cannot be held to justify a reversal on appeal.

[5] It was also assigned as error that the court permitted the autopsy surgeon to testify, without qualifying as to his competency, to the caliber of the bullet found in the wound. The surgeon had, in a former part of his testimony, testified that the bullets were 25 caliber, prior to the direct question as to what the caliber was, to which this objection was taken, and there was no objection to or motion to strike out this former testimony. Moreover, this is another of the uncontroverted facts of the case entirely susceptible to adverse proof, if any question had existed.

[6] It is assigned as error that counsel for defendant was not permitted to pursue his cross-examination of the witness Inez Jewell, sister of the slain woman, on account of her taking notes at the trial, to show her interest and bias in the case; also a remark of the trial judge, "Why shouldn't she have an interest in the case?" Neither the ruling nor the remark of the judge was prejudicial. She was a sister of the dead woman. She admitted she was keeping notes of the evidence. The fact was obvious, and the remark of the court merely affirmed the point of counsel's objection, that she was, from the very nature of the circumstances, an interested witness. Counsel for appellant say that the statement, "Why shouldn't she be interested," assumed that the defendant was sane and that he killed the deceased premeditatedly. That would be a very extravagant inference. The words quoted simply assumed what counsel was asserting, that the witness was interested, and the fact did not require further proof.

[7] The letter written by defendant and introduced by the prosecution did not justify the production, on cross-examination, of other correspondence not connected with the letter in evidence. Defendant had a right in his own case to call for and introduce other correspondence relevant to the case, but this he did not attempt to do.

[8] The witness W. H. Maddox, called on behalf of the people, was present at the shooting. On cross-examination he was asked if he noticed the eyes of the defendant at that time and if they did not appear to him "as the eyes of an insane person," and if there was not something abnormal—something unusual about the eyes of this man" that particularly attracted his attention.

The sustaining of an objection to these questions is assigned as error. The objection was properly sustained. The witness was permitted to testify that the eyes were glazed and the pupils greatly dilated. He was not qualified to give an opinion as to the significance of these conditions. The witness had just testified to seeing the defendant

put a pistol in his mouth and firing a bullet into his own head. The defendant, at the time the witness observed his eyes, was stretched on the sidewalk in a state of semi-consciousness. It might be taken for granted that such conditions would produce in themselves "something abnormal" in the expression of the eyes. Under the circumstances no legitimate inference of insanity could be drawn from the appearance of his eyes.

[9] Walter M. Harvey, a witness called on behalf of the defendant, testified that he had been a medical student for three years; that he had put in 3,000 hours in the Receiving Hospital of Los Angeles, where he had numerous opportunities to observe insane people. He, like the witness Maddox, only saw the defendant immediately after the tragedy, and in the ambulance on the way to the hospital, when defendant was in a semiconscious condition from self-inflicted wounds. This witness was permitted to testify to all the facts relating to defendant's appearance and actions while under his observation, but the court refused to allow him to give his opinion as to the defendant's sanity.

Appellant concedes that the witness did not qualify as an expert so as to justify admitting his opinion upon a hypothetical statement of facts, and it appears from the evidence that he had no intimate acquaintance with the defendant, and his only opportunity for observation was for a brief period when the defendant was suffering from his injuries and practically unconscious as a result thereof. Under such circumstances the opinion of the witness was properly excluded.

[10] Similar assignments of error relating to other witnesses are based upon the refusal of the court, after taking the testimony of the witnesses as to their observation of the appearance and conduct of the defendant, to permit them to express an opinion as to defendant's sanity. In each instance such ruling was based upon the insufficiency of the showing that the witness was qualified under subdivision 10 of section 1870 of the Code of Civil Procedure, which only authorizes the admission of such an opinion, from one not an expert on insanity, when he is shown to have been an intimate acquaintance of the defendant. The proffered testimony was properly excluded.

[11] Appellant complains of the refusal of the court to take an adjournment of the trial, in order to permit counsel for defendant to prepare a hypothetical question to propound to the experts on insanity.

Such a hypothetical question was framed and propounded by the defense, and it is not pointed out wherein it was not sufficient. Unless it appears that defendant failed to get a full and satisfactory opinion from his witnesses in this respect, no error will be

presumed, even if the court abused its discretion in refusing an adjournment.

[12] The trial court should have permitted counsel for defendant to ask the witness Dr. Sawyer if he had not subsequently to his examination in chief stated to one Mr. Vogel, "that the defendant might have been insane." But, under the circumstances, we cannot deem the error prejudicial.

Dr. Sawyer's testimony for the prosecution was at best indefinite and negative in its character. He had made a brief personal examination of the defendant three or four months after the date of the shooting, after the trial had commenced, and testified that, in his opinion, at the time of such examination the defendant was sane. He at no time directly testified that defendant was sane at the time of the shooting, though he did state, upon his attention being called to certain facts introduced by the defense to prove insanity, that he did not see any evidence in the testimony that would lead him to believe that the defendant was insane. On the other hand, upon cross-examination upon a hypothetical state of facts in the case, the witness answered that the defendant "might have been insane according to that." Most of his testimony was directed to special acts and conduct of the defendant, offered by defendant to prove insanity, which the witness stated would not necessarily, or did not in his opinion, indicate that the man was insane.

The declaration claimed to have been made to the man, Vogel, if proven, would only indicate a state of speculation by the witness as to defendant's mental condition, which is apparent throughout his testimony, and in the instance above referred to was expressly stated.

The jury was fully and correctly instructed as to the law of the case, and we find no prejudicial error in the rulings of the court in granting or refusing instructions.

The appellant makes particular objection to the instruction on insanity predicated upon the theory of "irresistible impulse." That part of the instruction claimed to be unwarranted and prejudicial reads as follows:

"It has been urged, on behalf of the defendant, that it being impossible to assign any reason for the perpetration of the offense, he must have been acting under what is called a powerful and irresistible influence or homicidal tendency. But in that connection I charge you that the circumstances of an act being apparently motiveless is not a ground from which you can safely infer the existence of such an influence. Motives exist unknown and innumerable which might prompt the act. A morbid and restless (but irresistible) thirst for blood would itself be a motive urging such a deed for its own relief."

It is not questioned that such instruction correctly states the law, but appellant claims

that the instruction assumes the commission of the homicide by defendant, and is based upon an unwarranted statement that defendant relied upon evidence that he acted under an irresistible influence or homicidal tendency.

[13] As to the assumption in the instruction that defendant committed the homicide, the contention of appellant cannot be maintained in the light of other instructions given, in which the jury was fully informed as to the presumptions of innocence and the necessity of proof beyond a reasonable doubt of every element of the offense charged.

[14] This particular instruction was directed to the defense of insanity, which is always based upon the hypothesis that the defendant has committed the act thus sought to be excused, and does not carry the implication that the act itself does not first have to be proved to the satisfaction of the jury beyond a reasonable doubt. Moreover, if the fact of the homicidal act was assumed as a proven fact, in this case, it would not be prejudicial, as it is a fact which, if not expressly admitted, was inferentially conceded throughout the trial. The commission of the crime was not a controverted fact on the trial, other than as made by the issue of insanity. There is no possible doubt, under the evidence, that the defendant shot and killed his wife. The sole defense rests on the degree of the crime, and the defense of what is called "confusional insanity." The characteristics of such insanity, as explained by expert witnesses for the defense, consist of such a state of mind as to render the sufferer incapable of knowing the nature of the act, or an uncontrollable impulse to do certain things. It cannot be said that this latter element was not before the jury. Defendant's experts expressed the opinion that, under the facts presented to them, the defendant "was impelled by a force over which he had no control"; that among the delusions found on an examination of the defendant was "the impulse to do things, and an impulse over which he had no control"; and, again: "He was unable to control the act which he did, in my judgment." All this was ample justification for instructing the jury as to the application of this form of insanity to the case.

As heretofore stated, the only controverted points in this case are as to the defendant's mental insanity and responsibility for the homicide and, if he was responsible, the degree of his guilt.

We find no error in the trial indicating that there was a miscarriage of justice in this case.

Judgment affirmed.

We concur: SHAW, C. J.; RICHARDS, Justice pro tem.; LAWLOR, J.; WASTE, J.; WILBUR, J.; SHURTLEFF, J.

188 Cal. 378

HINKEL v. CROWSON. (S. F. 9321.)(Supreme Court of California. March 8, 1922.
Rehearing Denied April 7, 1922.)

1. Homestead §108—That administrator has not been appointed held no excuse for not presenting claim constituting lien on homestead.

Code Civ. Proc. § 1475, providing that liens on the homestead must be presented to the administrator and shall be valid against the homestead, only for a deficiency, applies, though no administrator was appointed in view of sections 1294, 1365, 1377, providing for appointment of administrators and for appointing any applicant, where those preferentially entitled fail to apply.

2. Homestead §108—Waiver of claim against general assets does not excuse presentation of claim, constituting a lien on the homestead.

Under Code Civ. Proc. § 1475, providing that liens on a homestead must be presented to administrator, and that the lien may be enforced against the homestead only for a deficiency, after personal assets are applied, presentation of the lien to the administrator is a condition precedent to the right to enforce it against the homestead, and the general rule that, where a lien is on a specific piece of land, presentation to the administrator is not necessary, when no claim is made on the general assets, has no application.

3. Homestead §108—Vendor's claim for price is a "lien" within statute requiring presentation to administrator.

Under Civ. Code, § 3046, declaring that "one who sells real estate has a vendor's lien thereon" and section 1241, providing that the homestead is subject to forced sale for vendor's liens, the right of the vendor to look to the land for the payment of the purchase price is a "lien," and, in order to subject a homestead to the payment of the lien, the vendor must first present his claim to the administrator of the deceased purchaser, pursuant to Code Civ. Proc. § 1475.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Lien.]

4. Homestead §108—Setting apart homestead to surviving husband of purchaser held not to relieve vendor from necessity of presenting claim for purchase price to administrator.

In view of Civ. Code, § 1241, providing that a homestead is subject to vendor's lien existing at the time the declaration of homestead is filed, a proceeding under Code Civ. Proc. § 1723, setting apart the homestead to the surviving husband of a deceased purchaser, did not have the effect of separating the homestead from the other property of the deceased wife, so as to relieve the vendor from the necessity of presenting his claim for the unpaid purchase price to the administrator of the wife, as required by Code Civ. Proc. § 1475, before being able to subject the homestead to the payment of the lien.

On Petition for Rehearing.

5. Executors and administrators §3(1)—Administration of estate can be had where necessary to enforce certain liens against the homestead.

Though there are no general assets of an estate subject to payment of ordinary debts, administration of an estate can be had to subject a homestead to payment of vendor's liens or mechanic's liens as provided for in Civ. Code, § 1241.

In Bank.

Appeal from Superior Court, Alameda County; Dudley Kinsell, Judge.

Action by John Hinkel against E. A. Crowson. From judgment for plaintiff, defendant appeals. Reversed.

See, also, 182 Cal. 68, 186 Pac. 1042.

James F. Sheehan, Chas. J. Heggerty, and Knight & Heggerty, all of San Francisco, for appellant.

Richard B. Bell, of Berkeley (R. M. F. Soto, of San Francisco, of counsel), for respondent.

SHAW, C. J. The plaintiff sued to foreclose an alleged vendor's lien. The complaint alleges the sale and conveyance of the lot in question by plaintiff to one Florence G. Hinkel, for the price of \$4,000, on November 27, 1914, the giving of a note for the price by said vendee; that it was agreed at the time that she would execute to the plaintiff a mortgage on the lot to secure the payment of the price but that she failed to do so; that the price is unpaid, except to the amount of \$510; that said Florence G. Hinkel afterwards married the defendant, E. A. Crowson, and thereupon filed a declaration of homestead on the lot for the benefit of herself and said Crowson; that she died on October 16, 1916, and said E. A. Crowson, by proceedings under section 1723 of the Code of Civil Procedure, procured an order of the superior court of the county on May 7, 1917, setting apart said lot to Crowson as surviving husband of said decedent, and that Crowson has since intermarried with the defendant, Katherine M. Crowson, who is now his wife. It also expressly waived all recourse by the plaintiff to any other property of the estate of Florence G. Crowson, deceased, for the payment or satisfaction of said debt.

The answer admitted, by failing to deny, the allegation that Florence had agreed to execute a mortgage on the lot to secure the price aforesaid, but alleged that a mortgage for the price was executed by her to the plaintiff, and that he afterward released it. It alleged that the conveyance of the lot to Florence G. Hinkel was a gift, and denied that any money was owing to plaintiff as the price of said lot, or at all.

The court found that the allegations of the

complaint were true; that no mortgage was ever executed to plaintiff by said Florence G. Hinkel to secure the price of said lot; that no administration has ever been had upon the estate of said decedent and that none is pending, and that \$4,551.07 was due to plaintiff for the principal and interest of the note given for the price of the lot. Thereupon judgment was entered for the foreclosure and sale of the lot to discharge the vendor's lien of the plaintiff thereon. From this judgment the defendant, E. A. Crowson, appeals. The appeal is upon the judgment roll alone.

[1] The appellant contends that the complaint and findings are insufficient to support the judgment, because it is neither alleged nor found that any claim for the payment of the balance due on the note was presented to an administrator of the estate of the deceased, Florence G. Crowson, for allowance. Section 1475 of the Code of Civil Procedure provides that, if there be subsisting liens or incumbrances on the homestead of a deceased person, the claim secured thereby must be presented to the administrator, and the funds in his hands applied thereon, and that the lien shall only be enforced against the homestead for any deficiency remaining after the other funds of the estate have been applied in payment of the claim.

In *Camp v. Grider*, 62 Cal. 20, the owner of the homestead died leaving the homestead incumbered by a mortgage. There was administration upon the estate, but no claim for the mortgage debt was presented for allowance. The complaint in foreclosure alleged that the plaintiff waived all recourse against any other property of the estate, as the complaint does here. The court, holding that the complaint did not state a cause of action, said:

"The purpose of the Legislature in providing, by section 1475, that if there be subsisting liens or incumbrances on the homestead, the claims secured thereby must be presented and allowed as other claims against the estate, was undoubtedly to preserve the homestead if possible."

This case was followed in *Bollinger v. Manning*, 79 Cal. 7, 21 Pac. 375, where, after the foreclosure suit was begun and before the trial, the mortgagor died. No claim was presented to the administrator of the estate of the mortgagor within the time prescribed by the law. The plaintiff then amended his complaint by averring that he waived all recourse against any property of the estate, except that covered by the mortgage. The court found that there was not, and never had been, any property or assets of the estate that could be subjected to the payment of the mortgage, except the property mortgaged, but gave judgment for the defendants and this judgment was affirmed. This court held that the fact that there were no other assets did not change the rule that the claim must be

presented to the administrator and allowed, as required by section 1475, as held in *Camp v. Grider*, supra. With respect to the effect of that section, the court said:

"The provision of the section is general, that claims secured by liens or incumbrances on the homestead, selected and recorded prior to the death of the decedent, must be presented and allowed as other claims against the estate. The whole matter was under the control of the Legislature, and we are not authorized to nullify the plain letter of the law because we can see no good reason for making it applicable to a case like this,"

—and that the decision in *Camp v. Grider* was a correct exposition of the Code on the subject and must be upheld and followed. The same rule was stated and applied in *Building, etc., Ass'n v. King*, 83 Cal. 442, 23 Pac. 376; *Hearn v. Kennedy*, 85 Cal. 57, 24 Pac. 606; *Rosenberg v. Ford*, 85 Cal. 612, 24 Pac. 779; *Sanders v. Russell*, 86 Cal. 121, 24 Pac. 852, 21 Am. St. Rep. 26; *Perkins v. Onyett*, 86 Cal. 350, 24 Pac. 1024; *Wise v. Williams*, 88 Cal. 33, 25 Pac. 1064, and *Bank v. Stephens*, 144 Cal. 663, 79 Pac. 379. The case of *Bull v. Coe*, 77 Cal. 62, 18 Pac. 808, 11 Am. St. Rep. 235, is not in conflict with these cases. In that case the wife had mortgaged her separate property as security for the debt of her husband. The husband died. In the lifetime of both a homestead had been declared on the property. It was held that, with respect to the debt, she stood in the relation of a surety for her husband, but that, inasmuch as the homestead was on her separate property, and not on the community property or the separate property of the husband, no presentation of a claim for the debt against the husband's estate was necessary as a condition precedent to the right to foreclose the mortgage on her property. This must be so, since the language of section 1475 limits its application to cases where the homestead to be protected is a part of the estate of the decedent.

It is apparent from these authorities that the appellant's objection is well taken, unless some reason can be found for declaring this case to be an exception to the rule thus established.

[1] It is argued that the presentation of the claim for allowance is not necessary, when there is not, and never has been, any administrator to whom it could be presented. We have seen that the fact that there are no other assets does not avoid the statutory requirement, *Bollinger v. Manning*, supra. In this case the absence of other assets is not shown, either in the complaint or findings. The simple fact that no administrator has been appointed does not appear to be as potent to avoid the necessity for presenting a claim as an absence of assets. The latter is incurable, and would remove all necessity for presentation of a claim, and would dem-

onstrate beyond doubt that no benefit could flow therefrom, to the homestead claimant, if such inquiry could be made and the fact established in the foreclosure suit. But it is always possible to have an administrator appointed. Section 1365 prescribes the order of preference of persons entitled to letters of administration, but section 1377 provides that, where those preferentially entitled to fail to apply for letters, they may be granted "to any applicant." The superior court of the county in which the decedent was a resident at the time of her death or in which she left estate has jurisdiction to appoint an administrator of such estate. Code Civ. Proc. § 1294. The homestead was her property, and was a part of her estate at the time of her death. The plaintiff could therefore have obviated the difficulty by procuring letters to be granted to a competent person. In view of the imperative language of section 1475 and the construction given to it in the above cited case, we think a lien claimant cannot escape its requirements, on the ground that no person has applied for or received letters of administration upon the estate. It is his own inaction that has produced that condition, and he cannot take advantage thereof to avoid the statute.

[2] The plaintiff claims that the right of a vendor, to have the price declared a charge upon the land and the land sold to enforce payment thereof, is not technically a lien, and therefore is not within the scope of section 1475. He bases this claim upon some expressions descriptive of the right of a vendor in this respect in *Porter v. Brooks*, 35 Cal. 202, to the effect that it is "only an equitable right to resort to the land for payment," and holding that where the vendor has conveyed the land, his vendor's lien does not prevent him from suing out an attachment in an action for the price. He also relies on a statement in *Fitzell v. Leaky*, 72 Cal. 484, 14 Pac. 201, that a vendor's lien "is in its nature a personal privilege, unassignable, which the vendor can assert, only in a suit brought for the purpose of having it decreed and enforced." We do not regard these decisions as decisive of the matter. No doubt it is true that the lien of a vendor is not assignable and that it can be enforced only in an action in equity. But section 1475 expressly applies to, and includes, all "subsisting liens or encumbrances on the homestead." The Civil Code declares that "one who sells real property has a vendor's lien thereon" for so much of the price as remains unpaid and otherwise unsecured (section 3046), and that the homestead is subject to forced sale on liens existing at the time the declaration of homestead is filed, and "on debts secured by mechanics, contractors, subcontractors, artisans, architects, builders, laborers of every class, materialmen's or vendors' liens upon the premises" (section 1241). These provisions

leave no doubt that the vendor's right to resort to the land for payment of the price thereof is a lien; that one of the objects of section 1475 was to protect the homestead from vendors' liens, as well as other liens, and that no sound distinction exists upon which to differentiate a vendor's lien from any other lien on the premises embraced on the homestead.

[3] The plaintiff also relies on decisions such as *Fallon v. Butler*, 21 Cal. 24, 81 Am. Dec. 140, holding that it is not necessary to present a claim against an estate for a lien upon a specific parcel of land belonging to such estate, not the homestead, as a condition precedent to the right to foreclose such lien. These decisions go upon the principle that the lien itself is not a claim against the estate. They do not hold that the debt, which is secured by the lien is not a claim which must be presented and allowed in order to secure payment thereof out of the general assets, but merely declare that, where resort to the general assets is waived, the holder of the lien can have his action against the specific parcel upon which his lien exists, without having presented a claim for allowance. Necessarily, they have no application whatever to cases coming under section 1475, in which the lien exists against the homestead, and they do not at all impair the force of the decisions first above cited, holding that, where the lien is on the homestead, a claim for the debt secured by such lien must be presented to the administrator of the estate of the deceased owner, as a condition precedent to the right to enforce the lien against the homestead premises.

[4] It is also suggested that the proceeding under section 1723, Code of Civil Procedure, above mentioned, whereby the homestead was declared to have vested in the defendant, as surviving husband, had the effect of separating the property from the other estate of the deceased wife so that the presentation of the claim was unnecessary. The other provisions of the Code show that this could not be the effect of an order under section 1723. The Civil Code, as above shown, provides that the homestead shall be subject to liens of the various kinds there specified, among them the lien of a vendor for the purchase money. The order declaring the homestead vested in the surviving husband left it as it was, subject to these liens, and it therefore was as important to the husband to have the other assets of the estate of his deceased wife applied to discharge the vendor's lien, after such order vested title in him, as it was before.

We find no ground upon which to predicate the statement that the plaintiff's case is an exception to the established rule. The

conclusion follows that the court below erred in giving plaintiff judgment of foreclosure. The judgment is reversed.

We concur: **LAWLOR, J.; WILBUR, J.; SLOANE, J.; SHURTLEFF, J.**

On Petition for Rehearing.

PER CURIAM. [5] In a petition for rehearing, the respondent refers to the statement in the opinion heretofore filed, in discussing the possibility of obtaining letters of administration upon the estate of the deceased wife of the appellant, that, "the homestead was her property and was a part of her estate at the time of her death," and claims that this statement is contrary to previous decisions of this court, referring to *Matter of Tracey*, 136 Cal. 385, 69 Pac. 20; *Estate of Shirey*, 167 Cal. 193, 138 Pac. 994; *Saddlemire v. Stockton*, etc., Soc., 144 Cal. 653, 79 Pac. 381; *Estate of Beer*, 178 Cal. 57, 171 Pac. 1062; and *Estate of Simonton*, 183 Cal. 54, 190 Pac. 442. These cases declare that a homestead which was declared upon community property or upon separate property of the spouse making or joining in the declaration upon the death of either spouse, vests immediately in the survivor and constitutes no part of the property of the deceased spouse, although it was his or her property at the immediate time of his or her death. The decision of the *Estate of Beer* is to the effect that a brother of a deceased wife is not entitled to administration of his estate, in preference to the public administrator, where the only property in which he claimed an interest was a homestead declared upon separate property of the wife in the lifetime of herself and the decedent, the wife having died before the husband, it being stated that the homestead thereupon immediately vested in the surviving husband and that the relatives of the wife took no interest therein by descent. The above-quoted passage of our opinion should perhaps have been followed by a further statement in explanation, but when considered in connection with the subject then under discussion it is not contrary to the previous decisions of this court. None of those decisions hold that, where a homestead declared on separate property is subject to a vendor's lien, there can be no administration upon the estate for the purpose of disposing of such homestead and enforcing the vendor's lien thereon. It is no part of the assets of the estate for the payment of ordinary debts, and it immediately vests in the surviving spouse upon the death of the spouse in whom the title was previously vested. The question whether administration could be had because of the necessity of providing for the enforcement of the subsisting liens on the homestead, such as the vendor's liens or me-

chanic's liens provided for in section 1241 of the Civil Code, was not involved in any of those cases. Where administration is necessary for that purpose, it must be held that administration can be had although there are no general assets of the estate subject to the payment of ordinary debts.

The petition for rehearing is denied.

SHAW, C. J., and LAWLOR, WILBUR, SLOANE, LENNON, and SHURTLEFF, JJ., concur.

188 Cal. 508

Ex parte NEWELL. (Cr. 2447.)

(Supreme Court of California. March 28, 1922.)

1. Criminal law  576(3)—New information after acquittal because of variance need not be filed within 30 days of commitment.

Pen. Code, § 1382, requiring the dismissal of the prosecution if no information is filed within 30 days after accused has been held to answer by the committing magistrate, does not apply where an information had been filed within the time fixed and accused placed on trial thereon but acquitted on the ground of variance, and the court had directed that he be detained in custody until a new information was filed, as authorized by Pen. Code, § 1165.

2. Indictment and information  41(6)—Preliminary hearing unnecessary to sustain new information directed by court after acquittal because of variance.

Under Pen. Code, § 1165, authorizing the court to order defendant detained in custody after acquittal because of variance, to the end that a new information may be filed as authorized by section 1117, and under section 998, prescribing procedure under such new information, a new preliminary examination is not necessary to authorize the new information when directed by the court, though, if the court fails to refuse to order the new information, the district attorney can proceed to have defendant examined before a magistrate, and may, upon his commitment, file a new information in the same manner as if no charge had previously been preferred against him.

3. Habeas corpus  3—Erroneous acquittal because of variance does not deprive court of jurisdiction to order new information so as to warrant discharge.

Even if the court was in error in directing an acquittal of accused because of variance, that error did not deprive the court of jurisdiction to order accused to be detained pending the filing of a new information against him, so as to entitle him to discharge for such detention on writ of habeas corpus, as he can avail himself of the error by pleading the first acquittal as a bar to a prosecution under the new information.

In Bank.

Application by **Hugh H. Newell** for writ of habeas corpus to be directed to the Sher-

iff of Alameda County to secure release of petitioner from custody, on the ground that his detention is illegal. Writ denied.

Raine Ewell, of San Francisco, and Chas. H. Seecombe and Dutton, Seecombe & McDonough, all of Oakland, for petitioner.

SHAW, C. J. The petitioner, Hugh H. Newell, was tried upon an information charging him with cashing a check drawn upon a bank in which he had no funds, and he was acquitted on the ground of variance. Thereupon the court directed the district attorney to file a new information so as to avoid the variance discovered upon the trial. In accordance with this order a new information was filed, and the petitioner was detained in custody to await trial upon the new information. He applies for a writ of habeas corpus on the ground that his detention to answer the new information is illegal.

[1] The principal point relied on is that, because of the fact that the new information was filed more than 30 days after the defendant had been held to answer by the committing magistrate, the court has no power to do otherwise than dismiss the prosecution as provided in section 1382 of the Penal Code. That section does not apply to the case. It provides that, unless good cause to the contrary is shown, the court must dismiss a prosecution where the defendant has been held to answer and no information is filed within 30 days thereafter. It does not provide for a case where an information has been filed within the 30 days and a trial has been had thereon, and a new information is directed by the court because of an acquittal upon the trial of the original information on the ground of variance. In such a case a new information is authorized by section 1165, and it is manifest that the provision of section 1382 applies only to the information first filed, where the filing is delayed more than 30 days after the commitment to answer.

[2] Section 1165 provides that, where an acquittal occurs because of a variance between the pleading and proof, the court may order the defendant to be detained in custody "to the end that a new indictment or information may be preferred, in the same manner and with like effect as provided in section 1117." Section 1117 provides that, when the trial of a cause is discontinued and a jury discharged because the facts alleged did not constitute an offense, and the court, nevertheless, believes from the evidence adduced or for other good reasons that a new charge can be framed which will constitute an offense, the court "may direct the district attorney to file a new information * * * and the same proceedings must be had thereon as are prescribed in section 998; provided, that after such order or submission the defendant may be examined before a magis-

trate, and discharged or committed by him as in other cases." Section 998 provides that, where a new information is ordered, the defendant shall remain in custody, or on bail, to answer the same, but that if it is not filed before the next grand jury of the county is discharged, the defendant must be discharged from custody or his bail exonerated.

It is clear from these provisions that a new preliminary examination is not necessary to authorize a new information curing the variance to be filed when it is ordered in pursuance of section 1165. Doubtless, under section 1117, to which reference is made in section 1165, if the court fails or refuses to order the district attorney to file a new information, that officer may, nevertheless, under section 1117, proceed to have the defendant again charged before a magistrate with the proper offense disclosed by the evidence, and may, upon his commitment, file a new information in the same manner as if no charge had previously been preferred against him, but this does not mean that such re-examination must be had in all cases. If the court orders a new information, there is no necessity for another preliminary examination or commitment. The hearing already had in court upon the original information furnishes all the foundation that is necessary to authorize the filing of the new information as ordered by the court.

[3] We are not to be understood as holding or conceding that the validity of the new information, so ordered to be filed, could be attacked on habeas corpus in any event. It would seem that the superior court, having jurisdiction of the cause regularly brought before it, would have jurisdiction to direct an amendment of the information, and that its action in doing so would be an exercise of its jurisdiction, erroneous but not void, and reviewable only on appeal. But upon this we need express no opinion. So, also, the claim that the court, in directing the new information to be filed, erred in its holding that there was a variance rendering the new information void, is without merit. That ruling would be a ruling in the exercise of its jurisdiction and advantage could be taken thereof only by presenting the former acquittal as a former adjudication in defense of the new information. It cannot be made the ground for issuing a writ of habeas corpus.

There being no merit in the petition in any view of the case, it is ordered that the writ be denied and that petitioner be remanded to the custody of the sheriff of Alameda county, to be held for trial on said new information.

We concur: RICHARDS, Justice pro tem.; SHURTLEFF, J.; WILBUR, J.; SLOANE, J.; LAWLOR, J.

(188 Cal. 602)

PEOPLE v. MANRIQUEZ. (Cr. 2409.)

(Supreme Court of California. April 4, 1922.)

1. Criminal law ☞1081; 1070½, New, vol. 11 Key-No. Series—Appeal from judgment not taken in open court or by notice within two days must be dismissed.

Where the appeal from a judgment entered upon a plea of guilty was not taken by defendant in open court, in the manner prescribed by Pen. Code, § 1239, at the time the judgment was rendered, or by filing a written notice of appeal within two days thereafter, the appeal must be dismissed.

2. Criminal law ☞273—Plea of guilty must be made by accused and be explicit.

Under Pen. Code, § 1018, providing that a plea of guilty can be put in by defendant himself only in open court, the plea must be entered by defendant personally and the confession of guilt should be explicitly made, and the form is sufficiently vital, if the admission of guilt is clear and unconditional.

3. Criminal law ☞273—Express admission of guilt by defendant personally held sufficient plea.

Where the attorney for accused stated the plea was guilty, before accused could reply through the interpreter, but accused himself thereafter stated he had been guilty all the time, the statement of accused was sufficiently explicit to be a plea of guilty.

4. Criminal law ☞274—Plea of guilty cannot be withdrawn because entered with unfounded hope of leniency.

A plea of guilty entered by defendant with knowledge of his rights and the consequences of his plea, cannot be withdrawn merely because he was led by his counsel or others to hope or believe that he would receive a milder punishment than if he stood trial, which hope proved unfounded.

5. Criminal law ☞977(3)—Requirement sentence shall not be imposed before two days after plea of guilty may be waived.

The provision of Pen. Code, § 1191, that judgment shall not be entered less than two days after the entry of the plea of guilty, creates a right for the benefit of accused which he can waive and which is waived where his counsel expressly consented to sentence on the day following the entry of the plea.

6. Homicide ☞18(5)—Unintended killing in commission of robbery is "first degree murder."

A homicide, committed in the perpetration of a robbery, was murder in the first degree, under Pen. Code, § 189, notwithstanding defendant's claim that the pistol went off when his victim grabbed at it.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Murder in First Degree.]

7. Criminal law ☞980(1)—Trial judge has in his discretion power to impose death penalty on plea of guilty to first degree murder.

Where the trial judge had decided, as required by Pen. Code, § 1192, that, upon the evidence introduced, the defendant, who had pleaded guilty, was guilty of murder in the first degree, it was within his discretion to impose the death penalty.

8. Criminal law ☞1149—Leave to withdraw plea of guilty rests in trial court's discretion.

The denial or granting of permission to withdraw a plea of guilty and to substitute a plea of not guilty rests within the sound discretion of the trial court, and its action thereon must be upheld unless an abuse of such discretion clearly appears.

In Bank.

Appeal from Superior Court, Imperial County; M. W. Conkling, Judge.

Miguel Manriquez was adjudged, after plea of guilty, to be guilty of murder in the first degree and sentenced to death, and he appeals from the judgment and from an order denying his motion to set aside the judgment and to permit him to withdraw his plea of guilty. Appeal from the judgment dismissed, and order affirmed.

Harry B. Ellison, of El Centro, and M. A. Thomas, of San Francisco, for appellant.

E. R. Simon, of El Centro, U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

WASTE, J. [1] The defendant was charged with the crime of murder. After the entry of a plea of "guilty" the court determined the degree of the crime as murder in the first degree, and, on July 22, 1921, imposed the death penalty. Thereafter the defendant interposed a motion to set aside the judgment and for leave to withdraw the plea of guilty and to substitute a plea of not guilty instead. The motion was denied on September 28, 1921. There appears, in the clerk's transcript of the proceedings in the court below, what purports to be a notice of appeal to this court from the judgment of conviction, "and from an order made on the 28th day of September, 1921, after judgment affecting the substantial rights of the defendant." It does not appear that any appeal from the judgment was taken by the defendant in open court, in the manner prescribed by section 1239 of the Penal Code, at the time the judgment was rendered, or by filing a written notice of appeal within two days thereafter. Consequently the appeal from the judgment must be, and is, dismissed.

Several contentions are advanced in support of the appeal from the order denying the motion to set aside the judgment and to permit the withdrawal and substitution of

the plea. The motion was made upon the ground, in substance, first, that no plea of guilty was put in by the defendant himself in open court, as required by section 1018 of the Penal Code, and that the entry of any such purported plea was without his express consent. Passing over the provision of the statute which requires that application for permission to withdraw a plea of guilty, and to substitute a plea of not guilty, must be made before judgment (Pen. Code, sec. 1018), a point not raised by the Attorney General, we are convinced that there is no merit in appellant's position.

From the record of the proceedings on arraignment, and no attempt is made to impeach the verity of the reporter's transcript, it appears that the appellant is a Mexican who does not speak or understand the English language. When he came into court for arraignment, an interpreter was duly appointed and sworn to interpret the proceedings. By direction of the court, the information was then translated to the appellant by the interpreter, a copy of the information was handed to the defendant at the time, and the court informed him of his right to be represented by counsel before being arraigned. Upon appellant stating that he had none, and no money with which to pay one, the court appointed a member of the local bar to represent the defendant, and continued the arraignment until the following morning. When the case was called the next day, the attorney appointed by the court appeared with appellant. At his request the information was read by the district attorney and then translated to the defendant by the interpreter. The court thereupon arraigned the defendant, but, at the request of his counsel, continued the matter another day to take the plea. At that time the following proceedings were had:

"The Court: Are you ready for plea?

Mr. Ellison (defendant's counsel): Yes, sir.

The Court: Is the interpreter in court? Translate the proceedings to the defendant, please, Mr. Interpreter. Miguel Manriquez, you have been heretofore arraigned upon this information, charged with the crime of murder; to this information what is your plea?

Mr. Ellison: The plea is guilty to the charge of murder.

The Defendant: I have been guilty all the time.

Mr. Ellison: The plea of guilty may be entered.

The Court: My recollection is I have to take evidence to determine the degree.

Mr. Simon (the district attorney): I think that is true. If the court please, I assume the burden will be on us to show the degree.

Mr. Ellison: I am willing it should be shown by the defendant himself."

[2, 3] The court thereupon proceeded to take the testimony of several witnesses, including the defendant, who took the stand

at his counsel's suggestion, and determined the crime committed to be murder in the first degree. Section 1018 of the Penal Code provides that a plea of guilty can be put in by the defendant himself only in open court, and the point now made on behalf of the appellant is that he "himself" offered no plea when arraigned. He relies upon the statement in *People v. Thompson*, 4 Cal. 238, to the effect that a defendant must plead guilty in person, and his attorney is not allowed by the law to admit away his life or liberty. It is true, as was said in *People v. McCrory*, 41 Cal. 458, 461, that a plea of a defendant confessing himself guilty of crime should not be entered except with the express consent of the defendant, given by him personally in direct terms in open court, and his confession of guilt should be explicitly made. We are satisfied that there was a positive and literal compliance with such requirement in this case. The foregoing extract from the record and the transcript of the proceedings on the motion to set aside clearly and most conclusively confirm that view. The mere fact that the attorney for the defendant announced to the court what the plea would be, before the defendant was able to answer through the interpreter, and consented to the entry of the plea after it was made, is an unimportant matter in view of the independent action of the defendant himself. There is no merit in the contention that the answer of the appellant cannot be held to constitute a plea except by implication. The statement was a direct and explicit confession of guilt and was properly received by the court and entered as the plea in the case. The form of the plea is not of vital importance, provided the admission of guilt is clear, definite, and unconditional. 16 C. J. 401.

[4] Another ground upon which the appellant based his motion for vacation of the judgment was that his plea of guilty was entered without due deliberation, and with the hope and expectation that the punishment to which he might be exposed would be mitigated. Even if such were the case, the fact that a defendant, knowing his rights and the consequences of his act, hoped or believed, or was led by his counsel, or others, to hope or believe that he would receive a milder punishment by pleading guilty than that which would fall to his lot after trial and conviction by a jury, presents no ground for the exercise of the discretion necessary to permit a plea of guilt to be withdrawn. *People v. Dabner*, 153 Cal. 398, 403, 95 Pac. 880; *People v. Miller*, 114 Cal. 10, 16, 45 Pac. 986; *People v. Lennox*, 67 Cal. 113, 115, 7 Pac. 260.

[5] Appellant's last contention in support of his motion to vacate the judgment is that the court violated the provisions of section 1191 of the Penal Code in that it pronounced

judgment upon him the day following the entry of his plea. The section provides that, after a plea of guilty, the court must appoint a time for pronouncing judgment, which must be not less than two nor more than five days after the entry of the plea. A sufficient answer to the contention is that the appellant through his counsel, at the time he made his plea, expressly waived time and, with the consent of the court and district attorney, requested the court to impose the sentence on the day following. It has long been settled that one may waive a right created by statute for his benefit, and that the rule applies to the time for pronouncing the judgment of the court in criminal cases. *People v. Robinson*, 46 Cal. 94, 96; *People v. Mess*, 65 Cal. 174, 3 Pac. 670; *People v. Johnson*, 88 Cal. 171, 174, 25 Pac. 1116.

[6] Although the appeal from the judgment has of necessity been dismissed, we have carefully read the entire record of the evidence submitted to the trial court, to enable it to determine the degree of the crime, before passing sentence. The homicide resulted from the attempt of the appellant and two others to rob a store at El Centro, kept by a Chinese. The three men went together to the store for the purpose of committing the robbery. According to the appellant, who took the stand at the instance of his own counsel, one of his accomplices directed Quon Sue, one of the Chinese, to hold up his hands and told the appellant "to hold him there." He "put his gun on him" and—

"as soon as I did it he tried to grab it. * * * When the Chinaman grabbed at me, the pistol went off, and he went down, and I ran out, and I don't know what the others did."

[7] There was other testimony that Quon Sue was killed instantly, and the evidence of the autopsy surgeons tended very strongly to indicate that the killing was not in the manner described by the appellant. Be that as it may, the homicide was committed in an attempt to perpetrate robbery, and was murder in the first degree. Pen. Code, sec. 189. The evidence was of such a nature as to support no other conclusion. Having determined this matter, as was its duty to do upon the entry of the plea of guilty (Pen. Code, sec. 1192), nothing further remained for the trial court but to pronounce judgment. That it approached the performance of this difficult task with due regard for the serious consequences which might attend the appellant is evidenced by the careful manner in which it considered and determined the degree of the crime committed. That it saw fit to impose the extreme penalty fixed by the law is a matter resting within the exercise of the judicial discretion with which the trial court is vested by the supreme power of the state.

[8] The granting or denying of permission to withdraw a plea of guilty, and to substitute a plea of not guilty, is a matter within the sound discretion of the trial court, and its action must be upheld unless an abuse of such discretion clearly appears. There are no such peculiar or unusual circumstances in this case as to enable us to say the trial court should have acted differently in the matter. *People v. Bostic*, 167 Cal. 754, 760, 141 Pac. 380; *People v. Dabner*, supra.

No legal questions are presented by the appeal which call for the intervention of this court. It follows therefore that the order appealed from must be affirmed. It is so ordered.

We concur: SHAW, C. J.; LAWLOR, J.; WILBUR, J.; SHURTLEFF, J.; SLOANE, J.; RICHARDS, Justice pro tem.

188 Cal. 158

IN RE SCRIMGER'S ESTATE. (S. F. 9676.)

(Supreme Court of California. Feb. 14, 1922, as Modified March 27, 1922.)

1. Charities ☞33—Devise to orphan asylum given to corporation conducting asylum as successor of former corporation.

Where a will provided that, at the termination of a life estate, interests in the property should be given to a Roman Catholic orphan asylum and others (corporations, societies, and institutions in San Francisco), and it appeared that the corporation conducting such asylum at the date of the will had been dissolved by expiration of its charter, and that a new corporation had taken over the management of the same asylum, the new corporation is entitled to the benefit of the gift, since the children in the institution were the real beneficiaries, and the appropriate custodian of the fund at the termination of the life estate was the corporation then operating the institution.

2. Executors and administrators ☞315(5)—Decree of distribution is conclusive as to meaning of will.

A decree of distribution is a conclusive determination of the meaning and effect of the will, and the will itself cannot be looked to for the purpose of interpreting the decree except in so far as it is referred to and made a part thereof.

3. Charities ☞20(2) — Corporations ☞1—Equity disregards corporate form to promote justice.

Courts of equity look behind the corporate form to the persons behind that form, where necessary to promote justice, and can regard a new corporation, formed to conduct an orphan asylum after the expiration of the term of the former corporation, as the revival and reorganization of the former to enable the new corporation to receive a gift made to the former one.

4. Charities ☞37—New corporation to conduct orphanage held entitled to fund under cy pres doctrine.

Where a will gave a portion of the trust fund at the termination of the trust to a corporation conducting an orphanage at the time the will was executed, the fund can be given, under the doctrine of cy pres applied to charities, to a corporation formed to conduct the orphanage after the expiration of the charter of the corporation in existence when the will was made.

5. Wills ☞681(2) — Beneficial interest not definitely given does not revert to heirs but remains in the trustees.

Where an estate was vested in trustees the title remains in them even though the beneficiaries cannot be ascertained, so that the interest of a beneficiary not ascertainable cannot, in any event, pass to the heirs of testator but must be held by the trustees.

6. Trusts ☞331—Matters settled on first accounting of trustees cannot thereafter be questioned.

Payments by the trustees out of the corpus of the estate which were approved on a first settlement of the trustees' account cannot be questioned on settlement of their final account.

7. Trusts ☞315(1)—Trustees can charge for care pending determination of disposition after termination of trust.

Where the trustees retained possession of the trust funds, and cared for them for several years after the termination of the trust, because litigation was pending by an heir to have the gifts of the trust fund to charities declared void, the trustees are entitled to charge for the care of the property during such period.

8. Appeal and error ☞757(3)—Objection to allowance to trustees can be disregarded where testimony is not printed in appellants' brief.

An objection to an allowance to trustees of expenses incurred by them in the care of the estate after the termination of the trust can be disregarded on appeal where the appellants did not print the evidence in their brief, the appeal being upon a typewritten transcript, nor point out in detail the items of the account to which they objected.

9. Executors and administrators ☞315(6)—Decree is not void though error appears on its face.

A decree of distribution is not subject to attack on final settlement of the trustees' accounts because error in sustaining charitable devises by will, executed within 30 days of testator's death, appears on the face of the decree, since the court had jurisdiction to render such decree even though it was erroneous, and the only remedy would be by appeal.

10. Executors and administrators ☞315(6)—Decree ordering distribution to charity in accordance with void bequest not necessarily erroneous.

The mere fact that a decree distributed property in accordance with charitable be-

quests, which were void because the will was executed within 30 days of testator's death, does not establish that the decree was erroneous, since it might have been consented to by the persons who otherwise would have been entitled to receive the fund.

In Bank.

Appeal from Superior Court, Alameda County; E. C. Robinson, Judge.

In the matter of the estate of Charles Louis Scrimger, deceased. From an order settling the final account of trustees and directing distribution of the funds in their hands, the Roman Catholic Orphan Asylum of San Francisco and others appeal. Affirmed in part, and reversed in part, with directions.

W. H. Burrows, of San Francisco, for appellant Roman Catholic Orphan Asylum.

Charles W. Slack and E. T. Zook, both of San Francisco, for appellant San Francisco Protestant Orphan Asylum Society.

Aaron Sapiro and Milton D. Sapiro, both of San Francisco, for appellant Pacific Hebrew Orphan Asylum and Home Society of San Francisco.

Fitzgerald, Abbott & Beardsley and Ben F. Woolner, all of Oakland, for respondents.

WILBUR, J. This is an appeal by the Roman Catholic Orphan Asylum of San Francisco, Protestant Orphan Asylum, and the Pacific Hebrew Orphan Asylum from the order of the superior court settling the final account of the trustees under the final decree of distribution in the estate, and directing the distribution of that portion of the trust estate held by said trustees in trust for the Roman Catholic Orphan Asylum to a sister of the deceased, Kate McGavin.

On the 15th of January, 1911, a decree of distribution was entered in the above-entitled matter whereby the residue of the estate, after the payment of specific legacies, was distributed to J. C. Fitzsimmons and Joseph E. Barry as trustees upon the trust provided in the will and set forth in the decree, to hold the same until said trust shall terminate by reason of the death of the mother or sister of the deceased. The decree of distribution recites the provisions of the will as follows:

"Sixth. After the payment of all specified bequests * * * I give, devise, and bequeath to J. C. Fitzsimmons of Oakland * * * and Joseph E. Barry of said city and county of San Francisco * * * as trustees, all my property and estate * * * in trust for the following uses and purposes. * * *

"Upon the death of my said mother or my said sister said trust and the powers and duties of my said trustees shall ipso facto cease and determine, and in the event that my said mother die before my said sister, an undivided two-thirds of all of my said property shall go to my said sister, free and clear of any trust

and for her own and absolute use forever, and the remaining undivided one-third of my said property shall go as follows, to wit: Protestant Orphan Asylum, Pacific Hebrew Orphan Asylum, Roman Catholic Orphan Asylum, and San Francisco Society for Protection of Children (corporations, societies, or institutions located in the city and county of San Francisco, state of California), to be divided equally among said charitable institutions share and share alike, all of my said property being subject, however, to the payment therefrom of the funeral expenses and the expenses of the last illness of my said mother, and, in the event that my said sister die before my said mother, an undivided two-thirds of all of my said property shall go to my said mother, free and clear of any trust and for her own and absolute use forever, and the remaining undivided one-third of my said property shall go as follows, to wit: To the Protestant Orphan Asylum, Pacific Hebrew Orphan Asylum, Roman Catholic Orphan Asylum, and San Francisco Society for Protection of Children (corporations, societies, or institutions located in the city and county of San Francisco, state of California), to be divided equally among said charitable institutions, share and share alike."

The decree then provided:

"That upon the death of said Nancy C. Scrimger, the said mother of said deceased, before the death of Kate McGavin, the said sister of said deceased, the said Kate McGavin, sister of said deceased, will be entitled to an undivided two-thirds of all of said trust property, free and clear of any trust, and for her own and absolute use thereafter; and at the same time the charitable institutions mentioned in said will, and as hereinbefore set forth, Protestant Orphan Asylum, Pacific Hebrew Orphan Asylum, Roman Catholic Orphan Asylum, and San Francisco Society for Protection of Children, will be entitled to the remaining undivided one-third of the said property and trust fund, free and clear of any trust, in equal shares, share and share alike;

"That in the event Kate McGavin, the said sister of said Charles Louis Scrimger, deceased, die before the said mother of said deceased, Nancy C. Scrimger, the said mother of said deceased will then be entitled to an undivided two-thirds ($\frac{2}{3}$) of all of the said property of said deceased, free and clear of any trust, and for her own and absolute use forever, and at the same time the charitable institutions named in said will namely, Protestant Orphan Asylum, Pacific Hebrew Orphan Asylum, Roman Catholic Orphan Asylum, and San Francisco Society for Protection of Children, will then be entitled to the remaining undivided one-third ($\frac{1}{3}$) of the property of said deceased, in equal shares, share and share alike."

The mother of the deceased died November 19, 1912, and the trust then terminated. The decree settling the account of the trustees awarded the portions of the trust property held in trust for the Roman Catholic Orphan Asylum and for the San Francisco Society for Protection of Children to the sister, Kate McGavin. The appellants contend

that this portion of the decree, so far as it relates to the Roman Catholic Orphan Asylum, is erroneous, but no complaint is made with reference to that portion of the decree by which the property held in trust for the San Francisco Society for Protection of Children, under the decree of distribution, is now "distributed" to the sister of the deceased. Appellants also complain that the trustees have delayed distribution for more than seven years after the trust terminated, and that certain charges of expense awarded the trustees for that reason should not have been allowed, and that other expenses should have been paid from the income instead of from the principal of the trust. The basis upon which the court awarded that portion of the trust property the deceased left for the benefit of the Roman Catholic Orphan Asylum to the sister of the deceased instead of to the asylum is shown in the following finding of the trial court:

"The court further finds that the Roman Catholic Orphan Asylum named in the will of said deceased, and the Roman Catholic Orphan Asylum named in the decree of distribution, was a corporation incorporated under the laws of the state of California on the 12th day of August, 1858, and whose charter expired by limitation on the 12th day of August, 1908, prior to the date of the will of said decedent; that from on or about the 12th day of August, 1858, until the 12th day of August, 1908, on which said date it ceased to exist as a corporation as aforesaid, but not thereafter, said Roman Catholic Orphan Asylum was organized, existing and transacting its business and conducting a charitable institution for the care of orphans in the city and county of San Francisco; that on the 24th day of March, 1910, there was incorporated under the laws of the state of California a corporation by the name of Roman Catholic Orphan Asylum of San Francisco, which said corporation is the corporation which has appeared in this proceeding and filed objections to the above mentioned account; that said Roman Catholic Orphan Asylum of San Francisco thereupon commenced to transact business in the city and county of San Francisco and to carry on and conduct the asylum for the care of orphans that had been previously conducted by said Roman Catholic Orphan Asylum that had forfeited its charter on the 12th day of August, 1908, as aforesaid; that said orphan asylum was conducted continuously and that the people who had controlled the corporation that forfeited its charter on the 12th day of August, 1908, as aforesaid, continued to operate said asylum until the 24th day of March, 1910, at which date said same persons incorporated said Roman Catholic Orphan Asylum of San Francisco, which said last-named corporation has continued to operate said asylum as aforesaid; that the said Roman Catholic Orphan Asylum named in said will was the same Roman Catholic Orphan Asylum as was named in said decree of distribution and that said Roman Catholic Orphan Asylum named in said will and in said decree of distribution has at no time since the 12th day of August, 1908, existed either as

a corporation, or society, or institution, or otherwise; that said Roman Catholic Orphan Asylum of San Francisco incorporated March 24th, 1910, as aforesaid, and which is the only Roman Catholic Orphan Asylum that has appeared in any proceeding in connection with the said estate, or the said trust, was not named in said will or in said decree of distribution, and has no right, title, or interest in or to any portion of the said trust estate, either by reason of said will of said deceased, or said decree of distribution, or otherwise."

[1] The deceased died March 6, 1909. The decree of distribution was rendered January 5, 1911, and entered March 22, 1911. At that time the Roman Catholic Orphan Asylum in San Francisco was being operated by the Roman Catholic Orphan Asylum of San Francisco, a corporation. The decree should be construed as a distribution in trust for the new corporation then in existence, for it is clear that the real beneficiaries of the trust are the children in the institution and the appropriate custodian of the trust fund, upon the death of the mother of decedent, the corporation operating the institution. (See discussion in *Estate of Winchester*, 133 Cal. 271, 65 Pac. 475, 54 L. R. A. 281; *Estate of Upham*, 127 Cal. 90, 59 Pac. 315.)

The decree of distribution to the trustees declared that they were to hold the same upon a trust which terminated upon the death of the mother, whereupon one-third of the property should "belong to and vest in the following corporations, societies, or institutions located in the city and county of San Francisco, state of California, namely, Protestant Orphan Asylum, Pacific Hebrew Orphan Asylum, Roman Catholic Orphan Asylum, and San Francisco Society for Protection of Children, to be divided equally among such charitable institutions, share and share alike." Thus, by the terms of the decree the trustees were to turn over to a corporation, society, or institution known as the Roman Catholic Orphan Asylum, one-twelfth of the property in their hands. There was at the time of the decree of distribution in the city and county of San Francisco no other institution of that or similar name. It was, therefore, appropriate that the order settling the final account of the trustees should have directed the transfer from the trustees, Fitzsimmons and Barry, to the corporation in charge of the orphan asylum of that portion of the trust funds devoted to the Roman Catholic Orphan Asylum.

[2] In this connection it should be borne in mind that the decree of distribution is a conclusive determination of the meaning and effect of the will and that the will itself cannot be looked to for the purpose of interpreting the decree except in so far as it is referred to and made a part thereof. The rule in that regard is thus stated in *Wills v. Wills*, 166 Cal. 529, 531, 137 Pac. 249, 251.

"These decrees stand unassailed, and they are conclusive determinations against the existence of any trust in favor of plaintiff under the will of his father. (*William Hill Co. v. Lawler*, 116 Cal. 359, [48 Pac. 323]; *Goad v. Montgomery*, 119 Cal. 552, [63 Am. St. Rep. 145, 51 Pac. 681]; *Estate of Trescony*, 119 Cal. 568, [57 Pac. 951]; *Williams v. Marx*, 124 Cal. 22, [56 Pac. 603]; *More v. More*, 133 Cal. 494, [65 Pac. 1044, 66 Pac. 761]; *Martino-vich v. Marsicano*, 137 Cal. 354, [70 Pac. 459]; *Keating v. Smith*, 154 Cal. 186, [97 Pac. 300].) It will not do to argue, as is here done, that because the property must have been distributed to the widow in any and in all events, resort may be had to the will, from which it will be discovered that it was distributed to her as trustee under a trust. Only where by apt language the will is incorporated into the decree, as in *Goldtree v. Thompson*, 79 Cal. 613, [22 Pac. 50], may this be done. (*Goad v. Montgomery*, 119 Cal. 552, [63 Am. St. Rep. 145, 51 Pac. 681].) In all other cases the decree speaks for itself alone, without the aid of the evidence upon which it was based, and the will itself is only such evidence. 'The decree supersedes the will and prevails over any provision therein which may be thought inconsistent with the decree.' (*Goad v. Montgomery*, 119 Cal. 552, [63 Am. St. Rep. 145, 51 Pac. 681].) 'Where a trust has been created by will the validity of the trust is necessarily involved in the question of distribution, for if invalid the bequest fails. (*Estate of Walkerly*, 108 Cal. 660, [49 Am. St. Rep. 971, 41 Pac. 772].) Hence, as necessary to distribution, it is within the province of the probate court to define the rights of all who have legally or equitably any interest in the property of the estate derived from the will.' (*More v. More*, 133 Cal. 494, [65 Pac. 1044, 66 Pac. 761].) 'The decree was necessarily a judicial construction of the will and of the several interests of the distributees, and cannot be assailed collaterally. There is no doubt or uncertainty in the decree itself as to plaintiff's title, and to that alone we are permitted to look.' (*Williams v. Marx*, 124 Cal. 22, [56 Pac. 603].)"

So far as the Roman Catholic Orphan Asylum is concerned the matter resolves itself into this simple proposition: The trustees hold certain properties in trust for the Roman Catholic Orphan Asylum, indifferently described in the decree of distribution as a corporation, society, or institution. This is a charitable institution, described as such in the decree, which refers to the beneficiaries as "such charitable institutions." It is a matter of entire indifference whether the corporation in charge of the Roman Catholic Orphan Asylum is the identical corporation in charge at the time of making the will or the death of the deceased. There is no uncertainty as to the ultimate beneficiary of the trust. The question of whether or not there is or was a corporation entitled to take is wholly immaterial, where the decedent left the property to trustees who took the title thereto and were charged in law with the duty of administering the trust.

[3] Two other considerations leading to the same conclusion may be referred to. Courts of equity look behind the corporate form to the persons behind that form where necessary for the purpose of doing justice. In a recent case we said:

"But it is well established in this state that under circumstances such as these where a corporation reorganizes under a new name but with practically the same stockholders and directors and continues to carry on the same business, a court of equity will regard the new corporation as a continuation of the former corporation, and will hold it liable for the debts of the former corporation. (*Blanc v. Paymaster Mining Co.*, 95 Cal. 524, [29 Am. St. Rep. 149, 30 Pac. 765]; *Higgins v. California Petroleum Co.*, 122 Cal. 373, [55 Pac. 155]; 147 Cal. 363, [81 Pac. 1070]; *Strahm v. Fraser*, 32 Cal. App. 447, [163 Pac. 680].)" *Stanford Hotel Co. v. M. Schwind Co.*, 180 Cal. 348, 354, 181 Pac. 780, 783.

It would seem to follow inevitably in this case that we should be able to see the same orphan asylum with its officers and orphans behind the new corporate name, which is but a convenience for the conduct of the institution. (See *Estate of Winchester*, supra, and *Estate of Upham*, supra.) The new corporation was, in effect, a revival and reorganization of the defunct corporation by the former managers, and for the beneficiaries of the old corporation.

[4] The other rule leading to the same conclusion is the equitable doctrine of cy pres applied to charities. Here the respondents have the legal title to the estate under the decree and in trust for the "Roman Catholic Orphan Asylum." The doctrine of cy pres points to the Roman Catholic Orphan Asylum of San Francisco as the proper object of such trust. The rule is thus stated in *Estate of Hinckley*, 58 Cal. 457, 504:

"* * * Our conclusion upon this branch of the case, is, that courts of equity in this state have jurisdiction, derived from the English common law, independent of the statute of Elizabeth, to establish and enforce charities, when trustees competent to take the legal estate are named, and the class to be benefited, and the individuals to be designated by the trustees, are capable of ascertainment. * * *"

[5] There is, in any event, no basis whatever for the order directing the trustees to turn the property over to Kate McGavin. We are not dealing with a legacy lapsed for uncertainty which the heir at law may take, but with an estate vested in the trustees, and the only question is whether the beneficiaries can be ascertained by the probate court or a court of equity. If not, the title remains in the trustees.

[6] A large portion of the appellants' opening brief is devoted to a discussion of certain general objections to the settlement of the account of the trustees. These objections are taken in general terms and the specific items

of the account objected to in the main are not pointed out. It is objected that the trustees violated the terms of the trust in that they paid certain expenses out of the corpus of the estate instead of out of the income before the death of the mother. These matters were settled in the first account of the trustees and cannot now be questioned. It is claimed that the trustees had no right to use the trust property to pay assessments upon stock in certain corporations which had been distributed to them as a part of the trust estate. In response to this very general objection the respondents call attention to the fact that most of these payments were made with the knowledge and consent of all the beneficiaries of the trust, including the appellants. The stock in one of the corporations finally became worthless by reason of the foreclosure of a mortgage upon the property of the corporation.

[7] The appellants also object to the allowance made to the trustees for expenses and for fees during the administration of the trust estate from the time of the death of the mother until the date of the account. The objection is that the trustees should have turned the property over upon the termination of the trust in 1912, and that the continued possession of the trust estate by the trustees was wrongful, and that they should not only be deprived of the compensation but should pay interest upon the trust as a penalty for such wrong holding. It is particularly pointed out that the trustees have favored the sister, Kate McGavin, in the litigation which she has instituted to secure for herself the entire trust estate.

[8] In view of the fact that the appellants neither printed the evidence in their brief, the appeal being based upon a typewritten transcript, nor have pointed out in detail the items of the account to which they object, we would be justified in declining to consider these propositions. It appears, however, that the reason for the delay in the distribution of this estate has been that the respondent Kate McGavin, upon the death of her mother, claimed that the original decree of distribution was procured by mistake, by reason of the fact that the will having been made within 30 days of the death of the deceased, Charles Louis Scrimger, was void as to charitable bequests under the provisions of section 1313, Civil Code, and this was overlooked in preparing the decree. She instituted an action to have the decree vacated and was successful in the lower court, but the judgment was reversed upon appeal. *McGavin v. San Francisco P. O. A. Soc.*, 34 Cal. App. 168, 167 Pac. 182. Upon the return of the remittitur to the lower court the respondent herein requested the trial court to adjudicate the rights of the beneficiaries of the trust in that equitable action, but the court refused

to do so and dismissed the case, leaving the matter to be determined upon the settlement of the final account of the trustees. The trustees thereafter rendered an account and requested that the trust estate be distributed. The respondent Kate McGavin then contended, and still contends, that she is entitled to the entire estate. The trial court found that the trustees at all times acted in good faith; that the appellants were estopped to object to the payment of assessments upon the corporate stock held by them as trustees, so that the general claim of appellants with reference to the account narrows itself down to this proposition, namely, that trustees as a matter of law are not entitled to any expenses paid after the termination of the trust even though they may hold the property for a long period awaiting proper settlement of the final accounts and the decree of distribution by the probate court. It is sufficient to say that this position cannot be maintained. It was the duty of trustees to care for the trust estate, even after the trust terminated, where there was a dispute as to the rights of the beneficiaries, until the matter was settled by the court having jurisdiction over the settlement of their final account. We see no reason for overturning the conclusion of the trial court that the trustees were entitled to the allowance as made to them. The appellants in their reply brief have offered to print such portions of the record as we may consider necessary to the proper determination of the appeal. After an examination of the typewritten record as well as the brief, we feel satisfied that the order settling the account should be affirmed, and that no substantial benefit would be derived by the appellants by a further printing of the record, and, no doubt, that was the opinion of the appellants when they printed their brief.

[9] The respondents claim that in view of the fact that under the law the provisions of the will of the deceased in favor of the appellants were void because the will was executed within 30 days of the death of decedent, and because it is stated by the appellants in their brief that the deceased did, in fact, die within 30 days from the date of the will, that these admitted facts render the decree invalid, and that the judgment should be affirmed for the reason that the effect of such admission is the same as though the decree of distribution itself had recited the fact of the death of the testator within 30 days after the will was executed. This point is not well taken. The court had jurisdiction to make an erroneous decree of distribution, and, even though the facts showing such error appeared upon the face of the decree, it would not be void as to such provisions. The remedy would be by appeal.

[10] Moreover, the mere fact that the de-

creed of distribution was made in accordance with the terms of the will, notwithstanding the fact that the will was invalid as to the charitable bequests, would not necessarily show that the decree was erroneous. It might have been consented to by the persons who would otherwise be entitled to receive the trust estate and for that reason be valid.

The trial court is directed to enter a decree reducing the award to Kate McGavin from five-sixths to three-fourths of the estate, and to award one-twelfth to the Roman Catholic Orphan Asylum of San Francisco, one-twelfth to the Pacific Hebrew Orphan Asylum, and one-twelfth to the Protestant Orphan Asylum.

SHAW, C. J., and WASTE, SLOANE, SHURTLEFF, and LAWLOR, JJ., and RICHARDS, Justice pro tem., concur.

188 Cal. 525

**SHEEHAN v. BOARD OF POLICE COM'RS
OF CITY AND COUNTY OF SAN
FRANCISCO et al. (S. F. 9938.)**

(Supreme Court of California. March 29, 1922.
Rehearing Denied April 27, 1922.)

1. Appeal and error ⇨882(20)—On appeal by defendants from order refusing to quash writ of mandate, petitioner cannot urge that issuance of writ was unnecessary.

Where, upon the going down of remittiturs from the Supreme Court in an appeal, a petitioner applied ex parte to the court in which the proceedings were initiated for an order directing issuance of a peremptory writ of mandate requiring defendants to issue a warrant for the payment of the sums found to be due petitioner on the appeal and the writ issued, and defendants appealed from the order refusing to quash the writ, petitioner's motion to dismiss the appeal, on the ground that the issuance of the writ was unnecessary and hence not harmful to respondents, cannot be urged.

2. Appeal and error ⇨801(4)—Where ground of dismissal could be determined on hearing on the merits, motion for dismissal will be denied.

Upon the going down of remittiturs from the Supreme Court in an appeal, petitioner applied ex parte to the court for an order directing issuance of a writ of mandate requiring defendants to issue a warrant for the payment of the sums found to be due petitioner on the appeal and the writ issued, and defendants moved to set aside the order and quash the writ on appeal from the order refusing to quash the writ, where the question of the rights of the clerk to include interest was within the scope of the appeal upon its merits, petitioner's motion to dismiss should be denied.

3. Interest $\S$ 22(1)—Adjudication of right to writ of mandamus held not to have the effect of judgment in civil action, so as to authorize interest on claim.

In a proceeding, under Code Civ. Proc. $\S$ 1085, to compel the board of police commissioners to issue a warrant for a claim to a retired police officer, as provided in San Francisco charter, art. 8, c. 10, the fact that the petitioner was bound to allege and prove that he was entitled to the pension due him for the payment of which a warrant should issue, did not give the proceeding the nature of a civil action, so as to render the judgment the same as one procured in civil action so as to entitle petitioner to interest as provided by Civ. Code, $\S\S$ 1915, 1920.

4. Mandamus $\S$ 176—Board of police relief and pension fund commissioners of San Francisco not liable for money judgment in mandamus proceeding.

The board of police commissioners of San Francisco, whether acting as such or ex officio as a board of police relief and pension fund commissioners, is a mere agency of the municipality for dispensing certain funds in the custody of its treasurer and has no separate existence and is incapable of either suing or being sued, except as it may be required, as an official body, by mandamus to perform its official duties, and where mandamus proceedings are brought against the board to compel the issuance of a writ for an unpaid pension, the procurement of a money judgment either against the board or the municipality was not within the scope and purpose of the proceeding.

In Bank.

Appeal from Superior Court, City and County of San Francisco; James M. Troutt, Judge.

Mandamus by James F. Sheehan against the Board of Police Commissioners of the City and County of San Francisco and others. From an order denying motion to set aside order directing writ of mandate to issue and directing payment of judgment with interest and costs, defendants appeal. Reversed.

George Lull, City Atty., and Charles S. Peery, Asst. City Atty., both of San Francisco, for appellants.

Charles J. Heggerty and Knight & Heggerty, all of San Francisco, for respondent.

PER CURIAM. The proceedings out of which the present appeal arose had their inception in two certain special proceedings, instituted by the respondent herein in the superior court of the city and county of San Francisco against the board of police commissioners of said municipality, by which, in the first of said proceedings, he sought, by a writ of review, to have certain orders of said board, wherein he was attempted to be dismissed from the police department thereof reviewed and annulled; and by the second of which proceedings he sought, by writ

of mandate, to compel his restoration and reinstatement as a disabled and retired police officer, and also to compel the issuance of a warrant by said board for the payment of his accrued and accruing pensions as such disabled and retired officer. These two proceedings were consolidated by the trial court which, upon the hearing thereon, upheld the contention of the petitioner in both of said proceedings, reviewing and annulling the said orders dismissing him from the police department, adjudging that he was entitled to have and receive his accrued and accruing pensions as such disabled and retired police officer, establishing the aggregate amount of his already accrued pensions up to the time of the rendition of its decision to be \$4,600, and directing a writ of mandate to issue against the said board of police commissioners, acting ex officio as a board of police relief and pension fund commissioners, and ordering said board in that capacity to issue a warrant for said sum, drawn upon the auditor and treasurer of said municipality.

From the orders of said court, directing the issuance of these respective writs, appeals were taken to the District Court of Appeal for the First district, upon the hearing of which the said orders were respectively affirmed. The history of said proceedings and of said appeals up to the time of their said affirmance is quite fully and accurately set forth in *Sheehan v. Board of Police Com'rs, etc., et al.* (Cal. App.) 190 Pac. 51. Upon the going down of the remittiturs in each of said appeals, the petitioner and respondent therein applied ex parte to the court in which said proceedings had been initiated for an order directing the clerk of said court to issue a peremptory writ of mandate requiring the said board of police commissioners, in their said capacity as ex officio the board of police relief and pension fund commissioners, to issue a warrant to the petitioner for the payment of said sum of \$4,600—

"the amount of the pension due and unpaid to the petitioner from the 1st day of January, 1904, to the 1st day of September, 1911, together with legal interest on said \$4,600 from September 1, 1911, to July 1, 1920, at the rate of 7 per cent. per annum; and also for the further sum of \$600 per annum payable and unpaid to petitioner for his pension from September 1, 1911, to July 1, 1920, together with legal interest at 7 per cent. per annum thereon from the end of each year, viz., from September 1, 1912, on said sum of \$600 per annum from the time the same became due and payable up to July 1, 1920; and also for the sum of \$209.75, the amount of petitioner's costs herein."

An order was made pursuant to said applications and in the above language thereof, and a peremptory writ of mandate issued in accordance with said order and in the terms thereof, as above quoted, on July 2, 1920.

Thereafter, and on July 21, 1920, the defendants, board of police commissioners, gave notice of a motion to set aside said order and to quash and to recall said writ, which motion, coming on for hearing on August 6, 1920, was by the trial court denied, whereupon the present appeal was taken by said defendants from the order of July 2, 1920, directing the issuance of said peremptory writ of mandate, and also from the order made on August 6, 1920, denying said defendant's motion to vacate said former order and refusing to recall and quash the peremptory writ of mandate issued in pursuance of said former order.

[1, 2] Upon the hearing of this appeal, the respondent moved for a dismissal thereof upon several grounds, most of which related to informalities in the defendants' motion to vacate the order for the issuance of said peremptory writ of mandate; and, as to these, we do not perceive any merit in them. Nor do we think there is any merit in the chief ground of said motion to dismiss which is that the order directing the issuance of the peremptory writ was one unnecessary to be made and hence not harmful to the appellants, since it was the duty of the clerk of the trial court, upon the receipt of the remittitur showing the affirmance upon appeal of the original order of the trial court directing the issuance of a peremptory writ, to issue said writ without the necessity of any further or later order of the court. The answer to this portion of the respondent's motion to dismiss is twofold, the first being that the respondent, having deemed such further order necessary to the issuance of said writ, as shown by his *ex parte* application therefor, cannot now be heard to urge that the making of said order was unnecessary upon a motion to dismiss the appeal thereon; second, as to that portion of said order which requires the clerk to include interest upon both the amount of the petitioner's claims for his pension accrued prior to September 1, 1912, the date of his original order, and the amount thereof accruing and becoming payable annually after said date, the same question arises, namely, whether the clerk had the right to include said items of interest in the terms of said writ. We think that the order of August 6, 1920, was sufficient in form to cover and deny the appellants' motion to quash and recall said writ, and we also think that the question of the right of the clerk to include said items of interest in said writ, with or without an order of the court to that effect, is embraced within the scope of this appeal upon the merits, and hence that the respondent's motion to dismiss the same should be denied.

[3] The single question thus presented upon this appeal is whether or not the trial court had a right to order interest payable upon the so-called "judgment" in said mandamus proceeding, establishing the petition-

er's status as a disabled and retired police officer and, as such, entitled to the pension provided for in chapter 10 of article 8 of the San Francisco charter, and ordering the issuance of a warrant by the board of police commissioners for the amount of his said accrued and accruing pension. The respondent contends that the adjudication of the trial court is such a judgment as would bear interest from the date of its entry, under the provisions of sections 1915 and 1920 of the Civil Code, and he relies, as the basis for his said insistence, upon the express terms and phrasing of said adjudication, wherein the trial court used the following language:

"Now, therefore, it is hereby ordered, adjudged, and decreed that the petitioner have and recover judgment, and judgment is hereby made and given in favor of the petitioner and against the respondents as prayed for in the petition of petitioner * * * and that the petitioner have and recover and that he be paid and that respondents pay to petitioner, from the police relief and pension fund of the police department of the city and county of San Francisco, a yearly pension of \$600 from and after the 1st day of January, 1904, and that there was due and unpaid from the said police relief and pension fund to the petitioner on the 1st day of September, 1911, the sum of \$4,600 * * * and that the petitioner have and recover and be paid by the respondents, from the police relief and pension fund of the said police department, the said sum of \$4,600, together with his costs expended herein."

The trial court further—

"adjudged and decreed that the petitioner had no speedy or adequate remedy in the ordinary course of law and that a peremptory writ of mandate issue out of this court * * * addressed to the respondents, directing and requiring that the respondents revoke and set aside the said finding, action, order, and resolution of January 12, 1904, and that the respondents restore the petitioner to the pension roll of the police relief and pension fund of the police department of the city and county of San Francisco, and that the petitioner be paid, from the said relief and pension fund, a yearly pension of \$600, from and after the 1st day of January, 1904, and which pension up to the 1st day of September, 1911, amounts and is hereby adjudged to be the sum of \$4,600, which it is ordered and adjudged shall be paid by the respondents to the petitioner, from the police relief and pension fund of the police department of the city and county of San Francisco."

If we were to regard the form of this adjudication as decisive of the question before us, it might well be held sufficient as such a judgment as, entered in an appropriate action or proceeding, would come within the terms of sections 1915 and 1920 of the Civil Code; but the question presented herein lies deeper than the face or terms of this adjudication and involves the nature of the proceeding, the parties before the court, the fund from which the petitioner's pension was

and is payable, and the powers of the trial court, both in the making of such original adjudication and in the issuance of its subsequent order and writ for the enforcement of its terms. It may be conceded, at the outset of this discussion, that the petitioner and respondent herein has sufficiently established his right to be the recipient of a pension amounting to the sum of \$600 a year, dating from the 1st day of January, 1904, and continuing down to September 1, 1911, and that such pension was payable from the police relief and pension fund, collected and maintained by said municipality for the payment of pensions to disabled police officers or, in the event of their death in service, to their relatives; and that such pension, to which the petitioner was thus entitled, had remained unpaid down to and after the time of the inception of the original proceedings herein, by means of which he sought to compel the allowance and payment of his said accumulated pensions. The police relief and pension fund of said municipality is provided for in chapter 10 of article 8 of the San Francisco charter. By the terms of said chapter, the board of police commissioners of said municipality are constituted ex officio a board of police relief and pension fund commissioners and, as such, are made the trustees of said fund. The moneys which supply and maintain the same, derived from various sources, are deposited with the treasurer of the municipality and are paid out by said treasurer to those persons who are entitled thereto, upon warrants issued by the said board of police relief and pension fund commissioners and presented to the auditor to be, by the latter official, audited and ordered paid. The only function which the board of police commissioners, acting ex officio as the board of police relief and pension fund commissioners, have to perform in relation to said fund is that of determining who, among the members of the police department of said municipality, by reason of age, infirmity, or physical disability, are entitled to retirement upon pension, or the relatives of whom, by reason of his death in service, are entitled to receive such pension, and for what length of time the same shall be paid. Having determined these matters, the only further function of said board of police relief and pension fund commissioners is to issue the warrant for the amount of pension to which the pensioner has thus become entitled, and which warrant when issued is to be presented to the auditor for approval and to the treasurer for payment. The petitioner herein, being, as we have seen, entitled to his pension in the sum of \$600 per annum from a date not long after his original disability and retirement on account thereof, and his right to such pension having been accordingly fixed and awarded, demanded the issuance of his warrant for the aggregate amount thereof by said board; and this demand be-

ing refused, he commenced the original proceedings herein wherein he sought a writ of mandate to compel the issuance of said writ. In so doing, he was acting strictly within the scope and terms of section 1085 of the Code of Civil Procedure, which provides for the issuance of writs of mandate "to compel the performance of an act which the law specially enjoins, as a duty resulting from an office, trust, or station." In seeking this appropriate remedy, the petitioner was bound to allege and prove that he was entitled to the said pension and to the aggregate amount thereof then due him and for the payment of which such warrant should issue; but that fact did not give to the proceeding the nature or qualities of a civil action so as to render the adjudication by the court in such special proceeding that the petitioner was entitled to said writ, such a judgment as would be obtainable in a civil action. The petitioner could not, in fact, have obtained such a judgment in said special proceeding, since he would not have been entitled to sue the board of police commissioners in a civil action to recover the amount due him on account of his said pension.

[4] The board of police commissioners, whether acting directly as such or acting ex officio as a board of police relief and pension fund commissioners, is a mere agency of the municipality for the dispensation of certain of its funds in the custody of its treasurer. Said board has no separate existence and is incapable of either suing or being sued, except as it may be required as an official body by mandamus to perform its official duties, or except as its official action may be compelled or enjoined in some other special proceeding. It was so decided in the case of *Spencer v. City of Los Angeles*, 180 Cal. 103, 116, 179 Pac. 163, and in that case it was held to be well settled that an action will not lie against the officers or official boards of a municipality to recover money, as, in that case, money paid upon an illegal assessment, unless it appeared that the money was still in the hands of the board or its members at the time such action was begun. *Spencer v. City of Los Angeles*, supra; *Hartford, etc., Co. v. Jordan*, 168 Cal. 270, 142 Pac. 839; *Craig v. Boone*, 146 Cal. 718, 81 Pac. 22. In the instant case, none of the money belonging to said pension fund was at any time in the hands or under the control of the board of police commissioners, either directly or in their said ex officio capacity, their only function in regard to such pensions, when allowed, being, as we have seen, that of issuing warrants for the amount thereof for presentation to and approval by the auditor and for payment upon his order by the treasurer, who is the official custodian of said pension fund. This being so, the sole purpose for which the petitioner could institute, and, in fact, did institute, his mandamus proceedings was that of procuring an adjudication of his

right to a writ of mandate, directing said board to perform its official duty by the issuance of a warrant for his unpaid pension. It was not, and could not be, the procurement of a money judgment, either against said board of police commissioners or against said municipality, since the procurement of such a judgment was not within the scope and purposes of such a proceeding.

We are reinforced in this conclusion by the uniform current of authority in this state as to the scope and functions of writs of mandate. In the early case of *Davis v. Porter, Treas., etc.*, 66 Cal. 658, 6 Pac. 746, the proceeding was one in mandamus to compel the treasurer of the city of Sacramento to pay certain coupons on bonds issued by said city, and it was attempted, in said proceeding, to have it adjudicated that the payee of such bonds was entitled to interest upon such of said coupons as were not paid at maturity. The court held that such a question could not be adjudicated in that form of proceeding, saying:

"It may be conceded that the plaintiff is entitled to have the interest on his coupons not paid at maturity, of the city of Sacramento. But in this proceeding it cannot be allowed, for the reasons above given. This is not an action brought upon the coupons, to recover the amount due on them, and interest on such amount. Nor is it an application to have the proper authorities of the city of Sacramento levy a tax for such purpose. But it is an application to compel the performance of an act especially enjoined by law, and resulting as a duty from the office and station of respondent. We have pointed out the limits of the remedy in the foregoing part of this opinion, and, as so limited, such interest on interest cannot be allowed. If the party is entitled to recover such interest, he must resort to some other mode of procedure."

In the case of *Barber v. Mulford*, 117 Cal. 356, 49 Pac. 206, the application was in mandamus against the board of education of the city of San Diego to compel the issuance of an order upon the county school superintendent for the drawing of a requisition on the county treasurer for the payment of a claim of the petitioner against the school district. It was contended, by the petitioner, successfully in the trial court that he was entitled, in said proceeding, to the allowance and award of interest upon his claim from the time of its allowance by the board of education. In refusing to sustain this contention, upon appeal, the court said:

"It was error to allow interest in the mandate of the writ. If it be said that interest should be allowed for damages as in ordinary cases for breach of contract, the reply is that mandamus does not lie to enforce the obligation of contracts but only the performance of an act which the law specially enjoins, in this instance the issuance to plaintiff of an order for the amount of his audited claim, no more nor less. The judgment should be modified by omit-

ting therefrom the direction for the allowance of interest."

In the case of *Howe v. Southrey*, 144 Cal. 767, 78 Pac. 259, the application was for a writ of mandate to compel the trustees of a school district to issue an order for the payment of the amount of a judgment, which the applicant had obtained against the school district for the sum of \$55 and costs, amounting to \$134.50. The judgment did not provide by its terms for interest thereon, but the applicant insisted that he was entitled to interest upon the judgment, under the provisions of sections 1915 and 1920 of the Civil Code. The court said:

"As to the matter of interest, it does not appear from the petition herein that any interest was provided for in the judgment entered in the original suit. Mandamus does not lie to enforce the obligation of contracts, but only to enforce the performance of an act which the law specially enjoins. In this case it can go no farther than to compel the board to issue its requisition for the exact amount of the judgment. It cannot determine whether the obligation rests upon the district to pay interest upon the judgment, for such is not the office of the writ of mandate." Citing *Barber v. Mulford*, supra.

In the recent case of *Engebretson v. City of San Diego* (Cal. Sup.) 197 Pac. 651, the question of the right of a claimant against a municipality to recover interest upon his claim from and after the date when payment thereon was due, took a broader range, since that action was one directly against the city of San Diego to recover upon such claim with interest. The court in that case held that, in the absence of a statutory provision authorizing it, the holder of a claim against a municipality was not entitled to recover interest, even in a direct action against said municipality to recover a judgment upon such claim. In so holding, the court cited, with approval, the foregoing cases to the effect that, in a mandamus proceeding, interest was not allowable upon a claim against the funds of a city, and stated that the only remedy, if any, for a claimant in case of delay in the auditing and payment of his claim would be by a direct action against the city to recover judgment thereon, which judgment, when recovered, would bear interest, under section 1920 of the Civil Code. This case has a direct bearing, not only upon that portion of the order of the trial court herein which directed the inclusion in the writ of mandate of interest upon the pension claims of the petitioner accrued prior to its original adjudication, but also upon that portion of the order herein appealed from which directs payment of interest upon the pension claims of the petitioner, which have ripened since such original adjudication and as to which no judgment or adjudication of any kind, other than said *ex parte* order and the later

order refusing to vacate the same, has ever been had.

The cases cited and relied upon by the respondent are not at variance with the views above expressed. They are, in each instance, cases wherein the judgment relied upon, as bearing interest, was one obtained in a direct civil action against the municipality or individual owing the debt or directly liable for the amount of the demand. No case of a writ of mandate directing interest to be allowed upon a claim not founded upon such a judgment has been called to our attention. The case of *Fuller v. Aylesworth*, 75 Fed. 694, 21 C. C. A. 505, upon which the respondent herein strongly relies, was a case wherein a money judgment had been rendered against a county, adjudging it liable to pay a sum certain to the plaintiff, with a provision for mandamus to compel the levy of certain assessments for the payment of such judgment. Judge Taft, in that case, pointed out:

"That the writ of mandamus in the circuit courts is never an independent suit as it is in many states and in England, but it is only a proceeding ancillary to the judgment which gives the jurisdiction; and, when issued, becomes a substitute for the ordinary process of execution to enforce payment of the same as provided in the contract."

The writ of mandate in this state is an independent proceeding, having for its purpose the compulsion of an act which the law specially enjoins as a duty resulting from an office, trust or station. It has none of the characteristics or functions of a civil action for the collection of a debt.

It follows from the foregoing review of the authorities that the petitioner and respondent herein neither had nor could obtain such a money judgment in this mandamus proceeding, as would bear interest under the provisions of sections 1915 and 1920 of the Civil Code, and hence that the trial court was in error, in its ex parte order of July 2, 1920, in so far as it undertook to direct the issuance of a writ of mandate to the appellants herein, which should include the allowance of interest upon the aggregate amount of the petitioner's pension due and unpaid prior to September 1, 1911, the date of its original order, from and after said date and up to July 1, 1920; and was also in error in providing therein for the inclusion of interest at the legal rate, upon the annual amount of the petitioner's pension, to which he had become entitled between September 1, 1911, and July 1, 1920; and was also in error in its refusal to vacate and set aside its said order of July 2, 1920, in so far as the same related to and required the payment of such interest, and in refusing to recall and quash the writ of mandate issued in accordance with said order.

The orders are reversed, and the trial court is hereby directed to recall and quash the

writ of mandate, issued in conformity therewith, in so far as the same directs the drawing of any warrant or warrants for the payment of interest upon the petitioner's pension demands.

SHAW, C. J., and WILBUR, SHURTLIFF, SLOANE, and LAWLOR, JJ., concur.

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BANK OF ORLAND v. HARLAN.
(Sac. 3124.)

(Supreme Court of California. March 16, 1922.
Rehearing Denied April 14, 1922.)

1. Contracts ☞108(2)—Contract to loan credit and securities to bank to enable it to pass examination is illegal.

Under Pen. Code, § 563, and section 563a, as added by St. 1917, p. 580, making it an offense for any officer of a bank to make a false entry with intent to deceive an examiner, a contract whereby defendant agreed to loan to a bank his credit, represented by his note, together with certain securities, to protect an overdraft by defendant's brother so that the bank examiner would make no adverse report because of the overdraft and the bank agreed to return the note and securities at the end of 90 days regardless of whether the brother was able to deposit other securities by that time, was illegal.

2. Contracts ☞138(1)—Court will not aid either party to contract to loan credit and securities to bank to enable it to pass examination.

A court will not lend its aid to either party to a contract, whereby defendant loaned plaintiff bank his credit, represented by his note, together with certain securities, to enable it to pass examination by the examiner without criticism of an illegal overdraft to defendant's brother, but will neither enforce defendant's note against him in suit by the bank, nor enforce, in defendant's favor, the bank's agreement to return his note and securities.

3. Contracts ☞138(3)—Participation in illegal contract for benefit of bank bars party from recovering property transferred.

The fact that defendant's participation in an illegal contract, whereby he loaned to a bank his credit, represented by his note, together with certain securities to enable the bank to pass examination, was for the benefit of the bank and that he received no profit therefrom and that only the bank was amenable to the penal statute, does not prevent defendant from being in *pari delicto* as to the fraud and deceit involved, as respects his right to have enforced the bank's agreement to return his note and securities.

4. Contracts ☞138(6)—Immaterial whether illegal nature of contract appears from pleadings.

Whether or not facts showing that the contract sought to be enforced is illegal appear

from the pleadings, where the evidence discloses that the relations of the parties are illegal, the court, will act on its own motion.

On Petition for Rehearing.

5. Contracts §138(1)—Public good does not require enforcement of illegal contract in favor of solvent bank.

The exception to the rule against enforcement of illegal contracts in cases where the public good demands the enforcement of defendant's obligation does not apply to an illegal contract whereby a bank apparently obtained additional security to enable it to pass examination, if there is no showing that the bank is not solvent and able to pay all its debts, including those due the depositors, notwithstanding the loss of the demand based on the illegal contract.

In Bank.

Appeal from Superior Court, Glenn County; Wm. M. Finch, Judge.

Action by the Bank of Orland against T. W. Harlan on promissory notes. Judgment for defendant, and plaintiff appeals. Reversed.

A. C. Huston, of Woodland, W. T. Belieu, of Willows, and W. E. Johnson, of San Francisco, for appellant.

Frank Freeman, George R. Freeman, and Duard F. Geis, all of Willows, for respondent.

SLOANE, J. Plaintiff brought its action to recover on a promissory note executed by defendant to plaintiff, and for the conversion of a certain crop of barley covered by a mortgage assigned by defendant to plaintiff. Defendant, by his answers, pleaded by way of defense and for affirmative relief, that the note was executed and the crop mortgage and other securities were assigned to plaintiff for a limited and temporary use, with the agreement that they would, within a specified period, be surrendered and returned to defendant.

The two actions were consolidated and tried before a jury, and a verdict and judgment rendered in favor of defendant, awarding him the return and possession of such note and securities. From this judgment the plaintiff appealed.

The appeal was first heard before the third district court of appeal, where the judgment was affirmed. A rehearing was granted in this court for the purpose of further consideration of the questions of law involved. The following statement of the case and conclusions of the district court of appeal are adopted as part of this opinion:

"The appellant makes but two points. The first is the insufficiency of the evidence to justify the verdict. The second is error in giving a certain instruction. As to the first, it is sufficient to say that the evidence was sharply

conflicting on the disputed point. The verdict, if supported at all by evidence setting out a reasonably credible story, is conclusive on appeal. The appellant insists, however, that the version of the matter tendered by the respondent is so inherently improbable that, as a matter of law, it must be held that it is not true. We cannot accept this view. It is quite true that the transaction was an unusual one, but the conditions which brought it forth were somewhat unusual. The appellant had permitted one G. B. Harlan, a brother of the respondent, to overdraw his account to the extent of some \$13,000 and wholly without security. The significance of this large overdraft is appreciated when it is recalled that the entire capital stock of the appellant bank is but \$50,000, and that an overdraft in this amount, being more than 10 per cent. of the capital stock, is permitted in violation of law. The appellant was expecting an official visit from the bank examiner, and it was apprehensive that that official would criticize its acts in the matter. In this emergency, the appellant applied to the respondent to furnish security in behalf of G. B. Harlan. The respondent at first refused; but being assured that the securities were desired only for a temporary purpose and would be returned to the respondent as soon as certain other specified securities were obtained, he responded to the request and placed in the hands of appellant the various securities here in suit. The respondent, in his answer, pleads this contract in full, sets out a description of these securities, and avers that the appellant agreed that it would rely upon these other securities and return to the respondent those furnished by him. It is further set out that it was mutually understood that these other securities would be substituted within about 90 days. In support of the verdict, it will be assumed that the jury found in favor of the respondent on such of these issues as are necessary to support the judgment."

The real question in dispute is whether the facts as stated and accordingly found by the verdict of the jury support the affirmative relief granted the defendant.

To elaborate a little more fully the testimony as to this transaction as given in behalf of the defendant, it is fairly made to appear that G. B. Harlan, a brother of the defendant, T. W. Harlan, was being financed by the plaintiff bank in a contract for state highway construction; that he had overdrawn his account in the sum of \$13,000, which overdrafts were unsecured. At a meeting arranged by G. B. Harlan with the bank officials, which the defendant had been invited to attend, it developed that the bank officials were expecting a visit from the bank examiner and were very desirous to obtain collateral security to cover these overdrafts before opening their books to the examiner. The defendant was in no way obligated to the bank or to his brother on account of this indebtedness. He was first asked if he would not furnish security on behalf of his brother. This he positively refused to do. He was

then asked if he would loan his credit and securities to the bank temporarily until it would have an opportunity to substitute other securities from the business resources of G. B. Harlan, which they represented would materialize in about 90 days. These anticipated securities were to consist of certain assignments on account of the highway contract of G. B. Harlan and a mortgage upon a rice crop to be planted and grown under a lease in which he was interested.

To put it in the words of the defendant:

"They simply asked me if it would be possible for me to loan them sufficient securities to keep away the bank examiner, so they could keep this amount of money whole, so that in the spring when Harlan [G. B.] was supposed to have the securities he had stated to them they would have, that they could take the security from him and return my securities to me. * * * I enumerated the securities that I did have that I would not need for two or three months, and if it would be of any benefit to them, if they would return them to me I would let them have them, and that was done."

He further testified that the bank accepted these securities and the note under the unqualified agreement to return them in 90 days, and that this agreement was not contingent upon the bank being able to substitute the securities expected from G. B. Harlan. In the language of the witness, referring to the director who was spokesman for the bank at this conference, "he was to give me back the securities irrespective of the mortgage."

This statement of the agreement was corroborated by the testimony of G. B. Harlan.

This version of the transaction is vigorously denied on behalf of the plaintiff, whose witnesses testify that the securities advanced by defendant were given in for the benefit of his brother and were only to be returned when other satisfactory security was deposited in his behalf.

If such was the arrangement it would have been entirely legitimate; but in view of the verdict of the jury, we are bound to accept the controlling force of the evidence most favorable to the defendant.

[1] It is contended on behalf of appellant, however, that, under the most favorable interpretation of defendant's story, the contract was made in furtherance of a fraud in an attempt to cover up the deficit in the bank's assets and to deceive and mislead the bank examiner. In such a case the courts will not aid either party in its enforcement.

Such would clearly be the application of the law if the effect of this agreement was purely fictitious, and for the sole purpose of deceiving the bank examiner, without any provision for substituting other securities for those to be surrendered. The transaction as testified to by respondent, under the conditions pleaded, amounts to the same thing.

Even conceding that both parties were sincere in the expectation that sufficient manna

would be sent down from heaven to replace respondent's securities within 90 days, such was not the result. Both parties must have known that G. B. Harlan's affairs bordered on insolvency. That the prospects from highway profits and crop mortgage were exceedingly nebulous. Yet, according to respondent's story and the implied findings of the jury, the bank and respondent connived at a plan to so fix the bank's securities as to make it appear to the bank examiner that this note and the hypothecated mortgages were held by the bank in the ordinary course of business, to cover this \$13,000 overdraft. The arrangement entered into, as sought to be enforced, reaches precisely this result. The bank having failed to obtain new securities at the end of the 90 days is left once more with this unprotected overdraft upon its hands.

In other words, the defendant was not relying upon the credit of some third party to release his note and securities, but upon the promise of the bank to return them, whether redeemed by other security or not. The parties were gambling upon the ability of the bank to procure other security. The transaction to be presented to the bank examiner was not what it seemed on its face. It was a state of affairs that no bank would dare disclose to the examiner, an overdraft for \$13,000, secured by collateral paper which was subject to withdrawal and cancellation after 90 days, with the bare contingency that the insolvent debtor might be able by that time to protect the dishonored paper. There was nothing on the books to indicate that this overdraft was not substantially and permanently protected. If the true state of the case, as found by the jury, was to be disclosed to the bank examiner, it must have been obvious to both parties that it would not for an instant pass inspection. They may have hoped and intended in some way to keep this security good, but to enter upon this contract to restore to respondent his securities, irrespective of substituting other indemnity, was to make the transaction upon the bank's books fictitious and misleading.

Section 563a of the Penal Code as added by St. 1917, p. 580, declares it a crime for any officer, director, trustee, or agent for any bank organized under the laws of this state to make an untrue entry in any book or any report, tag, or statement of the business affairs or condition, in whole or in part, of such corporation with intent to deceive * * * any agent or examiner, private or official, employed or lawfully appointed to examine into its condition. Section 563 of the Penal Code provides that every officer or agent of any corporation who, with intent to defraud, knowingly omits to make or cause or direct to be made a full and true entry on the books or accounts of such corporation of the property of the corporation,

or omits or concurs in omitting to make any material entry in any book of accounts or other record or document kept by such corporation, is punishable by imprisonment. Even in the absence of any such penal statute any such conduct would be a fraud upon the creditors and depositors, and any person participating or conniving at such concealment or deceit by the bank officials would be tainted with the same fraud.

Under section 5209 of the Revised Statutes of the United States (U. S. Comp. St. § 9772), corresponding with the sections of the Penal Code cited, the Supreme Court of the United States in *Cross v. State of North Carolina*, 132 U. S. 132, 10 Sup. Ct. 49, 33 L. Ed. 287, dealing with the question of fictitious assets, uses this language:

"If the notes in question had not been forged, but, with or without the consent of the obligors, had been temporarily placed by defendants among the assets of the bank, and entered upon its books, when they were not its property, with intent to deceive the agent appointed to examine its affairs, they could have been punished under section 5209."

While the law does not impose the penal liability for such a deal upon participants not officials of the corporation, that fact cannot relieve them from the moral opprobrium of the act.

Appellant cites the decision of Judge Ross in the case of *Pauly v. O'Brien* (Circuit Court, S. D. Cal.) 69 Fed. 460, in support of the illegality of this contract, but also of the contention that the respondent is nevertheless liable to the bank in this action.

The case cited fairly illustrates the illegality of the transaction before us, but does not put the appellant bank in the favorable position claimed. In the cited case the California National Bank of San Diego had procured a note from one of its employees to take the place of and cover up the insufficiency of paper of an insolvent debtor for the purpose of deceiving the bank examiner. The bank subsequently went into the hands of a receiver, and the suit was by the receiver on the note. Judge Ross in the opinion says:

"Undoubtedly, the transaction in question originated with the officers of the bank, but to it the defendant became a willing party. It would require more credulity than I possess to believe that the defendant, when his brother, who was the bookkeeper of the bank, came to him with the proposition of its vice president, in its every suggestion and essence deceptive and fraudulent, did not know its true character and purpose. So far as appears, Naylor was a total stranger to him. Why should he execute his note to take up the note of Naylor? What moved him to do it, except to enable the officers of the bank to supplant the overdue note of Naylor with a live note, which he now insists was without consideration and purely voluntary, but which enabled the bank officers to make a

deceptive, and therefore a fraudulent, showing of assets? Obviously, nothing."

In its inception and execution that transaction was closely analogous to the one presented in this action, and if here, as there, the action had been brought in behalf of the creditors, the defendant might properly be held estopped from showing that his obligation was different from what it appeared on its face.

The other citations by appellant upholding the right of the payee to recover, notwithstanding the contract was made in violation of law (*Blochman Bank v. F. G. Investment Co.*, 177 Cal. 763, 171 Pac. 944; *Brittan v. Oakland Bank of Savings*, 124 Cal. 282, 57 Pac. 84, 71 Am. St. Rep. 58), are not in point. In both of these cases the transaction was one restricted by law for the benefit of the bank and its depositors, and the defendants had received full consideration for the notes sued on. In the one case, the bank had made loans in excess of the limitations imposed by law, and in the other, had loaned money to one of its directors in violation of the law. It was said by this court in each of these decisions that the defendant could not take advantage of the situation "as the violation of the provision in question could only be availed of at the instance of the state or sovereign power."

[2] In the case at bar, under the facts as found, the bank parted with no value for the respondent's securities, and the respondent received no consideration therefor. The bank is not insolvent, the rights of creditors are not involved, and it would be indefensible to allow it to profit by its own wrong. On the other hand, the respondent, according to his own statement, made himself a party to a transaction intended to deceive and mislead the bank examiner as to the financial condition of the appellant bank. Public policy forbids that the courts should aid him in escaping from his dilemma.

The rule that a contract which is against public policy, good morals, or the express mandate of law cannot be made the basis of either legal or equitable relief in the courts requires no citation of authorities. And where the parties are in *pari delicto* neither can recover. It is the policy of the law to leave the parties precisely where it finds them.

Applying this doctrine to the parties to this action we are confronted with this situation:

The plaintiff stated and made *prima facie* proof of a good cause of action both as to the promissory note and the conversion of the property covered by the assigned mortgage. The defendant pleaded and proved by way of defense facts which showed not only that the note and assignments were given without consideration but for the purpose of perpetuating a fraud under the banking laws

of this state. Under this state of the facts the plaintiff cannot recover. *Union Collection Co. v. Buckman*, 150 Cal. 159, 88 Pac. 708, 9 L. R. A. (N. S.) 568, 119 Am. St. Rep. 164, 11 Ann. Cas. 609; *Gridley v. Dorn*, 57 Cal. 78, 40 Am. Rep. 110; *Thom v. Stewart*, 162 Cal. 413, 122 Pac. 1069; *Alpers v. Hunt*, 86 Cal. 78, 24 Pac. 846, 9 L. R. A. 483, 21 Am. St. Rep. 17; *Ball v. Putnam*, 123 Cal. 134, 55 Pac. 773.

[3] On the other hand, the defendant has placed himself in a position where, in seeking the return of his note and securities, his only ground for such affirmative relief is in reliance upon this same indefensible contract. He entered into the arrangement voluntarily and, although not himself benefited by the transaction, assumed an equal moral responsibility with the plaintiff. Both parties connived at this attempt to deceive the bank examiner. The fact that only the appellant is amenable to the penal statute does not prevent the respondent from being in *pari delicto* as to the fraud and deceit involved. In this case both parties understood the purpose, the nature, and the probable result of the agreement they entered into. The respondent, while not financially interested and acting, it may be conceded, for the accommodation of the appellant, proceeded voluntarily and without undue influence of any kind. He, therefore, cannot escape his share of the responsibility. *Colby v. Title Insurance & Trust Co.*, 160 Cal. 632, 117 Pac. 913, 35 L. R. A. (N. S.) 813, Ann. Cas. 1913A, 515; *Exchange Bank v. Center State Bank*, 100 Neb. 278, 159 N. W. 409.

[4] Neither party is entitled to relief in this case. The courts will leave them where they were when the action was begun. It is immaterial whether the facts showing the unenforceable nature of the contract appear from the pleadings or not, where the evidence discloses the relations of the parties to the transaction are illegal and against public policy the court will act on its own motion. *Morrill v. Nightingale*, 93 Cal. 452, 28 Pac. 1068, 27 Am. St. Rep. 207; *Kreamer v. Earl*, 91 Cal. 112, 27 Pac. 735; *Vulcan Powder Co. v. Hercules Powder Co.*, 96 Cal. 510, 31 Pac. 581, 31 Am. St. Rep. 242; *Pac. Wharf & Storage Co. v. Standard Am. Dredg. Co.*, 184 Cal. 24, 192 Pac. 847.

The judgment is reversed.

We concur: SHAW, C. J.; WASTE, J.; LAWLOR, J.; WILBUR, J.; SHURTLEFF, J.

On Petition for Rehearing.

PER CURIAM. In a petition for rehearing the plaintiff urges that the circumstances of this case bring it within an exception to the rule that "in *pari delicto* potior est conditio defendentis," because the good of the

public is involved, and that the public good demands that the defendant's obligation be enforced.

[5] The good of the public is not involved in this case, unless some other party than the plaintiff is concerned or interested therein. If the plaintiff is solvent and able to pay its debts, including those due its depositors, notwithstanding the loss of its demand against the defendant, then it would seem that the public is not interested in the matter. There is nothing in the case which purports to show or to claim that the rights of creditors or depositors were involved or endangered by the loss of this asset of the plaintiff. Consequently the basis for the exception in favor of the plaintiff is wanting. If, in any subsequent action, it shall appear that it is necessary for the protection of creditors or depositors to enforce this obligation, the opinion and judgment in this action will not be a bar to such relief.

The petition for a rehearing is denied.

SHAW, C. J., and LAWLOR, WILBUR, and LENNON, J.J., and RICHARDS, Justice pro tem., concur.

188 Cal. 625.

HOGARTY v. HOGARTY. (S. F. 9713.)

(Supreme Court of California. April 12, 1922.)

1. Divorce ⇨219—Alimony only allowed pendente lite.

Alimony is only allowed during the pendency of the suit.

2. Divorce ⇨252—Award of property to wife on husband securing divorce held a property settlement, and not a statutory allowance.

Since Civ. Code, § 139, providing that, where a divorce is granted for an offense of the husband, the court may compel him to make suitable allowance to his wife for her support for life or for a shorter period, is inapplicable to a husband's suit for divorce, an agreement made by a husband, and embodied in decree for divorce against his wife, to pay her \$30 per month, was not an allowance, but was a part of the property settlement.

3. Divorce ⇨249(1)—Spouse guilty of cruelty cannot complain because award of community property was on condition.

Where a divorce was granted for cruelty, the court having power under Civ. Code, § 146, to grant all the community property to plaintiff absolutely, without any provision for the defendant, defendant cannot complain because the allowance was granted on condition that it might be set aside.

4. Divorce ⇨249(2)—Agreement for allowance to wife, embodied in decree for divorce to husband, conditioned on wife's proper conduct, held valid.

Where a divorce was granted the husband, an agreement giving the wife \$30 per month

until set aside by court for misconduct of the wife, if untainted by fraud or collusion, is valid, and when made a part of a decree is binding on the parties thereto.

5. Divorce — 249(2)—Agreement granting allowance until misconduct of wife discontinued, where misconduct shown.

Where a divorce was granted a husband for extreme cruelty, and the parties made an agreement embodied in the decree settling their property rights, whereby the husband was to pay the wife \$30 per month until set aside by a court because of her misconduct, and misconduct was shown, the court could discontinue the allowance, if misconduct was grave enough to justify it.

In Bank.

Appeal from Superior Court, Alameda County; T. W. Harris, Judge.

Action by William E. Hogarty against Mary E. Hogarty. From an order denying motion to modify interlocutory decree of divorce, plaintiff appeals. Order reversed.

L. R. Weinmann and Augustin Donovan, all of Alameda, for appellant.

Joseph P. Lacey, of Oakland, for respondent.

LAWLOR, J. The plaintiff appeals from an order denying his motion to modify an interlocutory decree of divorce.

Appellant, William E. Hogarty, and respondent, Mary E. Hogarty, were married January 11, 1892, and on July 10, 1918, appellant commenced a suit for divorce on the grounds of desertion and extreme cruelty. On April 3, 1919, an interlocutory decree was granted on the ground of extreme cruelty alone, and on April 6, 1920, the court entered its final decree of divorce. No appeal from either judgment was taken.

On March 18, 1919, appellant and respondent entered into an agreement settling their property rights, which agreement was embodied in the interlocutory decree. By the terms of this agreement and the decree, respondent conveyed to appellant all her right in their home, which was community property, and upon which, it appears, a homestead had been declared. Appellant agreed to pay respondent \$30 a month "until the remarriage or death of defendant, or until set aside by the above-entitled court for misconduct on the part of the defendant."

On August 20, 1920, appellant moved for an order modifying the interlocutory decree by setting aside the provision that appellant pay respondent \$30 a month. The motion was based on alleged misconduct on the part of respondent, which the court, from the evidence, found to have occurred. The court denied the motion upon the ground that the provisions sought to be modified—

"were based upon an agreement for the settlement of property rights whereby the major

part of the community property was given to the plaintiff by said property settlement in lieu of said alimony provision of \$30 per month, and that in such case the court cannot modify the interlocutory decree, even upon a finding that the defendant has been guilty of misconduct, and that this court has no jurisdiction to modify said decree, notwithstanding the said parties have agreed to and stipulated that said provisions for alimony contained in said interlocutory decree might be modified and set aside by the court."

From that order this appeal is taken.

Appellant contends that in an action for divorce by a husband on the ground of cruelty there is no statute providing for a payment of alimony, but that in such an action the community property may be divided as the court sees fit, that therefore this payment must be regarded as a property settlement, that the court had the power to impose terms on the payment, and that the court in cutting off the payment is really enforcing the decree.

[1-3] We are of the opinion that appellant's position is correct. The payment in question cannot be regarded as alimony, for alimony is only allowed pendente lite, nor is it a permanent allowance under section 139 of the Civil Code, for such an allowance is only made where the divorce is granted for an offense of the husband. Ex parte Spencer, 83 Cal. 460, 23 Pac. 395, 17 Am. St. Rep. 266. This allowance must therefore be considered as a part of the property settlement. Since the court might have granted all the community property to appellant absolutely (Civ. Code, § 146), without any provision for an allowance to respondent, the divorce having been granted for cruelty, respondent cannot complain because the allowance made by the court was granted upon a condition. It was held in *Cohen v. Cohen*, 150 Cal. 99, 88 Pac. 267, 11 Ann. Cas. 520, that:

"Where a wife has obtained an absolute divorce carrying with it the privilege of a remarriage, and permanent alimony is decreed to her, it is generally held that the husband, upon her subsequent remarriage, may secure an order vacating the decree as to alimony." 14 Cyc. 787, and citing cases. There is a qualification of this rule, generally adverted to in the cases cited, to the effect that such a remarriage does not authorize a vacation of the decree for alimony, where it is given as a substitute for, or in lieu of, the wife's rights, at the time of the decree, in the property of the husband, or in the community property, or in property which he acquired from her by the marriage."

The same considerations must apply to a case where a permanent allowance in lieu of a property settlement was ordered set aside for the subsequent misconduct of the wife, as is the case here.

[4] However, this case presents a different question, for here the court reserved the

right to cut off the payments upon misconduct, in accordance with the agreement of the parties. Such an agreement, when untainted by fraud, collusion, or the like, is valid (*Stoff v. Erken*, 25 Cal. App. 528, 144 Pac. 312; *Murray v. Murray*, 28 Cal. App. 533, 153 Pac. 248), and when made a part of the decree is binding on the parties as a part thereof (*Duncan v. Duncan*, 175 Cal. 693, 167 Pac. 141). It was clearly pointed out in the latter case that the settlement of property rights and the granting of the decree of divorce itself are separate matters which may be considered independently of each other. In *Ex parte Ambrose*, 72 Cal. 398, 14 Pac. 33, it was held that the court need not determine the question of the property settlement at the time the decree of divorce is granted, but may retain jurisdiction over the property in the action, and reserved jurisdiction to decide, at a subsequent time, whether the allowance should continue, depending on respondent's conduct.

[5] Having made such a condition a part of its judgment, the court has jurisdiction to enforce it as a part thereof by ordering the payments discontinued. Therefore the court was in error in refusing to grant the motion on the sole ground assigned—that it lacked jurisdiction to make the order. Since the specific acts of misconduct were found to have been committed, and this finding is not questioned by respondent, the court was at liberty to grant the relief, if in its opinion the misconduct was so grave as to justify the withholding of the allowance.

For that reason the order must be reversed, and the cause remanded for further proceedings in accordance with the views herein expressed.

Order reversed.

We concur: SHAW, C. J.; WILBUR, J.; SLOANE, J.; WASTE, J.; SHURTLEFF, J.

56 Cal. App. 650

ARGABRITE v. ARGABRITE. (Civ. 4120.)

(District Court of Appeal, First District, Division 2, California. Feb. 27, 1922. Hearing Denied by Supreme Court April 27, 1922.)

1. Evidence § 82, 89—Judicial record, when not conclusive, presumed correct, but is disputable.

A judicial record, when not conclusive, will be presumed to correctly determine or set forth the rights of the parties; such presumption being disputable.

2. Divorce § 182—Findings on which court rendered decree against wife for cruelty held on appeal to prima facie show proper judgment rendered.

On wife's appeal from order denying her alimony pending appeal from decree granting husband divorce and attorney's fees for purposes of appeal, findings of lower court on which court rendered such decree in accordance with husband's allegations as to cruelty of wife, and with allegations of his answer to the wife's cross-complaint alleging cruelty, held to establish a prima facie showing that a proper judgment had been rendered against the wife.

3. Divorce § 182—Wife's motion for alimony and counsel fees on appeal addressed to sound discretion of court.

A wife's motion for alimony pending appeal from a decree granting husband divorce, and for counsel fees on appeal, is addressed to the sound discretion of the trial court.

4. Divorce § 184(4)—Court presumed to have denied the wife's motion for alimony and counsel fees on appeal in the exercise of its discretion, in absence of showing to contrary.

On wife's appeal from order denying her motion for alimony pending appeal from divorce decree for husband and for counsel fees for purpose of appeal, it must be assumed, in the absence of a showing to the contrary, the court denied the motion in the exercise of its discretion, and in particular because in the opinion of the court the wife had no just grounds for an appeal.

Appeal from Superior Court, City and County of San Francisco; Bernard J. Flood, Judge.

Action by William Wade Argabrite against Jessie Louise Argabrite. Decree for plaintiff, and, from an order refusing defendant alimony pending appeal and counsel fees for purposes of appeal, the defendant appeals. Affirmed.

Herbert Choynski and James Raleigh Kelly, both of San Francisco, for appellant.
Perry Evans, of San Francisco, for respondent.

STURTEVANT, J. The plaintiff commenced an action against the defendant for a divorce on the ground of cruelty. The trial court granted to the plaintiff a decree; thereafter the defendant made a motion in the trial court that the plaintiff be directed to pay her moneys for her support pending an appeal, moneys for her expenses on appeal, and moneys to employ an attorney to present her appeal. The trial court refused to make an order, and from the order of the trial court so refusing to make such order for maintenance, etc., the defendant has appealed. The defendant served a written notice of the time and place and nature of her motion, and thereafter made her motion for the relief above specified. At the time of the hearing of said motion the defendant read

in evidence her notice of motion, and her affidavit in support thereof, and she also read in evidence the complaint, the answer and cross-complaint, the answer to the cross-complaint, an order for alimony, costs, and counsel fees in the trial court, notice of intention to move for a new trial, the findings, and the judgment. In reply the defendant read his affidavit. The plaintiff's complaint is somewhat long, and it will suffice for the purposes of this opinion to state that it purports to charge acts of extreme cruelty, specifying the nature of the acts and the time and place of the commission of said acts, and which acts extended over a period of time 1914-1917, both dates inclusive. The findings of the trial court were in favor of the plaintiff and found the facts in plaintiff's favor in the language of the plaintiff's complaint. The allegations of the defendant's cross-complaint purported to plead a cause sounding in extreme cruelty, and enumerating acts covering the same period as the complaint. The trial court's findings were in favor of the plaintiff and against the defendant, and the findings were in accordance with the answer of the plaintiff to the defendant's cross-complaint. In the defendant's affidavit she set forth that the income of the plaintiff was \$350 per month, and in his affidavit the plaintiff set forth that his income was \$215 per month. In her affidavit the defendant set forth, among other things, an affidavit of merits. The foregoing constitutes the evidence that was placed before the trial court on the hearing of the motion, which was denied. It is recited in the findings, and also in the judgment, that the case in chief was tried before the trial judge sitting without a jury; that plaintiff appeared by his attorney and the defendant appeared by her attorney; that the issues presented by the above-mentioned pleadings were tried out; and that evidence, both oral and documentary was introduced.

[1, 2] One of the disputable presumptions of law is that a judicial record when not conclusive does still correctly determine or set forth the rights of the parties. In the face of that presumption, when the motion in question was made, and the portions of the judgment roll enumerated above were offered in evidence, a prima facie showing was made that a proper judgment had been rendered

against the defendant and that she had no meritorious defense. True she offered her affidavit of merits, but that affidavit of merits certainly had no more force and effect than the verified answer and cross-complaint which was more complete and specific than the affidavit of merits. No paper was introduced and no showing was made, either in the trial court or in this court, regarding errors in the reception and rejection of evidence or error, of any other nature. There is not, therefore, anything in this record to show that the trial court abused its discretion in denying the defendant's motion.

[3] It is the settled law of this state that such a motion is addressed to the sound discretion of the trial court. *Stewart v. Stewart*, 156 Cal. 651, 656, 105 Pac. 955. The appellant cites numerous cases, such as *Bruce v. Bruce*, 160 Cal. 28, 116 Pac. 66. Those authorities are not helpful. They are all cases in which the trial court granted the motion and all of them are to the effect that the trial court did not abuse its discretion in granting the motion. They do not deal with orders refusing to grant the motion. The one case that is slightly in point is *Coleman v. Coleman*, 23 Cal. App. 423, 138 Pac. 362. But that record differs materially from the record that is before the court in the instant case. In that case the record contained three appeals; an appeal from the judgment, an appeal refusing to allow the appellant to file a notice of intention to move for a new trial after the time for the filing of such notice had expired, and the third appeal being from an order denying plaintiff alimony, etc. The court disposed of the appeals in the order stated. When it came to the last one, it had already decided that the trial court had erred in rendering the judgment it rendered on the merits. In short, the court had a record before it showing there was merit in the appeal. We have no such record before us.

[4] Nothing to the contrary appearing, it must be assumed on appeal that the trial court denied the motion of the defendant in the exercise of its discretion, and in particular because, in the opinion of the trial court, the defendant had no just grounds for an appeal.

The order appealed from is affirmed.

We concur: LANGDON, P. J.; NOURSE, J.

56 Cal. App. 512

MIER v. SOUTHERN CALIFORNIA ICE CO.
et al. (Civ. 3508.)

(District Court of Appeal, Second District, Division 2, California. Feb. 17, 1922.)

1. Trover and conversion ⇨25—Joint conversion committed by participants in sale.

Where a company acting through its authorized foreman sold a crane and received the purchase price under an agreement to make delivery when dismantled, and subsequently the foreman permitted the crane to be shipped to a third party to whom it was sold by an interlocking company, acting through an agent who represented both companies and knew of the rights of the first purchaser, the two companies were jointly liable to him for conversion though they had not jointly contracted to sell to him.

2. Trover and conversion ⇨4—Act of ownership conversion.

Any act of ownership or exercise of dominion over the property of another in defiance of his rights is a conversion.

3. Trover and conversion ⇨10—Sale in defiance of owner's rights a conversion.

An unauthorized sale of the property of another in defiance of his rights is a conversion.

4. Trover and conversion ⇨9(7)—Demand for property sold held unnecessary.

An unauthorized sale and shipment of property in defiance of the owner's rights is a conversion for which he may sue without a demand.

5. Trover and conversion ⇨40(6)—Evidence held to sustain damages awarded.

In an action for conversion of machinery purchased for \$400, uncontradicted testimony that it was worth \$1,500 held to justify a verdict for \$600, the amount plaintiff's prospective purchaser agreed to pay, but did not because plaintiff was unable to make delivery owing to the conversion.

6. Trover and conversion ⇨22—Offer to return property no defense.

Where plaintiff's property was sold without authority, and in defiance of his rights, the right to damages for conversion became complete, and no subsequent offer by one of defendants to return the property could defeat his rights.

7. Appeal and error ⇨1033(5)—Appellants may not complain of too favorable instruction.

Defendants appellants cannot complain of an instruction which was more favorable to them than it should have been.

8. Appeal and error ⇨843(2)—Complaint of instruction on what constitutes legal demand not considered where demand was unnecessary.

In an action for conversion, where the conversion by the defendants was joint, and demand unnecessary, defendants' criticism of instruction on what is sufficient to constitute legal demand does not call for discussion.

Appeal from Superior Court, Los Angeles County; Paul J. McCormick, Judge.

Action by G. B. Mier against the Southern California Ice Company and another, for damages for conversion. Judgment for plaintiff, and defendants appeal. Affirmed.

Sidney J. Parsons, of Los Angeles, for appellants.

Charles J. Kelly, D. A. Stuart, and I. B. Benjamin, all of Los Angeles, for respondent.

FINLAYSON, P. J. This is an action to recover damages for the conversion by defendants of a crane and its equipment. The complaint alleges that the crane was sold to plaintiff by defendants under an agreement to make delivery when requested. The case, which was tried before a jury, was submitted upon the evidence adduced by plaintiff, defendants having elected not to present any evidence. The jury returned a verdict for the plaintiff, assessing his damages in the sum of \$600. From a judgment on that verdict, defendants appeal, contending that the evidence is insufficient to justify the verdict, in that there was no evidence of a conversion, or of a demand for the return of the property, or of damages to plaintiff, and that the court erred in excluding a certain document that was offered by defendants on their cross-examination of plaintiff, and likewise in giving certain instructions.

The evidence, which is without conflict, discloses the following facts: The defendant Los Angeles Ice & Cold Storage Company—hereafter, for brevity, referred to as the Los Angeles Company—is a corporation with its principal place of business in the city of Los Angeles. The other defendant, the Southern California Ice Company—hereafter, for brevity, referred to as the San Bernardino Company—is likewise a corporation, and has its principal place of business in the city of San Bernardino. W. R. Plue is the purchasing agent of the former company, as well as an agent for the San Bernardino Company. Indeed, the two companies appear to be closely interlocked. Such, at any rate, is the inference that is warranted by certain statements in appellants' brief, where we are informed that "the officers and agents of the defendant Los Angeles Ice & Cold Storage Company were the agents of the Southern California Ice Company"; also that Louis Hill, who is the foreman of the San Bernardino Company, "attended to its business at San Bernardino, under the direction of the officers of the company mentioned in Los Angeles"—that is, under the direction of the officers of the Los Angeles Company.

Shortly prior to August 11, 1919, plaintiff received through the mail a statement put out by the Los Angeles Company purporting to contain a list of secondhand machinery which that company had for sale. Whereup-

on plaintiff called upon Plue, who informed him that the machinery was located at San Bernardino, and was given an order on Hill, the foreman of the San Bernardino Company, directing the latter to show plaintiff two compressors, a part of the advertised machinery. Thereupon plaintiff went to San Bernardino, saw Hill, and was shown the two compressors. At the same time Hill, on behalf of his company, told plaintiff that he had a 10-ton traveling crane that he wanted to sell. Plaintiff, on August 11, 1919, purchased the two compressors and the crane for the aggregate sum of \$450. The sale was made to plaintiff by Hill, acting for and on behalf of the San Bernardino Company, if not for both companies. Plaintiff immediately paid Hill \$50 on account of the purchase price, and agreed to pay the balance to the Los Angeles Company upon his return to Los Angeles. This he did on August 24, 1919, by a check for \$400 payable to the order of the Los Angeles Company. When plaintiff was purchasing the crane and the two compressors, Hill, who was then engaged in dismantling those pieces of machinery, said that it would be a favor to him if plaintiff would leave the crane where it was for a short time, as it would suit him if he could dismantle it later. Plaintiff acceded to this proposition, telling Hill that when the latter should have dismantled that piece of machinery he could notify plaintiff, who would then return to San Bernardino and get the crane. It was agreed that delivery of the crane should be made on the sidewalk at San Bernardino. By this, we presume, was meant the sidewalk in front of the plant of the San Bernardino Company. Some time in the month of September following, plaintiff, having received no word that the crane was ready for delivery, wrote a letter of inquiry to Hill. No reply was made to this letter. Shortly thereafter plaintiff, while the crane was, as he supposed, still in San Bernardino in the possession of the San Bernardino Company, entered into a contract with a party in San Francisco whereby he agreed to sell the crane to the latter for the sum of \$600 f. o. b. San Bernardino. Subsequently this person rescinded his agreement to buy the crane from plaintiff because the latter was unable to make delivery, owing to the fact that defendants, unknown to plaintiff, and without authority, had sold and shipped the crane to another party. It seems that some time in the middle of October, 1919, plaintiff called on Plue at the latter's office in Los Angeles, and was informed by that agent of the Los Angeles Company that he had sold the crane, that it had been shipped to the purchaser, and that he did not know where it then was. The crane, it seems, was sold by the Los Angeles Company to a third party, and was shipped out of San Bernardino on or about October 4, 1919, which was some two or three weeks after plaintiff had agreed

to sell the crane for \$600 to the party in San Francisco, but before that person had rescinded his agreement to purchase. When plaintiff called upon Plue and spoke to him about the crane, some time in the middle of October, 1919, Plue asked plaintiff if it would satisfy him to have the crane delivered to plaintiff's purchaser in San Francisco. Plaintiff replied that it would not, as he already had lost the sale to his San Francisco buyer. At the date of the trial, September 23, 1920, the crane was in Los Angeles in the plant of the Los Angeles Company. At that time it was not in the condition in which it was when plaintiff bought it—a number of parts had been broken and much of it was missing. On March 13, 1920, which was more than three months after this action was commenced, Plue offered to deliver the crane to plaintiff, but the latter refused to take it.

[1-3] We think it clear that the evidence is sufficient to show a conversion of the crane by both defendants. The case seems to have been tried in the lower court upon the assumption that, in order to hold both defendants liable, it must appear that they had jointly contracted to sell and deliver the crane to plaintiff. This is an entirely erroneous theory. Plaintiff is not suing for a breach of contract. He is not suing for a mere failure to comply with that part of the contract of sale whereby Hill, on behalf of his company, had agreed to notify plaintiff when the crane was dismantled and to make delivery on the sidewalk at San Bernardino. He is suing for a tort—for the conversion of the crane—which unquestionably occurred when, about a month and a half after plaintiff had purchased it, the Los Angeles Company sold it and permitted it to be shipped out of San Bernardino. To sustain the verdict against both defendants all that it was necessary to show was that plaintiff was the owner, entitled to possession of the crane, and that defendants, as joint tortfeasors, had converted it. The first of these requisites, plaintiff's title and right to possession, is conceded. It is expressly averred by defendants in their answer that the San Bernardino Company had "sold * * * to plaintiff two certain compressors and one crane and its equipment." It is of no moment how plaintiff received his title and right of possession. It matters not whether it came to him under a contract made with both of these defendants or with but one of them, or whether he received title from an entirely different source. It is enough that plaintiff had the title and the right of possession. Having the title and right of possession, he is entitled to a joint judgment against these defendants if they jointly converted his property. That defendants were guilty of a joint conversion is clear. After the crane had been sold to plaintiff, and subsequently to the time when he was entitled to have it delivered to him on the sidewalk

in San Bernardino, the Los Angeles Company, wrongfully and with knowledge of plaintiff's rights, sold it to a third party, and permitted it, or all but the rails, to be shipped to that purchaser. Both Plue and Hill knew that plaintiff had purchased the crane, and both were well aware of his rights. This unauthorized sale by the Los Angeles Company was, without doubt, an exercise of dominion over plaintiff's property, in defiance of his rights, an actual conversion. Any act of ownership or exercise of dominion over the property of another, in defiance of his rights, is a conversion of that property. *Reynolds v. Shuler*, 5 Cow. (N. Y.) 323; *Bancroft-Whitney Co. v. McHugh*, 166 Cal. 143, 134 Pac. 1157. And the general rule is that one who sells the property of another, even though he believes he has the right so to do, is liable in trover to the true owner. *Swim v. Wilson*, 90 Cal. 126, 27 Pac. 33, 13 L. R. A. 605, 25 Am. St. Rep. 110; *Clark v. Whiteus* (Okla.) 171 Pac. 746; 28 Am. & Eng. Ency. of Law (2d Ed.) 702. In this connection, see, also, *Green v. Bennett*, 23 Mich. 464, and *Koon v. Brinkerhoff*, 39 Hun (N. Y.) 130. Without doubt, therefore, the defendant Los Angeles Ice & Cold Storage Company, by whom the unauthorized sale to the third party was made through its agent, Plue, was guilty of a conversion of plaintiff's property. Equally certain is it that the other defendant, as an aider and abettor of the Los Angeles Company, participated in this conversion, and that therefore there was a joint conversion by both defendants. As we have seen, Plue, who appears to have been an agent of each of these ice companies, sold the crane after it had been bought and paid for by plaintiff. A truckman, acting for the third party to whom Plue had thus wrongfully sold plaintiff's property, went to San Bernardino, saw Mr. Hill, told the latter that the crane had been sold by Plue, or, at any rate, showed him the bill of sale, and was permitted by Hill to cart it away on his truck. Upon these facts the San Bernardino Company unquestionably was, knowingly, a party to the transaction whereby the crane was sold and shipped away after it had been sold to plaintiff, and therefore was jointly liable with its codefendant for the conversion. Where the conversion is the result of the acts of several persons, which, though separately committed, all tend to the same end, there is a joint conversion. *Cram v. Thissell*, 35 Me. 86; 38 Cyc. 2055.

[4] No demand was necessary. When sold to him by the San Bernardino Company, the crane became plaintiff's property, and its subsequent unauthorized sale and shipment to another purchaser—the result of the acts of both defendants—was of itself a conversion. The rule is that, where there has been an actual conversion, a demand upon the defendant before the institution of the

action of trover is not necessary. For, since demand and refusal do not of themselves constitute conversion, but are only evidence from which conversion in certain cases may be found (*Steele v. Mariscano*, 102 Cal. 666, 36 Pac. 920), the conversion may be established by proof of other acts on the part of the defendant, such, for instance, as selling and delivering the property to some third person in defiance of the rights of the true owner. *May v. O'Neal*, 125 Ala. 620, 28 South. 12; *Courtis v. Cane*, 32 Vt. 232, 76 Am. Dec. 174; *Clark v. Whiteus*, supra; 28 Am. & Eng. Ency. of Law (2d Ed.) 697.

[5] Plaintiff and one of his witnesses, each of whom qualified as an expert on the value of secondhand machinery and equipment, testified that the reasonable market value of the crane was \$1,500. The jury assessed plaintiff's damages in the sum of \$600—the amount that plaintiff's prospective purchaser at San Francisco had agreed to pay for the crane, but did not because plaintiff was unable to make delivery owing to the acts of conversion on the part of these defendants. The uncontradicted testimony of plaintiff and his witnesses that the crane was reasonably worth \$1,500 was sufficient to justify a verdict for at least \$600.

[6] In the answer filed by them in this action, defendants allege that the defendant Southern California Ice Company is ready and willing to deliver the crane to plaintiff. Thereafter, namely, on March 13, 1920, which was about three and a half months after the commencement of the action, defendants served upon plaintiff a document containing a copy of the averment in their answer expressing the then willingness of the San Bernardino Company to deliver the crane to plaintiff. Defendants offered this document in evidence during their cross-examination of the plaintiff. The court sustained plaintiff's objection to the offer, and that ruling is now assigned as error. The action is not to recover the crane, but damages for its conversion. As we have shown, these defendants co-operated in the conversion of the crane when the Los Angeles Company wrongfully sold it to a third person after plaintiff had acquired the title and the right to possession by his purchase from the San Bernardino Company. When his property was thus sold and shipped to another in defiance of his rights, plaintiff's right to damages was then and there complete, and no subsequent offer to return could defeat his right of action. No such eleventh-hour repentance could undo the conversion already committed or purge it of its wrongfulness. If authority were needed for so plain a proposition, reference might be had to *Reynolds v. Shuler*, supra.

[7] The court instructed the jury to the effect that, if both of the defendants were parties to the contract of sale to plaintiff, the fact that one of them did not own the crane would not relieve it from liability to

plaintiff. Defendants cannot complain of this instruction. It was more favorable to them than it should have been. In giving it the court evidently proceeded upon the theory that defendants could not be held jointly liable in this action unless it were made to appear that they had jointly made the contract of sale to plaintiff. With plaintiff's title and right of possession established by the sale which it is conceded was made to him by the San Bernardino Company, defendants would be jointly liable if they jointly converted plaintiff's property. That they were guilty of a joint conversion was, as we have shown, established beyond peradventure by the uncontradicted evidence in the case. The giving of this instruction, therefore, was not prejudicial error, even though it may be based upon an erroneous theory respecting the ground for defendants' liability.

[3] Finally, appellants complain of an instruction whereby the jurors were advised as to what is sufficient to constitute a legal demand. Since there was no necessity for any demand, for the reason that defendants' joint participation in the sale and delivery of the crane to the third party was itself an actual joint conversion, appellants' criticism of the instruction does not call for discussion. The judgment is affirmed.

We concur: WORKS, J.; CRAIG, J.

(56 Cal. App. 541)

PEOPLE v. RITTENHOUSE. (Cr. 1016.)

(District Court of Appeal, First District, Division 2, California. Feb. 17, 1922. Hearing Denied by Supreme Court April 17, 1922.)

1. Embezzlement $\Leftrightarrow$ 44(1)—Evidence held to sustain conviction.

Evidence held to sustain a conviction of a bookkeeper for embezzlement.

2. Embezzlement $\Leftrightarrow$ 4—Employee who withdrew amount erroneously credited by bank to employer guilty.

Where bank erroneously credited employer with certain amount, employee who withdrew amount, and appropriated it, was guilty of embezzlement, the employer, and not the bank, being the loser, since, as between employer and the bank, the employer was liable to the bank for the amount credited under the mistake.

3. Forgery $\Leftrightarrow$ 20—Bookkeeper who appropriated employer's money by signing employer's name to check guilty of forgery though he charged himself with amount thereof on employer's books.

Bookkeeper who appropriated employer's money by signing the employer's name to check without authority to so do was guilty of forgery, though he charged himself with the amount thereof on the books of the employer.

4. Criminal law $\Leftrightarrow$ 435—Memorandum made by defendant, found in his cell, admissible though intended for his attorney.

Memorandum made by defendant, and found in cell after his removal therefrom, tending to show his guilt, was admissible even though it was intended to be delivered to his attorney.

5. Witnesses $\Leftrightarrow$ 204(2)—Attorney cannot be compelled to disclose papers delivered to or made by him.

An attorney cannot be compelled to disclose papers delivered or communications made to him, or letters or entries made by him in that capacity.

6. Criminal law $\Leftrightarrow$ 178—Dismissal of indictment before commencement of trial because of desire to prosecute under other indictment held not to bar subsequent prosecution.

Dismissal of indictment on motion of district attorney under Pen. Code, § 1385, on the ground that another indictment had been returned against defendant under which the district attorney desired to prosecute him under section 1387, before defendant's trial had been begun, and a jury impaneled, held not to bar prosecution under other indictment.

Appeal from Superior Court, Fresno County; J. E. Woolley, Judge.

George Rittenhouse was convicted of embezzlement and of forgery, and he appeals. Affirmed.

Richard Kittrelle and Paul W. Schenck, both of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., John H. Riordan, Deputy Atty. Gen., and B. W. Gearhart, Dist. Atty., and Philip Conley, Deputy Dist. Atty., both of Fresno, for the People.

LANGDON, P. J. This appeal is taken from a judgment of conviction of the crime of embezzlement and of the crime of forgery, charged in the third and fourth counts of an indictment against the defendant, which indictment contained five counts. Appellant was found "not guilty" on count 1, and the district attorney, prior to the trial, dismissed as to counts 2 and 5.

[1] Appellant contends that the evidence is insufficient to sustain the verdict. The defendant, Rittenhouse, in July, 1920, was employed as a bookkeeper for the Valley Oil Company, in Fresno, Cal.; among his duties were those of keeping the books of the company and of signing checks of the company, jointly with the president, Edward L. Tobin. The Valley Oil Company kept a checking account in the Bank & Trust Company of Central California in Fresno, which bank, a short time prior to the date of the alleged commission of the crimes herein considered, had changed its name to the Fidelity Trust & Savings Bank. Mr. Tobin, as president of the Valley Oil Company, secured a loan from this bank in the sum of \$2,500, and had it

deposited in the bank to the credit of the Valley Oil Company. By some mistake occurring during the transfer of the bank's business from the old name to its new name, the bank inadvertently credited the Valley Oil Company with two deposits of \$2,500 each. The second deposit was credited on May 12, 1920, the day after the first deposit was credited. The defendant was in a position to become aware of this error and it afforded him an opportunity for embezzlement. It was shown by the bank's ledger sheet that on July 29, 1920, \$600 was drawn from the company's account; on the following day the ledger shows that \$1,900 was withdrawn, making a total of \$2,500, the amount of the duplicate deposit. This amount was checked out without the consent of the president. The company was a small one, and was virtually controlled by its president, Mr. Tobin. All checks required the signatures of Tobin, as president, and of the defendant, as secretary. It appears from the evidence that on some occasions Tobin signed his name as president to certain blank checks to be used in the business. The evidence was conflicting as to whether or not Tobin, as president, had left checks signed in blank which the defendant might have used for securing this \$1,900 from the bank. That question was therefore submitted to the jury as to whether or not they believed that the defendant had forged Tobin's name to the \$1,900 check or had utilized one of the checks which had been signed in blank by Tobin and intrusted to the defendant for company purposes. The jury determined that the defendant was not guilty of forgery, but found him guilty of embezzlement of \$1,900, so that question drops out of this case. True, the prosecution was unable to produce the two checks, one for \$600 and the other for \$1,900, but the inference from the evidence is very strong, indeed compelling, that the defendant destroyed these checks. The card retained by the bank, which was signed by the person obtaining the canceled checks of the company, was produced. It contained two signatures of "Valley Oil Company," one on July 20, 1920, and one on August 2, 1920. The handwriting expert at the trial identified these signatures as the handwriting of the defendant. When the bank discovered the mistake, and went to check up the matter with the Valley Oil Company, the defendant had left his employment, and was not to be found, and the two checks which would have been evidence against the defendant had also disappeared. In the light of these facts, and of other evidence of defendant's guilt contained in the record, the inference that he secreted or destroyed these checks as a part of his scheme and to avoid detection is not unjustified.

The defendant is connected up with the cashing of the \$1,900 check by the following facts: Miss Frances Blair, an employee of

the bank, testified that on July 30, 1920, a man purchased from her, in the discharge of her duties, 19 traveler's checks of the denomination of \$100 each; that this man signed his name to said checks, as was required at the time of purchase, as "George Rittenhouse," and gave, in payment for the same a check of the Valley Oil Company, bearing the names of Tobin and Rittenhouse, as president and secretary, respectively, for \$1,900; that he stated that he needed these traveler's checks to go on a business trip for the company. These checks were cashed in various places, and were countersigned, "George Rittenhouse." The defendant stipulated that such signatures, appearing twice on each of said checks, were signatures of the defendant. We can perceive no gap in the proof. The employee of the bank testified to the purchase of \$1,900 of traveler's checks, countersigned by "George Rittenhouse" in her presence. These checks were cashed by the defendant and returned to the bank in the usual course of business, and produced at the trial. It is stipulated that the signatures countersigned thereon are signatures of the defendant. He, then, purchased these checks from the bank, and, according to the testimony of the bank employee, he gave in payment therefor a check of the Valley Oil Company, signed with the names of Tobin and himself. He had no authority to do this, and Tobin testified that he never signed such a check. The defendant appropriated the proceeds of this Valley Oil Company check, which was exchanged for the traveler's checks, to his own use.

[2] It is argued that, as the \$2,500 appropriated by the defendant was erroneously credited by the bank to the oil company's account, the oil company has not suffered a loss, and therefore the defendant has not embezzled the money. There is no merit in this contention. Under the facts in evidence, as between the bank and the oil company, the oil company would be liable to return to the bank the amount credited under a mistake, and is liable to the bank therefor. Of course, if it could be proven that the defendant had forged the signature of Tobin, the situation might be otherwise; but, under the finding made here by the jury, there was no forgery, and the oil company is the loser by the amount embezzled, at least so far as any issue in the present case is concerned.

[3] With the reference to the count for forgery, upon which the defendant was found guilty, there was introduced in evidence a check for \$70.03, payable to the defendant's order, and signed with the names of Tobin and Rittenhouse, as president and secretary, respectively. Tobin testified that he had not signed this check, and had not authorized his name to be signed thereto and his signature, which is brought before this court in the record on appeal, for comparison with the forged signature, amply bears

out this testimony. The handwriting expert declared that the forged signature was in the handwriting of Rittenhouse. Tobin testified that some time after Rittenhouse disappeared he went back to the office of the company at night, and made an entry in the books charging himself with the amount of this check. Appellant relies on this entry as negating an intent to defraud. The charge was not a proper one, nor one that defendant was authorized to make on behalf of the company. As the jury found that the amount was secured on a forged check, the entry which Rittenhouse later made charging himself with the same on the books of the company cannot in any way save the situation as to him. It is unthinkable that a man forging a check and receiving the money thereon should absolve himself from criminal liability by making an unauthorized entry on the books of the company on whose funds the check had been drawn, charging himself with this amount. As well might a burglar leave behind him his note for the amount of his booty.

[4, 5] It is asserted that the trial court erred in admitting in evidence a certain document found in the cell occupied by the defendant while in the county jail at Fresno. After the prisoner had been removed from his cell, the paper was found by the sheriff. The writing is not in the form of a letter, and is not addressed to any one. It is an enumeration of 16 different matters where there is an absence of proof or difficulty connected with proving the elements of the crimes charged against the defendant, which he conceived would work to his advantage. Nothing could be more eloquent of the guilt of the defendant than this expression of his carefully thought out and many-sided scheme for circumventing justice. Among other circumstances advantageous to himself, he enumerates the fact that the prosecution will find the \$600 and \$1,900 checks missing and that defendant cannot be identified as the man who cashed them. Counsel for defendant offered to prove that this document was intended as a letter to defendant's counsel, and as such was privileged. The rule which appellant invokes is well settled that an attorney of a party cannot be compelled to disclose papers delivered or communications made to him, or letters or entries made by him in that capacity. 1 Greenleaf on Evidence (16th Ed.) p. 373, § 237. But we find no authority for the extension of the privilege to communications or letters which are intended by the party to be later delivered or communicated to his attorney. We think such an extension of the rule would be against public policy, as, if it were so extended, it would only be necessary for a party to state that any incriminating documents, etc., discovered by third parties or officers of the law were intended for transmission to his attorney in order to tie the hands of the

state. This situation comes rather within the reason of the rule that, where a third person, not within the confidential relation, overhears the communications between attorney and client, he may disclose what he hears. *State v. Perry*, 4 Idaho, 224, 38 Pac. 658, 659; *Basye v. State*, 45 Neb. 261, 283, 63 N. W. 811; *Hoy v. Morris*, 13 Gray (Mass.) 519, 74 Am. Dec. 650; *Whiting v. Barney et al.*, 30 N. Y. 330, 86 Am. Dec. 385.

[6] The only other point urged by appellant is that the defendant has been twice put in jeopardy, and that this plea warranted a judgment in his favor in the present action. The claim is based upon the fact that on March 24, 1921, the grand jury of Fresno county returned and filed an amended indictment against the defendant, numbered 4565. At the time this amended indictment was filed, the defendant had not pleaded to the original indictment and he does not complain of this step in the proceedings. However, thereafter, on March 24, 1922, a demurrer to the amended indictment was interposed and overruled, and the defendant pleaded "not guilty" to each and every count of the indictment. The cause was set for trial on June 15, 1921. On June 14, on motion of the district attorney, the trial court dismissed said indictment No. 4565, and the minute entry upon the records of the court recites that—

"The district attorney came into open court and now moves the court for an order dismissing the amended indictment against defendant, George Rittenhouse, No. 4565, on the ground and for the reason that the grand jury of the county of Fresno has found another indictment against the said George Rittenhouse, No. 4645, Department No. 1, upon which indictment the district attorney desires to bring said defendant to trial; whereupon the court now orders that said action be, and is hereby dismissed on the grounds mentioned and in accordance with the motion of the district attorney."

Thereafter, the grand jury filed indictment No. 4645, upon which the defendant was convicted. We see no merit in appellant's position on this point. The action taken by the court was in accordance with section 1385 of the Penal Code. The reason for the dismissal of the indictment is stated in the order. Section 1387, Penal Code, provides that such a dismissal is not a bar to a further prosecution in the case of a felony. But appellant contends that the reason given in the order for the dismissal of the indictment does not indicate that the dismissal was in furtherance of justice. Assuredly it is in the interest of justice to have indictments drawn as carefully and correctly as possible, and in accordance with the facts, so that trials may be conducted regularly and without error. It is perfectly apparent from the record that the district attorney desired to try the defendant upon the last indictment because he considered that it better stated

the facts necessary to constitute the offenses charged against the defendant, and more accurately stated the facts which could be shown by the evidence. The defendant refused to put in evidence the entire content of the first amended indictment, but read into the record one count therefrom. The district attorney admitted, and the record confirms the statement, that the count so read from the first amended indictment relates to the same transaction involved in one of the counts in the indictment upon which the defendant was tried; but the facts regarding such transaction are stated in the two indictments in different ways so as to charge different offenses, and the other counts of the two indictments, according to the statement of the district attorney, which is all that is before us, vary in statement of facts and in the offenses charged thereby. Under these circumstances, we consider it desirable and in furtherance of justice that the first indictment against the defendant be dismissed after it became apparent to the district attorney that one more in accordance with the facts could be filed. No possible prejudice could result to the defendant from this procedure under the circumstances of this case. Furthermore, defendant was not twice in jeopardy, as his trial had not begun, and no jury had been impaneled at the time the first amended indictment against him was dismissed.

The judgment is affirmed.

We concur: STURTEVANT, J.; NOURSE, J.

50 Cal. App. 472

PEOPLE v. MILLER. (Cr. 570.)

(District Court of Appeal, Third District, California. Feb. 16, 1922. Hearing Denied by Supreme Court April 17, 1922.)

1. Criminal law §742(1)—Credibility of witnesses for jury.

The credibility of witnesses is peculiarly within the province of the jury.

2. Rape §53(2)—Evidence held sufficient to sustain charge of assault with intent to commit rape.

Evidence held sufficient to sustain a charge of assault with intent to commit rape.

3. Witnesses §283 — Objection to further cross-examination of prosecutrix after prosecution rested and defendant had introduced his evidence properly sustained.

Where defendant, after the prosecution rested, introduced all his evidence, and then recalled prosecutrix for further cross-examination, the court properly sustained an objection, though defendant, on excusing the witness following her cross-examination had stated that he reserved the right to recall her, where he re-cross-examined her after the prosecution had re-examined.

4. Criminal law §714—Reading to jury witness' testimony at preliminary examination held proper.

Where counsel for defendant, to discredit prosecutrix's testimony, called her attention to inconsistent testimony at the preliminary examination, whereupon the district attorney questioned her as to other parts of such testimony tending to qualify that read by defendant's counsel so as to make it consistent with her testimony on the stand, his reading of some of the former testimony to which the witness' attention had been directed in his argument to the jury was proper.

5. Rape §42—Exclusion of evidence as to defendant's reputation for peace and quietude held not error.

In a prosecution for assault with intent to commit rape, the court's rulings sustaining objections to questions as to defendant's reputation for peace and quietude, but allowing those as to his reputation for morality and as a law-abiding citizen, were not erroneous.

6. Criminal law §678(3)—Prosecution held not to have relied on proof of earlier of two assaults.

In a prosecution for assault with intent to commit rape, where evidence of a prior technical assault during the same day was not offered to prove commission of the crime charged, but to show relations between the parties and defendant's intent, contention that the prosecution must be deemed to have relied for conviction on evidence of the first assault where it did not elect between the two held without merit.

7. Criminal law §829(3)—Refusal of instructions fairly covered by those given not erroneous.

In a prosecution for assault with intent to commit rape, where the court fairly instructed the jury on law relating to elements of the offense contained in defendant's proposed instructions, though not always in language so favorable to him, it did not err in refusing such instructions.

8. Criminal law §1144(15)—Court's reply to juror's question that defendant was being tried, not for rape, but for attempt, presumed proper.

In a prosecution for assault with intent to commit rape, where the court instructed that an assault is an unlawful attempt, coupled with a present ability to commit, the court's use of the word "attempt" in answer to a juror's question as to whether they were not trying defendant for attempt to commit rape, that such was the charge, "not rape, but attempt," must be presumed to have referred to the attempt mentioned in the instruction.

Appeal from Superior Court, Stanislaus County; J. C. Needham, Judge.

Horace Miller was convicted of assault with intent to commit rape, and he appeals. Affirmed.

J. B. Jennings and James L. Crittenden, both of Modesto, and J. M. Frame, of Reno, Nev., for appellant.

U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

FINCH, P. J. The defendant was charged with assault with intent to commit rape, and a prior conviction of the crime of rape. He admitted the prior conviction, but entered a plea of not guilty to the crime charged. This appeal is from the judgment of conviction and the order denying his motion for a new trial.

At the time of the alleged offense the prosecutrix was 22 years of age, married, and the mother of one child. She was then visiting at the home of her mother in Modesto, her husband being elsewhere at the time. In the afternoon of November 11, 1920, she went riding with the defendant in his automobile. On this trip the defendant turned off the main highway into a "little road," stopped his machine, put his arms around the prosecutrix, and proposed sexual intercourse, but she refused, and protested against his conduct. He told her that he was sorry for his conduct, that he only did it to "find out what kind of a girl she really was," and asked her forgiveness. After much protestation on his part, she finally said she would forgive him. Certain witnesses for the defendant testified to having seen the parties at the place mentioned, sitting in the machine with their arms around each other. This testimony furnishes the only contradiction of the prosecutrix, the defendant declining to take the stand.

On their return to the mother's home they found no one there, and the house was locked. After searching unsuccessfully for the door key they drove about in search for some member of the family, but, finding no one, the defendant proposed that they go to a restaurant for dinner. At first the prosecutrix objected, but, upon the defendant's assurance that he desired to show her what kind of a man he really could be, she accompanied him. At the table he "grabbed" her hands twice, and she "pulled" them away. This conduct on his part made her so nervous that she did not eat anything. On leaving the restaurant she said she would walk home. He argued that she would be foolish to do so, and asked what her mother would think to see her come into the house alone after being out with him. It was raining at the time, and she finally agreed to let him take her home.

On leaving the restaurant the defendant took the road towards Empire. The prosecutrix remonstrated, and the defendant said: "I am going to take you out for a ride, and love you up a little bit." She replied, "No, you are not," and "started to open the door," but the side curtains being up made it difficult for her to do so. He "grabbed" her

with such force as to tear two buttons off her coat, and speeded up the machine, and she commenced to cry. About two miles out the defendant turned off the highway, and stopped the machine at some gum trees about two blocks distant from the main road. There he "grabbed" her, drew her to him, and kissed her several times. She broke away from his embrace, and shoved him. He tried to get out from under the steering wheel, but she prevented him. He then repeatedly called her profane and vile names, and several times told her she had "got" to have intercourse with him. She said: "You have got to kill me first. * * * I want to die first." He replied: "Well, die or no die, you have got to do it." He unbuttoned his trousers, forced her hand upon his private parts, and placed his other hand on her private parts, and continued to call her vile names, and tell her she "had to do it." Finally, in an effort to get away from him, she promised to accede to his demands if he would let her out to answer a call of nature. He then allowed her to get out, but followed her and stood by her while outside. They then observed the lights of an automobile moving along the highway, and she said: "Oh, my God, look what you have done; look what the people will think." He, evidently to avoid being seen, "jumped" into his machine. The automobile on the highway passed on, and the defendant said: "Come on in. * * * If I keep you out here until 6 o'clock to-morrow morning, you have got to do it." The prosecutrix then saw the lights of another machine, and noticed the defendant's foot as if he were getting out. She thereupon ran towards the highway, the defendant following for a certain distance, and then turning back. The machine did not stop, but another approached, traveling from Modesto towards Empire, and the prosecutrix ran in front of it, screaming and waving her hands. This machine stopped and took her to Empire. The defendant followed in his own machine. The driver of the machine which picked up the prosecutrix testified that she appeared to be very much frightened and that he was compelled to swerve to one side to avoid striking her with his machine. Another witness testified that at Empire the defendant's trousers were still unbuttoned, "all the buttons opened here in front." Except as otherwise stated, the foregoing testimony was all given by the prosecutrix. It is wholly uncontradicted, except as stated, and is corroborated as to the circumstances attending her flight and escape from the defendant. It is set forth more fully than would otherwise be necessary because of appellant's insistence that it is insufficient to support the verdict.

[1] Appellant points out circumstances tending, as he claims, to discredit the prosecutrix, but there is nothing therein which would warrant an appellate court in disturb-

ing the jury's determination that her testimony is worthy of credence. The credibility of witnesses is peculiarly within the province of the jury.

[2] The assault was not merely technical, as contended by the appellant, but was forcible and continuous from the moment the prosecutrix endeavored to leave the machine at Modesto until she finally made her escape. The jury was justified in believing that her resistance was equally continuous, and as effective as she was capable of making. The conduct and language of the defendant afford ample proof of intent. From a careful examination of all the evidence, there can be no doubt of its sufficiency to sustain the charge. The case of *People v. Norrington* (Cal. App.) 202 Pac. 932, is so directly in point and so well supported by reason and authority that no other citation is deemed necessary on the question under discussion.

[3] At the close of the direct examination of the complaining witness, counsel for defendant examined her at length, and then excused her, saying: "We are reserving the right to recall her for further cross-examination." The prosecution then re-examined, and the defendant recross-examined the witness. The prosecution then put on other witnesses, and rested. The defendant thereafter introduced all of his evidence, examining eight witnesses, and then recalled the prosecutrix for further cross-examination. The prosecution objected to any further cross-examination on the ground that it should have been conducted not later than the close of the plaintiff's case, and the court sustained the objection. Manifestly the ruling was not error.

[4] Counsel for defendant endeavored to discredit the prosecutrix by calling her attention to parts of her testimony given at the preliminary examination, claimed to be inconsistent with that given by her at the trial. The district attorney then, over defendant's objection, questioned her as to other parts of such former testimony tending to qualify that read by counsel for defendant, and make it consistent with that given by her on the stand. In an effort to show that there was no inconsistency, the district attorney, in his argument to the jury, read some of the former testimony to which the attention of the witness had been directed while on the stand. This was entirely proper.

[5] The defendant called several witnesses to prove his good character. The court sustained objections to questions relating to defendant's reputation for "peace and quietude," but allowed those bearing on his general reputation for "morality" and as a "law-abiding citizen." These rulings were not prejudicial. *Wigmore on Evidence*, §§ 59 to 62, and cases cited; *Wistrand v. People*, 218 Ill. 323, 75 N. E. 891; *State v. Brady*, 71 N. J. Law, 360, 59 Atl. 6; *State v. Shultz*, 177 Iowa, 321, 158 N. W. 539. Several other

rulings on minor matters relating to the admission of evidence are assigned as errors, but it is sufficient to say that there is no merit in any of them.

[6] Appellant contends that the prosecution should have elected, not later than the commencement of the trial, between the assault of the afternoon and that of the evening, and that, having failed to do so, and having first introduced evidence tending to prove the former, "the prosecution is deemed to have relied on such first offense proven for conviction," and that it constituted only a "technical" assault. It is apparent from the record that evidence of the occurrences during the afternoon was not offered to prove the commission of the crime at that time, but to show the relations between the parties and the conduct of the defendant as bearing upon the intent with which he committed the later assault. The case is wholly unlike that of *People v. Williams*, 133 Cal. 165, 65 Pac. 323, relied upon by appellant, where many distinct crimes of rape were proved, covering a period of four months. In that case the court said:

"A verdict of guilty could have been rendered * * * although no two jurors were convinced * * * of the truth of the charge, as to any one of these separate offenses."

In the instant case, on the evidence presented neither the jury nor the defendant could have believed that he was being tried for the acts committed in the afternoon. It may be further stated that the opening statement of the district attorney clearly indicated that the assault made in the evening was the one upon which a conviction would be asked.

[7] There is no doubt as to the correctness of the instructions given by the court, but appellant complains of the court's refusal to give certain instructions proposed by defendant. The defendant requested the court to give 28 instructions, ranging in length from a few lines to about four folios. Of these the court gave 7 and refused 21, all but 2 of the 21 being refused on the ground that they were "given elsewhere in effect." The propositions of law contained in the proposed instructions which appellant contends should have been given are as follows: (No. 3) That the words "willfully, unlawfully, feloniously, violently, and forcibly" are not mere idle words of form, but material allegations which must be proved. (6) That it is not sufficient to prove an intent to accomplish the act by persuasion, but an actual attempt by force and violence against the will and without the consent of prosecutrix must be shown. (9) That the use of actual force must be proved. (10) That the act must be accomplished against the resistance of prosecutrix. (13) That a mere technical assault is not sufficient. (15) That both the assault and intent must be proved, and some overt act must be shown. (18) That voluntary submis-

sion, though reluctantly given, is a defense. (19) That verbal resistance is not sufficient. (21) That want of consent must be actual, and not merely technical. (22) That resistance must be by acts, and not a mere pretense, and reasonably proportionate to strength and opportunity, and must persist until offense is consummated. (24) That if consent was given at any time prior to the commission of the act, though reluctantly, the verdict should be not guilty. Proposed instruction No. 23 is so clearly argumentative as to merit no discussion.

The court instructed the jury that the prosecution must prove all the material allegations of the information beyond a reasonable doubt; that if the defendant "willfully, unlawfully, feloniously, violently, and forcibly" committed the act "with the intent then and there feloniously, and by force and violence, to carnally know and ravish" the prosecutrix, "and accomplish with her an act of sexual intercourse, against her will and without her consent," then the verdict should be guilty; that "rape is an act of sexual intercourse, accomplished with a female not the wife of the perpetrator, * * * where she resists, but her resistance is overcome by force and violence"; that the act must have been committed "with the felonious intent then and there to carnally know and ravish" the prosecutrix, "and accomplish with her an act of sexual intercourse, against her will and without her consent"; that proof of threats are not sufficient to constitute an assault; that if "she failed as a matter of fact to oppose the commission of the offense charged, then you may consider such lack of opposition * * * as consent upon her part to the commission of said offense, and, if you so find such consent to so have been given, then one of the essential elements of the crime charged is lacking, and you must return a verdict of not guilty"; that general statements of the prosecutrix that "she did her utmost, and the like, will not be sufficient to establish the fact of resistance, but she must relate the acts done in order that the jury may judge whether any were omitted." Certain other instructions given are hereinafter set out. It thus appears that the court fairly instructed the jury on all propositions of law contained in the proposed instructions which were refused, though not always in language so favorable to the defendant as in those refused.

[8] After deliberating for a time, the jury returned into court and asked that certain instructions be read to them. After several instructions had been read a juror asked: "If the defendant had threatened the complaining witness to do bodily harm, is that the force?" The court replied: "I instructed you there in one place mere threats was not sufficient." Some suggestion was made as to the necessity of proving penetration,

and a juror asked: "We are trying this man, are we not, on an attempt to commit rape?" The court replied: "Yes, that is the charge; not rape, but attempt." A few moments before making the answer of which complaint is made, the court had reread to the jury defendant's instruction number 2, as follows:

"An assault is an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another. There are three essential elements necessary to constitute an assault, to wit: First. In assault the intent must be to commit a violent injury on the person of another. Second. A present ability to do so. Third. The actual attempt to accomplish such injury. The intent to commit a violent injury on the person of another is necessary to constitute an assault in all cases, and this intent is always a question of fact, to be proved, but it may be inferred, however, from the circumstances of the assault, if an assault has been proved."

It must be presumed that, in the answer given, the court referred to the "attempt" so used in the instruction, and that the jury so understood. The attorneys for both sides must also have so understood; otherwise, in fairness to the court, they would have called attention to the alleged error. The court gave no instruction relative to the crime of attempt to commit rape. Immediately prior to answering the juror's question the court had reread defendant's instruction No. 14, as follows:

"Before you can convict the defendant of the crime charged by the complaint, you must find beyond all reasonable doubt and to a moral certainty that, not only was an assault committed by the defendant upon the person of the prosecutrix, but also that the defendant at the time of said assault intended to gratify his passion on the person of the prosecutrix, and that he intended to do so, in all events, notwithstanding any resistance on her part; and if you do not so find, then you must acquit the defendant of the crime charged."

From the juror's question and the court's answer it is apparent that the object of both was to make it clear that the defendant was not on trial for a consummated rape, not that the jury might convict of attempt to commit rape. Under such circumstances it is highly improbable that any juror was misled by the answer. The fact that the verdict was "Guilty of assault with intent to commit rape, as charged in the information," indicates that the jury was not so misled.

An examination of the whole case, including the evidence, not only fails to show a miscarriage of justice, but, giving credence to the testimony of the prosecutrix, there is no basis for a contrary verdict.

The judgment and order are affirmed.

We concur: HART, J.; BURNETT, J.

56 Cal. App. 572

PEOPLE v. AHERN et al. (Cr. 591.)(District Court of Appeal, Third District,
California. Feb. 21, 1922.)**1. Larceny §55 — Evidence held to prove identity of defendants as persons who stole mare.**

In prosecution for larceny of a mare, in which defendants denied being the persons who stole the mare, evidence held to sustain conviction.

2. Larceny §57—Evidence held to prove intent to steal mare.

Evidence held to sustain conviction for larceny of a mare, as against contention that defendants did not intend to steal the mare, but merely took her for a joy ride with the intent to return her.

3 Criminal law §1168(4)—Refusal to strike out testimony held harmless in view of other evidence.

In prosecution for larceny of a mare, involving the issue of the identity of the defendants as the persons who stole the mare, refusal to strike out testimony as to their identity on the admission of the witness that he had not recognized the defendants, but had obtained his information from others, held harmless, in view of testimony of other witnesses, conclusively proving defendants' identity.

4 Criminal law §404(1)—Evidence held sufficient to connect revolver admitted in evidence with that used by defendant.

In prosecution for larceny of a mare, in which a witness testified that, on discovery of one of the defendants in possession of the mare, the defendant had threatened witness with a revolver, testimony of other witness that she had seen the defendant drop something, and in searching therefor had found the cylinder of a revolver and several cartridges, and that later a revolver without a cylinder was found near the same spot, held sufficient foundation for the admission of such revolver cylinder and cartridges in evidence; the objection thereto going to its weight, and not its admissibility.

5. Criminal law §1186(4)—Admission of evidence harmless, in view of testimony proving defendant guilty.

In prosecution for larceny of a mare, the admission of a revolver and cartridges, if erroneous because of the insufficiency of evidence, was harmless, where there was ample, competent proof that defendants stole the mare, in view of Const. art. 6, § 4½, prohibiting reversal for technical error.

Appeal from Superior Court, Merced County; E. N. Rector, Judge.

William J. Ahern and Melvin Major were convicted of larceny, and from the judgment of conviction and from the order refusing to grant their motion for new trial, they appeal. Judgment and order affirmed.

John A. Wall, of Mariposa, for appellants.
U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

HART, J. The defendants were charged by information filed in the superior court of the county of Merced with the larceny of a "sorrel mare," alleged to be the property of one David Saling, and upon a trial upon said charge were convicted. They appeal from the judgment and the order refusing to grant their motion for a new trial.

They object to the verdict on these general grounds: That the verdict is against law and against the evidence, and that the court committed prejudicial error in the allowance, over their objection, of certain evidence.

Both defendants were, at the time of the commission of the crime charged, convicts on parole, and were employed as laborers on what is known as the "Holland Farm," in Merced county, the property of Miller & Lux.

David Saling, owner of the alleged stolen animal, resided with his father and mother on a farm about a mile and a half from the town of Dos Palos, in Merced county. The evidence introduced by the people disclosed that the alleged larceny was committed under the following circumstances: On Sunday, July 10, 1921, in the middle of the afternoon of said day, one Charles Griffin, who was then stopping at the home of the Salings, desiring to go to Dos Palos, borrowed the sorrel mare referred to from said David Saling to ride to said town. Thus proceeding to Dos Palos, he reached that town about 3 o'clock p. m., dismounted and hitched the mare to a hitching rack on the main street of said town. Just as he was engaged in doing this act, he saw the two defendants, in a cart, drawn by a single horse, passing along the street. After hitching the mare as indicated he went into a pool room and remained therein for some 10 or 15 minutes, when he stepped to the door and looked out and down towards the place where he had hitched the animal and observed that she was missing. He immediately started an investigation and, looking towards the west, he saw a man riding the mare. This man proceeded a short distance until he came to another road leading in a westerly direction and there joined the defendant Major, who was still in the cart. Griffin started after the two men, and the defendants observing that they were being pursued, started the horses in a rapid gait and went towards the west; the two horses, the mare ridden by Ahern, and the horse hitched to the cart and driven by Major, being then abreast. After going a short distance they turned to the south on a road which leads to the home of the Salings. Henry Saling, father of David Saling, and Mrs. Saling, the mother of David, were sitting on the front porch of their home,

from which they could see the road on which the defendants were traveling. David Saling and a young lady were out in the yard engaged in conversation. The mother of David, being attracted to the lively gait at which the horses were traveling towards their place, recognized the sorrel mare of her son and she thereupon called his attention to the fact that some one was riding his mare. David Saling immediately started towards the road, at about which time the horses reached the entrance to the Saling premises and the sorrel mare lessened her gait and attempted to go into the yard, the defendant Ahern, who was riding the mare, reining her into a different direction, not, however, until young Saling stated to him that the mare belonged to him, and attempted to take hold of the bridle. Upon this statement and act by David, Ahern drew a revolver, cautioned young Saling not to come near him, and threatened that if he did he "would blow his (Saling's) head off." The defendant then proceeded on his way, riding the mare. Young Saling immediately procured and mounted another horse, and followed Ahern to South Dos Palos, in which direction Ahern was traveling, and made a search for the animal. He finally saw one of the defendants standing in a planing mill in South Dos Palos, and, approaching him, asked where his mare was. The defendant stated that he knew nothing at all about his mare. Making a further search, Saling saw the mare standing inside the planing mill, and approximately at the same time the defendants opened a door to the mill and again started out on the road; Major driving the cart and Ahern riding the mare, going at a rapid gait. They went out side by side on the road leading to a place called Ora Loma, and after they had gone about half a mile Ahern rode out into a field, and Major went on toward the canals in a different direction. Young Saling then returned to South Dos Palos to obtain assistance. He started back with some men who had consented to help him in securing possession of his mare and when about a half a mile out they saw Major driving the horse and cart, traveling towards them. They asked Major what had become of the man who was riding the mare, and he said he "did not know anything about it." Proceeding a little farther, Saling observed Ahern riding the mare through the field. They then started after him, and Ahern, apparently observing them, rode the mare to the headgate of one of the canals and into the canal, evidently intending to cross the ditch at that point. The water, however, was running over the headgate, and after the mare got into the canal and he saw Saling and his companions closing in upon him he left the animal in the canal, and proceeded to crawl along the ditch as if to prevent being seen. Young Saling, assisted by the men who accompanied him,

got the mare out of the ditch, and thereafter caused the defendants to be arrested and charged with the crime of which they stand convicted.

It should be added to the above statement of the facts that at the time Ahern drew his weapon and threatened to take the life of David Saling the young lady who was at the Saling home saw something drop from the former's hand to the ground. After the defendant started on his way from the Saling place, the young lady referred to went out to the spot where Ahern was at the time he drew his weapon, and made a search for the object which she had seen drop, and found the cylinder of a revolver and several cartridges. Later a revolver without a cylinder was found near the same spot.

The story of the defendants was, in substance, that they went to Dos Palos on the day above mentioned in a cart drawn by a horse which they had borrowed from the superintendent of the farm on which they were working; that at said place they stopped, bought some tobacco, took a number of drinks of liquor and then returned to the farm. They denied having taken the mare of David Saling, and positively declared that they knew nothing whatever about the mare or about any horse of any kind having been taken by anybody that day. Ahern added, however, that if he did take the mare it was not with any intention of stealing her. He further stated that he had no revolver in his possession that day, and that he made no threat against young Saling. They also testified that young Saling, a few days after the alleged taking of his mare under the circumstances above indicated, approached them with the proposition that he would not pursue their prosecution for the theft if they would pay him \$15 for the damages which he claimed to have sustained by reason of the taking of his animal.

The contention that the verdict is against law is not pressed by the defendants, or, at any rate, there is no complaint made by them against the charge of the court to the jury or any portion thereof.

[1, 2] As to the contention that the verdict is against the evidence, it is only necessary to refer to the above recital of the facts as they were brought out by the evidence, to show that the point is not well taken. David Saling's testimony from which said facts are taken was corroborated in all vital particulars by the testimony of his father, his mother, and the young lady referred to above and some other witnesses. It is, however, with apparent earnestness insisted by the counsel for the defendants that, viewing the circumstances of the case as a whole, it is clear that the defendants had no intention of stealing the animal, but that they took her as indicated for no other purpose than to have a little sport—a sort of "joy ride" we

may suppose. In support of his position as to the effect of the evidence as thus stated counsel cites the case of *People v. Brown*, 105 Cal. 69, 38 Pac. 519, in which a boy was charged with the crime of burglary, in that he entered a building and took a bicycle therefrom, and in his defense stated that he took it only to get even with the boy who owned it, there having been previously some quarrel or misunderstanding between the two, and that he had no intention of keeping the bicycle, but intended to return it within a few hours. The trial court instructed the jury that, even if it were true that a party should take property under the circumstances as disclosed by the boy's testimony in that case—that is, with the intention only of temporarily retaining it or of not permanently depriving the owner thereof—he would, nevertheless, be guilty of larceny. The case was reversed for the giving of that instruction, the Supreme Court declaring that it not only involved an erroneous statement of the law, but, since the hypothetical case stated therein squared exactly with the facts as they were testified to by the boy, it impinged upon the province of the jury; that is, that it involved an instruction upon a question of fact. The court further said that—

“The authorities form an unbroken line to the effect that the felonious intent must be to deprive the owner of the property permanently.”

It is, of course, plainly manifest that the above case is no authority here. The point made by counsel does not involve the giving of an instruction. It simply involves the claim that the evidence does not show a criminal intent, but it is very clear that that question has been foreclosed by the verdict of the jury. It was for them to determine, from all the circumstances of the case whether the act of the defendants in taking the mare was or was not with a criminal intent or an intent to steal the animal, and it is equally clear that this court cannot say that the determination of the jury upon that question is not correct.

[3] The defendants assign two errors in the ruling of the court with respect to the evidence. The first objection in this particular involves the action of the court in refusing to strike out certain portions of the testimony of the witness Charles Griffin. This witness, after testifying on direct examination that he recognized the defendants as the parties who were driving down the road, the one riding upon the mare and the other riding in the cart, as above described, admitted on cross-examination that he did not at that time recognize the defendants as the men, but obtained from other persons the

information that they were the men who took the mare away. The counsel for the defendants thereupon moved to strike the testimony from the record. The court denied the motion. This was error, inasmuch as it developed on cross-examination that the testimony of the witness on direct examination that he recognized the defendants at the time referred to was pure hearsay, and, consequently incompetent; but four or five other witnesses identified the defendants as being the persons who had possession of the mare, and that Ahern was riding her, and thus the evidence appears to be conclusive of the fact that the defendants were the persons who took the mare from the town of Dos Palos and to the place on the Holland Farm where she was found, and conclusive of the guilt of the defendants. It is therefore clear that no miscarriage of justice resulted from the erroneous ruling.

[4, 5] The second assignment against the rulings is based upon the action of the court in admitting in evidence, over protest by the defendant, the revolver, the cylinder, and the cartridges. The ground of the objection at the trial was and here is that those articles were not properly or in any way connected with the defendants or their conduct at the time that they were accosted by David Saling, and by him told that the mare was his property. It is true that Ahern testified that he had no revolver in his possession on that occasion, and that he was not in the habit of carrying a weapon, but, notwithstanding this testimony, we think that, considering the circumstance that the articles were found near the place and time where and when the alleged threat was made and the further circumstance that some article was seen by one of the witnesses to drop from the hand of the defendant at that time and place, the testimony was admissible for what it was worth, and that consequently the objection thereto goes more to its weight than to its competency. It may also be suggested that the evidence regarding the revolver, etc., or even that of the threat, while important in that it might tend in some measure to show that the taking of the mare was with a criminal intent, was not indispensable to the justification of a verdict of guilty of the crime charged in the information, and that, even if erroneous, in view of the fact that there is ample competent proof of guilt, the ruling allowing said evidence is without prejudice. Const. art. 6, § 4½.

We have found no prejudicial error in the record, and the judgment and the order are therefore affirmed.

We concur: FINCH, P. J.; BURNETT, J.

56 Cal. App. 628

PURITAS COFFEE & TEA CO. v. DE MARTINI et al. (Civ. 4100.)

(District Court of Appeal, First District, Division 2, California. Feb. 24, 1922. Hearing Denied by Supreme Court April 24, 1922.)

1. Evidence ⇨242(4) — Communications between plaintiff and brokers with whom defendant dealt as plaintiff's agent are inadmissible.

In an action for goods sold to defendants, who dealt only with a broker and not with plaintiff directly, correspondence between plaintiff and the broker, not shown to have been communicated to defendants, is inadmissible against them, notwithstanding plaintiff's claim the broker was defendants' agent.

2. Sales ⇨202(6) — Bill of lading to seller's order attached to draft evidences intention to retain title until payment.

The fact that the seller took bill of lading to his order and sent it with draft attached to a bank with instructions to deliver to the buyer on payment of the draft, clearly evidences an intention by the seller to reserve title and possession until payment of the draft.

3. Sales ⇨202(1) — Title does not pass on cash sale until payment.

When the terms of the sale are cash, title does not pass until payment of the price.

4. Sales ⇨197 — Risk of loss is on title holder.

In the absence of an agreement to the contrary, the risk of loss during shipment of the goods sold is assumed by the party having the title.

5. Sales ⇨82(2) — Delivery and payment deemed concurrent in absence of agreement.

Where the contract of sale specified no time of payment, delivery of the goods and payment of the price are deemed to be concurrent acts.

6. Principal and agent ⇨169(2) — Delivery of goods with knowledge of terms of unauthorized contract adopts contract.

Though a seller was not bound by the terms of a contract which its agent was not authorized to make, it adopted the unauthorized contract by delivering the goods to the buyer, with full knowledge of all the circumstances, and must take the contract subject to its burdens as well as its benefits.

7. Sales ⇨445(1) — Evidence held to warrant submitting to jury whether sale was by sample.

Evidence that the broker, through whom nuts were sold to defendants, wrote a letter to defendants stating that the nuts ran better than the sample submitted, with testimony by plaintiff's agent that they submitted a sample with negotiations for the entire lot, warranted submitting to the jury the question whether plaintiff recognized the agreement was one for sale by sample.

8. Sales ⇨288(5) — Buyer by sample can inspect to ascertain conformity to sample.

Under Civ. Code, § 1766, making a sale by sample a warranty, the bulk was equal to the sample, and section 1785, giving the buyer on a

sale with warranty the right to inspect, a buyer of goods sold by sample was entitled to an opportunity to inspect the goods to ascertain whether they conformed to sample before he was obliged to pay for them.

9. Sales ⇨288(5) — Buyer can remove for inspection which is impossible at railroad station.

A buyer of nuts by sample can remove the shipment from the carrier, without waiving his right to inspect to ascertain conformity to sample, where the evidence sustains a finding that the inspection was impossible at the railroad station.

10. Sales ⇨177 — Buyer can reject goods if there was no meeting of the minds as to terms of the contract.

Where the sale of goods was through brokers and the minds of the parties never met as to the terms of the sale, so that there was no contract, the buyer was at liberty to reject the goods when delivered, if he acted promptly.

Appeal from Superior Court, City and County of San Francisco; John Hunt, Judge.

Action by the Puritas Coffee & Tea Company against L. De Martini and another, co-partners doing business under the firm name of the L. De Martini Supply Company, to recover damages for breach of contract and for goods sold. Judgment for defendants, and plaintiff appeals. Affirmed.

Ward Chapman and L. M. Chapman, both of Los Angeles, for appellant.

Daniel A. Ryan, of San Francisco, for respondents.

NOURSE, J. Plaintiff appeals from the judgment, following verdict in favor of defendants in this action to recover the purchase price of shelled walnuts.

The complaint alleged that, on January 15, 1919, plaintiff contracted to sell to defendants, and defendants contracted to purchase of plaintiff, 5,507 pounds of broken pieces of walnut meats and 5,002 pounds halves of walnut meats, then owned and in the possession of plaintiff, at Los Angeles, at a price of 40 cents per pound, or a total of \$4,203.60, f. o. b. Los Angeles, and plaintiff agreed to make delivery thereof to defendants by loading the same on board the cars at Los Angeles, consigned by rail to defendants at San Francisco, payment of the whole of the purchase price to be made upon presentation of sight draft therefor to defendants at San Francisco; that defendants refused to accept or pay the draft when presented, but agreed on or about said date that, if plaintiff would deliver to defendants the bill of lading so that defendants might obtain delivery of said shipment, defendants would immediately upon the arrival of the car pay the purchase price to plaintiff; that the car arrived and the goods were accepted and received by defendants,

but that they refused to pay the purchase price or any part thereof. The complaint contained a second count that, on or about January 21, 1919, defendants became indebted to plaintiff for goods, wares, and merchandise purchased from plaintiff of the reasonable value of \$4,203.60. Defendants' answer admitted the making of the contract, on January 15, 1919, for the quantity and at the price alleged in the complaint, but denied that the payment of the whole or any part of the purchase price of the walnuts was to be made upon presentation of sight draft, or any draft therefor, and also denied that plaintiff made delivery to them of the walnut meats on board cars at Los Angeles, consigned to defendants at San Francisco, and also denied the allegations of the second count, above referred to. They set up, by way of defense, that they had refused to accept or pay for the walnuts because (1) the goods were sold by sample and the walnut meats shipped were not in accordance with the sample, but were different from and inferior thereto; (2) that the walnuts which defendants agreed to buy were to be sweet and merchantable, but that the walnuts shipped were bitter and unmerchantable; and (3) that they were rancid and wormy and unfit for human consumption.

[1] There was no formal contract and the difference between the parties regarding its terms is due to the fact that defendants' negotiations for the purchase of these nuts were all had with one Ranniger, a broker in San Francisco, whose authority to represent it plaintiff repudiates. Ranniger was not a witness in the action, being out of the country at the time of the trial. It was admitted, however, that neither plaintiff, plaintiff's Los Angeles brokers, nor the latter's San Francisco correspondent, had directly communicated with defendants or had any negotiations whatever with them. Consequently all evidence relating to conversations or communications passing between these parties and between plaintiff's San Francisco representative and Ranniger, with whom plaintiff claims the latter dealt as defendants' representative, and all instructions to them, which it was not shown were communicated to defendants, were properly excluded. On the other hand, defendants were permitted to show their agreement with Ranniger. L. De Martini, the partner who conducted this transaction for defendants, insisted on the trial that Ranniger was not defendants' agent, and there was no evidence tending to prove any such relation. It was indisputably shown that defendants dealt with Ranniger and with no one else, in negotiating for and ordering these goods, and that thereafter plaintiffs shipped the walnuts to them. L. De Martini also testified that all his negotiations with Ranniger were oral and that he never submitted to Ranniger

any offer or statement in writing concerning any transaction, and Ranniger never submitted to him any writing, either correspondence or otherwise, in connection with any of these transactions. Ranniger, being the only person with whom defendants made any agreement regarding the nuts in suit, they were entitled to show this. While plaintiff could not be bound by an unauthorized agreement without a subsequent ratification, neither could plaintiff impose upon defendants terms to which they had not consented. L. De Martini testified that, about the 1st of November, 1918, Ranniger solicited him for an order for walnut meats; that he stated he was representing somebody in the south, but did not mention the name, and produced two samples, halves and pieces, which were white, sound, sweet, merchantable walnut meats; that he said they were from the new crop, that there was no more old crop; that he (De Martini) then requested Ranniger to send a sample of about 100 pounds of each, halves and pieces, stating, "if they are the same as the sample I will take the lot"; that Ranniger consented, and, on December 24, 1918, plaintiff shipped this order to defendants at 60 cents for halves and 58 cents for pieces, sending their invoice for same; that these were sweet, sound, merchantable nuts; that, on account of a delay in shipment, it was then too late to get the balance for use for the holiday trade; that defendants, therefore, on December 31, 1918, sent check direct to plaintiffs covering the December 24th invoice, with a letter stating:

"Please do not ship any more, as we cannot use them. The best we could have used them near the price you are asking, was before the holidays, and that trade is giving to other commodities, as all commodities are dropping pretty fast. If you have a better offer to make for the lot, let us know."

This was the only direct communication with plaintiff, or any one else other than Ranniger, and L. De Martini testified he later agreed with Ranniger upon 40 cents a pound, and that Ranniger told him the nuts were new, sweet, sound, and merchantable.

On January 21, 1919, plaintiff shipped the nuts, the price of which is the subject of this action. The goods were consigned to the order of plaintiff at San Francisco, with instructions in the bill of lading to "notify L. De Martini Co." Plaintiff indorsed the bill of lading in blank and forwarded it, with sight draft attached, to a San Francisco bank, with instructions to deliver to defendants upon payment of draft. Defendants refused to pay the draft, stating to the bank that they had never agreed to pay a draft and that they wished to inspect the goods before paying for them. It then became evident that there was a misunderstanding regarding the terms of the contract. Plaintiff's brokers in Los Angeles, on Janu-

ary 25, 1919, wrote to defendants, urging them to pay the draft, stating that they had confirmed the order mentioning that the terms were "sight draft with B/L attached, payable on presentation." The evidence, however, was that these terms were never communicated to or accepted by defendants. February 4, 1919, defendants replied:

"* * * In reference to the walnut meats there is no misunderstanding. We are prepared to take the walnut meats but not against sight draft. * * *"

Other matter followed relating to their prejudice against drafts, and the names of certain business people were mentioned to be used for references regarding their financial responsibility, but nothing was said about inspection, and the letter concluded:

"Now it is an option to yourself, whether you want to ship or not. We will pay for same as soon as we receive them."

Upon receipt of that letter and, as plaintiff's president, Mr. Glascock, testified, in reliance upon this promise of payment upon receipt of the goods, plaintiff authorized the release of the bill of lading without payment of the draft. Defendants had them taken from the railroad company's possession about February 14, 1919, to their place of business, as L. De Martini testified, for examination, because there were not the facilities at the former place for opening and properly examining a shipment of this kind. Upon inspection they found them to be unmerchantable, many of them being decayed and wormy and full of weevil. It is admitted that they were cold storage nuts from the old crop. Defendants promptly notified plaintiff that, because of their condition, they would not accept the nuts and asked for instructions regarding their disposition. Plaintiff disclaimed ownership and declined to give any instructions regarding their disposition. They remained in defendants' possession, where they were examined and quarantined a few weeks later by the pure food inspector and thereafter condemned and destroyed. Both parties insist that it was not intended, by releasing the bill of lading without payment of the draft, to extend credit, but was understood and agreed at that time that the terms were to be cash, payment to be made upon defendants' receipt of the goods, although to support a directly opposite position, plaintiff also argues that the sale was on credit.

Appellant raises no point on appeal regarding the condition of the nuts, in view of the verdict and the state of the evidence, but assumes that a substantial part of them were in bad condition when received at defendants' place of business. The question here is whether defendants were entitled to reject the walnuts or, as plaintiff asserts, were liable for the price regardless of their

damaged condition. On the trial, appellant's theory of the case was that the goods were sold to the defendants f. o. b. cars at Los Angeles, examination and inspection there; that the title passed to the defendants at the time the goods were loaded on the cars; that all risks of deterioration in transit were assumed by the purchaser; that they were to pay for these goods upon presentation of sight draft without awaiting the arrival of the goods; and that they had waived the right of inspection. The theory that delivery to defendants was accomplished by loading on the cars at Los Angeles and that, at that point of time, title passed to defendants, they then assuming all risk of deterioration in transit, has been practically abandoned by plaintiff on appeal. Plaintiff also concedes defendants' claim that they never agreed to examine and accept the goods at Los Angeles. There was an entire failure of proof to establish this theory.

[2-4] On the contrary, the fact that the bill of lading was made to the order of plaintiff, with instructions to notify defendants, and that it was forwarded with sight draft attached to a San Francisco bank authorized to deliver to defendants only upon payment of the draft, clearly evidenced an intention on the part of plaintiff to reserve title and possession until payment of the draft. When the terms are cash, title does not pass until payment of the price. *People v. Sing*, 42 Cal. App. 385, 183 Pac. 865, 867; *Katzenbach & Bullock Co. v. Breslauer* (Cal. App.) 197 Pac. 967, 968. And in the absence of an agreement to the contrary, the risk of loss is assumed by the party having the title. *Henderson v. Lauer & Sons*, 40 Cal. App. 696, 698, 181 Pac. 811; *Potts Drug Co. v. Benedict*, 156 Cal. 322, 334, 104 Pac. 432, 25 L. R. A. (N. S.) 609.

[5] It may be that plaintiff did not authorize Ranniger to contract with defendants. However, both parties believed there was a valid contract between them, and plaintiff and defendants both acted on this assumption. This being true, it seems unlikely that defendants' letter of February 4th was intended by them as an offer to supersede the agreement made with Ranniger by another and different arrangement. It seems rather to have been written in reliance on that agreement. Nothing was said when the order was given as to time of payment, in which event delivery of the goods and payment of the price are deemed to be concurrent acts. *Blackwood v. Cutting Packing Co.*, 76 Cal. 212, 215, 18 Pac. 248, 9 Am. St. Rep. 199; *Gilfallan v. Gilfallan*, 168 Cal. 23, 29; *United Canneries Co. v. Seelye* (Cal. App.) 192 Pac. 341, 342. The statements, then, in this letter: "In reference to the walnut meats there is no misunderstanding. We are prepared to take the walnut meats, but not against sight draft," and "We will pay for same as soon as we receive them,"

¹ 141 Pac. 623, Ann. Cas. 1915D, 784.

might reasonably have meant no more than that they were willing to perform in accordance with the terms of the contract. The letter does not purport to set forth the agreement in full. It does not, for instance, mention quantity or price—although the quantity bargained for with Ranniger was shipped and at the price agreed—but deals only with the method and time of payment. Under the circumstances a failure to mention other terms would not amount to a waiver of performance as to them.

[6, 7] Plaintiff could not have been bound by these terms, if unauthorized, and might have refused to deliver the goods. But it consented to them, delivered the bill of lading, and permitted defendants to take the goods from the carrier without payment of the price, which it then attempted to collect. If this was done with full knowledge of all the circumstances and conditions under which defendants had ordered the goods, it amounted to an adoption of the contract by plaintiff, which it would take subject to its burdens as well as its benefits. There is evidence that plaintiff recognized that the agreement was one for sale by sample. The brokers referred to the subject in their letter written to defendants urging them to pay the draft, stating: "These nuts run infinitely better than the sample that was submitted to you." Plaintiff's Mr. Glascock testified:

"We packed five barrels or five drums of these walnut meats and sent them up there as a sample, with negotiations for the entire lot, and they were received by the De Martini Company."

[8, 9] The question whether or not the sale was one by sample was submitted to the jury under proper instructions. "One who sells or agrees to sell goods by sample, thereby warrants the bulk to be equal to the sample" (Civ. Code, § 1766); and "on an agreement for sale, with warranty, the buyer has a right to inspect the thing sold, at a reasonable time, before accepting it * * *" (Civ. Code, § 1785). Assuming the jury concluded that plaintiff did adopt the contract purported to have been made for them by Ranniger with defendants, an opportunity to inspect the goods to ascertain whether or not they were in conformity with those ordered was a condition precedent to defendants' obligation to pay for them. If they were not, defendants were entitled to reject them and to refuse payment. *Newmark & Co. v. Smith*, 26 Cal. App. 339, 146 Pac. 1064. Appellant insists that defendants waived their right to inspect by failure to do so, prior to removing them from the carrier's possession. De Martini testified that the goods were hauled to defendants' establishment for the purpose of inspection, because it was impossible to examine them

at the railroad station—that there were not the facilities for properly examining a shipment of this character there—that the walnut meats were packed in small barrels or fiber containers, 59 in all. While the proof was not very full on this subject, it cannot be said that the jury were not entitled to conclude that inspection at the station was impossible. If so, removing the goods to their place of business for that purpose did not amount to a waiver of the right or an acceptance of the goods. *Wall Rice Milling Co. v. Continental Supply Co.*, 36 Utah, 121, 103 Pac. 242, 140 Am. St. Rep. 815. The goods were promptly examined, and, as heretofore stated, found to be defective, inferior to the sample, and totally unfit for the purpose for which they were ordered, or for any other purpose. Under these circumstances, defendants were entitled to reject the goods and to refuse payment.

[10] Assuming that there was no contract at all because there was no meeting of the minds of the parties and that the goods were delivered under a mutual mistake as to the facts, then clearly defendants were not obligated to keep and pay for the goods, they having acted promptly in the matter.

For the reasons given the judgment is affirmed.

We concur: LANGDON, P. J.; STURTEVANT, J.

56 Cal. App. 653

YOUNG v. SHRIVER et al. (Civ. 2389.)

(District Court of Appeal, Third District, California. Feb. 28, 1922. Hearing Denied by Supreme Court April 27, 1922.)

1. Mechanics' liens —Source of right is constitutional, not statutory.

Liens of mechanics, materialmen, etc., are not strictly statutory; the source thereof being in Const. art. 20, § 15, enjoining the Legislature to provide by law for the enforcement of such liens.

2. Mechanics' liens 33(1)—No lien for plowing or breaking farm land, even for first time; "tract of land."

Under Const. art. 20, § 15, enjoining the Legislature to provide for the enforcement of mechanics' and materialmen's liens, and Code Civ. Proc. § 1191, as amended by St. 1913, p. 333, § 1, giving a lien to any one who grades, fills in, or otherwise improves any lot or "tract of land" or the street or sidewalk adjoining same, etc., or "makes any improvements in connection therewith," construed ejusdem generis, no lien lies for plowing or breaking farm lands, even for the first time, though a "tract of land," as generally understood, is much more extensive in area than the ordinary town or city lot, and may be used for the usual agricultural or other rural purposes; the phrase "or makes

any improvements in connection therewith" necessarily referring to work like that precedently enumerated.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Tract.]

Appeal from Superior Court, Madera County; William M. Conley, Judge.

Action by R. J. Young against John D. Shriver and others. Judgment for defendants, and plaintiff appeals. Affirmed.

Sherwood Green, of Madera, for appellant.

G. W. Raburn and J. J. Coghlan, both of Madera, for respondents.

HART, J. This action is for the foreclosure of a lien of the certain real property described in the complaint for the sum of \$926.67 for labor performed on said property by the plaintiff. The court sustained a demurrer to the complaint on the general ground, and this appeal is by the plaintiff from the judgment entered after and upon the order sustaining said demurrer.

The labor performed by the plaintiff, and for which he claims the right to a lien upon the property in question as security for the payment therefor, consisted of the plowing of several tracts of land, theretofore in a wild and uncultivated state, and which belonged to the defendant Dunbar; the contract for doing the work having been made by the defendant John D. Shriver, alleged to be the agent of Dunbar, with one M. S. Foss, who in turn subcontracted with the plaintiff to perform the work. The complaint proceeds upon the theory that the right to a lien for the work of plowing said land is authorized by section 1191 of the Code of Civil Procedure. Said section thus provides:

"Any person who, at the request of the owner of any lot or tract of land, grades, fills in, or otherwise improves the same, or the street, highway, or sidewalk in front of or adjoining the same, or constructs any areas, or vaults, or cellars, or rooms, under said sidewalks, or makes any improvements in connection therewith, has a lien upon said lot or tract of land for his work done and materials furnished; provided, that in cases where the improvements made or work done is subject to acceptance by any municipal board or officer, the time for filing claims of lien shall not commence to run until after such acceptance shall have been made."

It is conceded, and in fact an examination of the several sections of the lien law, as embraced in the Code of Civil Procedure, will show to be true, that if a lien is at all permissible for labor performed in plowing agricultural land, whether for the first time or otherwise, the authority therefor must be

found in the above section. It is, however, contended by the respondents that said section cannot properly be so construed as to educe therefrom authority for a lien for labor so bestowed. It is further likewise contended that, even if it were true that a lien would lie in such a case, still the lien in this case cannot be allowed for two reasons, viz.: (1) That the section expressly declares and undoubtedly intends that the work or labor for which a lien is allowed under its terms must be done in person by the party himself taking the contract to do the work; (2) that the party doing the work must be the party directly employed by the owner of the land to perform the labor. In other words, it is the contention that a lien will not lie under said section, either where the party employed to perform the labor has not himself done all the work in person or where the work or labor is done by one who is not directly employed by the owner to perform.

We are, however, of the opinion that a lien will not lie for the performance of the work of plowing or breaking of lands used or to be used for agricultural or like purposes, whether such plowing or breaking was or was not the initial work of that character done upon the lands, and it will therefore not be necessary to consider the two points last above stated, although, in passing, we are not reluctant to say that we are not impressed with the argument offered in support of either of the propositions. We have been referred to no California cases, and, after some independent investigation, have found none, in which the point now to be considered was directly presented and decided. The question, so far as we are advised to the contrary, is entirely new in this state. There is, however, a case from the Iowa Supreme Court, to which we will hereafter refer, which has a direct bearing upon the question involved herein and holds contrary to the position of the appellant.

[1] The counsel for the respondents declare, in one of their briefs, that the right of mechanics, materialmen, artisans and laborers of every class to a lien upon property upon which they have bestowed labor or for which they have furnished materials for the value of such labor done and materials furnished, is strictly statutory. This is not altogether true. The source of that right is in our organic law. Const. art. 20, § 15. By that provision of the Constitution the Legislature is enjoined to provide by law "for the speedy and efficient enforcement of such liens." Of course, the right to compensation for such labor and materials arises out of contract, and the Constitution merely selects such classes of contracts as those for the enforcement of which an equitable remedy may be invoked. When the Legislature es-

tablished the means or procedure whereby the remedy vouchsafed in such cases by the Constitution might be brought into action, it did all that it was authorized to do by the Constitution, and we presume that no one will say that the right to the remedy expressly authorized by the organic law can be frittered away by any legislative action or enactment. These observations, however, may be rather academic to the discussion pertinent to the question to be decided here. They are ventured here simply because not only counsel here, but other attorneys whose briefs in other similar cases have come under our observation, seem to be of the opinion that we must look entirely to the provisions of the mechanics' lien law as enacted by the Legislature for the right of the persons for whose benefit such law has been established to invoke the remedy by lien for the enforcement of their contracts.

[2] The only question here is, as above suggested, whether it may reasonably be held that to such work or labor as that involved in this case it was contemplated by the framers of the Constitution and the people that section 15 of article 20 should apply. It is conceded by counsel for the appellant that a lien will not lie for labor performed in plowing lands which had previously been plowed and cultivated, but he contends that where the land is plowed or broken for the first time the situation is entirely different—that is, that such work amounts to a distinct improvement of the land, while succeeding work of that character upon the land after it has once been plowed and cultivated cannot be reasonably said to be an improvement. We are unable to perceive any distinction between the two situations suggested, or at the least cannot conceive of any principle upon which the two should be differentiated in this particular. But even if there is some distinction in the matter of the effect of such work upon the land as to its improvement, yet we cannot persuade ourselves to believe that either the provision of the Constitution or section 1191 of the Code of Civil Procedure contemplates or was intended to mean that in any case farm lands should be made subject to liens for labor performed thereon.

It seems to us that there are substantial reasons why a lien should not lie for labor performed in preparing lands for use for agricultural purposes in any case. If a lien were allowable for plowing the land, by analogy a lien would be allowable for labor performed in fertilizing and cultivating and planting it to crops or in harvesting the crops or any other labor necessarily incident to the business of farming or of fruit raising or any other purpose to which large bodies of agricultural lands may be adapted and put. Thus it is readily to be seen that lands

used for farming purposes might be perennially plastered with such incumbrances, some perhaps for very small amounts, to the great annoyance of farmers and in many cases detrimental to the farming interests, and such a condition we do not think the law would allow, in view of the just solicitude that the public and the law-making power necessarily have for the prosecution of those industries which constitute the very fundamental of all industrial and material prosperity. Indeed, it is not going too far to say that to allow liens upon farming lands for labor performed thereon would not be consistent with sound public policy.

The Legislature of 1913 amended section 1191 of the Code of Civil Procedure by including therein the words "or tract of land." Previous to said amendment there was no statutory authority for allowing a lien for labor of any kind or character performed on a "tract of land," assuming as we may that that phrase was intended to bear the same meaning in the section as it is generally or colloquially understood—that is, a body of land much more extensive in area than the ordinary town or city lots, and which may be used for the usual agricultural or other rural purposes. This amendment was perhaps inspired by the fact, which is a matter of common notoriety, that in recent years large bodies of lands have been subdivided into smaller tracts and sold to and occupied by tenants who conduct thereon farming or fruit raising on a comparatively limited scale, and that many of these smaller tracts are within the suburban zones of towns and cities and which appropriately demand improvements similar to those which characterize city property, such, for instance, as the maintenance of sidewalks and like conveniences, etc. For work bestowed upon or materials furnished for these or upon or for any of the buildings or other structures upon the land a lien would undoubtedly be permissible.

We think that this must be the correct conclusion as to the motive or purpose prompting the amendment. At any rate, it seems to us that the language of the section itself, in the very nature of the case, negatives the idea that the work of plowing or any other work necessary to the cultivation of farm lands was intended to fall within the purview of its terms. It will be observed that it provides that any person who grades, fills in, or otherwise improves any lot or tract of land or—

"the street, highway, or sidewalk in front of or adjoining the same, or constructs any areas, or vaults, or cellars, or rooms, under said sidewalks, or makes any improvements in connection therewith, has a lien upon said lot or tract of land for his work done and materials furnished."

Construing that section by the light of the rule of construction, *ejusdem generis*, as thus it should be viewed, it seems to us to be clear that the phrase, "or makes any improvements in connection therewith," must necessarily refer to work or labor of like character to that precedently enumerated; that is to say, that the improvements contemplated by said phrase must in a general way be similar to those described in the section immediately preceding said phrase.

The conclusion at which we have arrived in this case is sustained by the case of *Brown v. Wyman*, 56 Iowa, 452, 9 N. W. 344, 41 Am. Rep. 117, above adverted to. In that case a lien was claimed for the labor performed in breaking or plowing virgin prairie land. The claim of lien was based upon section 2130 of the Iowa Code, which secures a lien to—

"every mechanic, or other person who shall do any labor upon, or furnish any materials, machinery or fixtures for any building, erection or other improvement upon land."

The word "land" is as comprehensive as the words "tract of land," even if not more so, inasmuch as it embraces within its usual signification any body of land, whether large or small. The court, denying that a lien would lie in such case, said:

"The breaking of the prairie is necessary to the growth of crops, but not more necessary than the annual plowing which precedes the planting of crops. If a lien should be allowed for the first breaking of the prairie, we are unable to see upon what principle it would be denied for the subsequent plowings which are indispensable to the proper cultivation of the soil. Fertilizers greatly improve land. It would probably not be claimed that a lien would be acquired for hauling manure upon land. It is not proper for us now to undertake to determine to what classes of improvements section 2130 applies. The only question which is before us is, does it apply to the plowing of the soil? We think that to give it such an application would extend it beyond what was contemplated by the Legislature, and beyond what its language, fairly construed, justifies."

The foregoing language expresses our views with reference to the provision of our Constitution and section 1191 of the Code of Civil Procedure, relating to liens. Our conclusion is that, as in the Iowa case, so it is true here, to accept the construction of section 1191 of the Code of Civil Procedure ascribed to it by appellant would be to extend the language of said section as well as that of section 15 of article 20 of the Constitution beyond what was contemplated by either or which is justified by a fair and reasonable construction thereof.

The judgment is affirmed.

We concur: FINCH, P. J.; BURNETT, J.

56 Cal. App. 644

**SWEETNAM v. BOARD OF POLICE COM'RS
OF CITY OF LOS ANGELES et al.**
(Civ. 3648.)

(District Court of Appeal, Second District, Division 2, California. Feb. 27, 1922. Hearing Denied by Supreme Court April 27, 1922.)

1. Municipal corporations ☞185(5)—Board of police commissioners of city held not authorized to remove police officers.

Under the charter of the city of Los Angeles, § 93, the board of police commissioners had no power to remove a police officer, the power to remove or suspend being conferred upon the chief of police.

2. Municipal corporations ☞185(13) — Petition for writ of review of petitioner's dismissal from police department by police commissioners held insufficient.

Petition for writ of review by police officer alleging that petitioner was dismissed from the police department by the board of police commissioners held insufficient, since the board was not vested with power to remove a police officer, and its action in so doing was not the exercise of judicial power.

3. Certiorari ☞21—Proceedings of body not judicial tribunal reviewed only when of a judicial or quasi judicial character.

Where the inferior body is not a judicial tribunal, its proceedings will be reviewed on certiorari only when its acts are of a judicial or quasi judicial character.

4. Certiorari ☞21 — Removal of officer involves exercise of judicial functions only when notice and hearing of charge was condition precedent to removal.

The removal of an officer involves the exercise of judicial functions within rule that proceedings, to be reviewable on certiorari, must be of a judicial character only when the law by which that power is conferred requires notice and a hearing of the charge as a condition precedent to the removal.

5. Municipal corporations ☞186(4)—Board of police commissioners' attempted removal of police officer inoperative as to compensation.

Since the board of police commissioners of the city of Los Angeles was not empowered to remove a police officer, its purported order of removal was inoperative, and would not deprive officer of right to receive salary.

6. Certiorari ☞1—Matter sought to be reviewed must have some semblance of vitality.

To justify the writ of certiorari, it must appear that the matter sought to be reviewed has at least some semblance of vitality; that, as long as it stands, it affects some right or interest of the party applying for the writ.

Appeal from Superior Court, Los Angeles County; John W. Shenk, Judge.

Petition for writ of review by Sidney Sweetnam against the Board of Police Commissioners of the City of Los Angeles, state of California, and others to review the ac-

tion of the defendants in dismissing petitioner from the police department. From judgment refusing to review the action of the defendants, the petitioner appeals. Affirmed.

Warren L. Williams and Seymour S. Silvertown, both of Los Angeles, for appellant.

Jess E. Stephens, City Atty., and Robert Hanley, Deputy City Atty., both of Los Angeles, for respondents.

CRAIG, J. This is an appeal from a judgment of the superior court rendered after a demurrer had been sustained to a petition for a writ of review, the petitioner having declined to amend. The facts essential to be mentioned for the purposes of this decision are as follows: The petitioner was a police officer of the city of Los Angeles, and had been acting in that capacity for a considerable period prior to June 8, 1920. The defendants and respondents are the board of police commissioners of the city of Los Angeles, and the individual members of this board. The petition alleges that on or about the 8th day of June, 1920, the petitioner was dismissed from the employ of the police department of said city of Los Angeles by the respondents and defendants herein. It then continues to recite that in making said order of dismissal the respondents acted in excess of their jurisdiction; that no charges of any nature were preferred against the petitioner; that no cause or ground was assigned as a reason for his dismissal, and that no investigation was conducted relative to his dismissal. Both sides agree that the sole question presented upon this appeal is to be determined by a construction of section 93 of the charter of the city of Los Angeles, and that we are required to determine whether or not this section of the charter provides for a quasi judicial or an executive proceeding when the board of police commissioners makes an order removing a member of the police department. It is agreed that, if such a proceeding is quasi judicial, the action of the board is subject to review, and that if it is executive in its nature, the courts have no jurisdiction to review the action of the board. However, as we view the matter, our decision must be based upon other grounds.

Section 93 of the charter provides:

"The chief of police shall have the power to suspend or remove any officer or employee in the police department; but no such suspension or removal shall be made except for cause, which shall be stated in writing and filed with said board, with certification that a copy of such statement has been served upon the person so suspended or removed personally, or by leaving a copy thereof at his last known place of residence if he cannot be found. Upon such filing the suspension or removal shall take effect. Within fifteen days after such statement shall have been filed, the said board, upon its own motion, may, or upon written application of the person so suspended or removed, filed

with said board within five days after service upon him of such statement, as above provided, shall proceed to investigate the grounds for such suspension or removal. If, in the case of a removal, the said board, after such investigation, shall find in writing that the grounds stated were insufficient, or were not sustained, and also finds in writing that the person removed is a fit and suitable person to fill the position from which he was removed, the said board shall reinstate him in such position, and if, in the case of a suspension, the board, after such investigation, shall find in writing that the grounds stated were insufficient, or were not sustained, the said board shall restore the person so suspended to duty. The order of said board with respect to such suspension or removal shall be final and conclusive."

It will be observed that the procedure provided by the foregoing section for the removal of an officer contemplates first, the making of an order for removal by the chief of police. It is definitely stated that "upon such filing the suspension or removal shall take effect," so that an officer is removed when the chief of police shall have filed with the board of police commissioners the order for removal with a statement of the cause for such action having been taken. Counsel for appellant assumes that the charter requires the board of police commissioners to make an investigation to determine whether or not the action of the chief of police was justified, and the ground of removal stated sufficient. This assumption is erroneous. Unless the officer removed makes application for an investigation it is not incumbent upon the board to investigate of their own volition. To be sure, they are permitted to do so, but there is no requirement that they shall conduct any investigation unless requested by the officer whose removal has been ordered by the chief of police. Of course there are instances where the word "may," as used in statutory enactments, has been construed to mean "must," but it is too plain to require argument that in this instance such a construction cannot be placed upon the use of the word "may" where it is provided in the section here under consideration that the board "may, or upon written application of the person so suspended or removed * * * shall proceed to investigate the grounds for such suspension or removal." The petitioner, therefore, has no cause to complain that the board of police commissioners did not see fit to hold an investigation unless he filed with said board an application asking that such an investigation be made. The filing of such an application by the petitioner is expressly made a condition precedent to his acquiring a right to demand an investigation. It nowhere appears in the petition that such an application was filed, and hence it fails to state a cause of action, and the demurrer was properly sustained. The petition does aver that the board of police commissioners

made an order removing him, and that this was done irregularly, but it is not every order of a board constituted as this one is that is subject to review upon certiorari. The petition does not allege that the action of the board of police commissioners was preceded by any order of the chief of police.

Indeed, assuming the facts stated in the petition to be a complete recitation of the entire transaction, the action of the board cannot be said to be an attempt to exercise the authority delegated by section 93 of the charter, but rather the making of an order so entirely in excess of its jurisdiction as to be null and void upon its face. The board of police commissioners is, of course, one whose ordinary duties are ministerial rather than judicial. If it were to make an order clearly beyond its authority, as, for instance, to remove the city attorney, no one would suggest that a writ of certiorari would issue as a remedy against such usurpation of authority. Assuming the facts stated in this petition to be true, and considering these allegations only, which we must do upon this appeal the order of removal alleged to have been made must be regarded as so completely unsanctioned and beyond the authority of the board as not to suggest an attempted exercise of any authority actually belonging to the board under the charter.

Counsel assume in their briefs that the chief of police had made an order of removal of the petitioner, but this fact, if it be a fact, does not appear in the transcript and we cannot therefore properly consider it.

The judgment appealed from is affirmed.

FINLAYSON, P. J. [1-4] I concur in the judgment. It seems to be conceded by counsel that the only provisions relating to the removal of a police officer are those which are contained in section 93 of the city charter. That section nowhere vests the board of police commissioners with the power of removal. The power to remove or to suspend is conferred upon the chief of police. The board is vested with the power to review the action of that officer, but not with the power to make an order of removal or suspension. Nowhere in the petition is it alleged that petitioner was removed from office by the chief of police. The allegation is that petitioner "was dismissed from the employ of the police department * * * by the respondents and defendants herein"—the board of police commissioners of the city of

Los Angeles and the individual members thereof. If, as seems to be conceded, the sole authority for the removal of a police officer is such as may be discovered in section 93 of the city's organic law, and if, as is alleged in the petition, the board of police commissioners undertook to remove or dismiss petitioner, such action on the board's part was but a bald usurpation of power that is vested elsewhere, namely, in the chief of police. Where the inferior body is not a judicial tribunal its proceedings will be reviewed on certiorari only when its acts are of a judicial or quasi judicial character. The board of police commissioners is not a judicial body, and the mere act of removing a person from office does not necessarily involve an exercise of judicial power. Rather is it an act of the executive department. The removal of an officer involves the exercise of judicial functions only when the law by which the power is conferred requires notice and a hearing of the charge as a condition precedent to the removal. *Matter of Carter*, 141 Cal. 316, 74 Pac. 997. It follows, therefore, that, if a board that has no power whatever to make an order of removal in any event shall, nevertheless, assume to remove one from office, no judicial function is exercised or assumed, since, as I have shown, the mere act of removing one from office involves the exercise of an executive, rather than a judicial, power.

[5, 6] Moreover, if the board of police commissioners is not vested with the power to remove a police officer, but only with the power to review the action of the chief of police after the latter has removed or suspended the officer, then the board's purported order of removal, being wholly without force determines no right. It is in legal contemplation as inoperative as though it had never been promulgated. It would not stand between petitioner and his right to receive the salary that goes with the office from which, if the allegations of the petition be true, the defendants ineffectively endeavored to remove him. To justify the allowance of a writ of certiorari it must appear that the matter sought to be reviewed has at least some semblance of vitality; that, as long as it stands, it affects some right or interest of the party applying for the writ. *Clay v. Civil Service Commission*, 89 N. J. Law, 194, 98 Atl. 312.

I concur: **WORKS, J.**

58 Cal. App. 683

MESERVE v. SMITH BROS. et al.
(Civ. 3662.)

(District Court of Appeal, Second District, Division 2, California. March 1, 1922.)

1. Sales 77(2)—Dealer agreeing to sell old car and credit owner with "net balance" can make necessary repairs.

Where an automobile dealer took plaintiff's old car in exchange for a new one at a stipulated price, and agreed to sell the car for as much more than the stipulated price as possible, and credit the plaintiff with the net balance after making such sale, the term "net balance" means the balance of the proceeds after deducting the expenses incident to the sale, so that the dealer is entitled to deduct from the sale price the cost of repairs necessary to effect the sale.

[Ed. Note.—For other definitions, see Words and Phrases, Net Balance.]

2. Sales 181(11)—Evidence held to show repairs on old car made by dealer were necessary to sale.

Evidence by an experienced automobile man that a used car could not be sold unless it was first put in running order is sufficient to show that the repairs necessary to put it in such order were necessary for the sale, so that the dealer was entitled to deduct the cost of such repairs from the sale price before crediting the owner with the net balance.

3. Sales 77(1) — Dealer need account to owner only for actual not agreed value of car taken in trade.

Where an automobile dealer had agreed to sell plaintiff's old car for as much above the stipulated price as possible, and traded the car for part cash and another used car taken at an agreed valuation, the dealer need account to the plaintiff only for the actual value of the used car taken by him, not the value agreed upon for the purposes of the trade.

4. Appeal and error 760(2)—Reference to transcript for ruling on evidence objected to is insufficient.

A statement in brief that the court erred in evidence rulings, followed by a reference to the transcript, leaving to the appellate court the task of following up the reference to ascertain the nature of the question, objection, and ruling, is not adequate presentation of the points, and does not require consideration of them.

Appeal from Superior Court, Los Angeles County; Albert Lee Stephens, Judge.

Action by Shirley E. Meserve against Smith Bros. and another, doing business under the firm name of Smith Bros. Judgment for defendants, and plaintiff appeals. Affirmed.

William A. Sumner, of Los Angeles, for appellant.

Newby & Palmer, of Los Angeles, for respondents.

WORKS. J. Defendants are dealers in automobiles. Plaintiff purchased from them a "new" car, turning in his "old" car in part payment to the amount of \$1,900. The contract evidencing the deal was in writing, and contained the provision: "Old car to be sold for as much more than \$1,900 as possible, and net balance to be credited to" plaintiff. Defendants then transferred the old car to a third party for the sum of \$1,600 in cash and a used Chevrolet car, which, to quote from appellant's brief, "was taken in by defendants at the agreed figure" of \$750. Before making this deal defendants expended the sum of \$162.65 in repairs on the old car. As the sum of \$1,600, representing the cash received by defendants on the old car, and the sum of \$750, the "agreed figure" placed on the Chevrolet, together make the sum of \$2,350, plaintiff brought this action against defendants for the difference between \$1,900 and \$2,350, or \$450, basing his claim upon the ground that the old car had been sold under the writing above mentioned for \$450 more than the \$1,900 specified therein. Defendants made their defense upon the theory that, although the Chevrolet car was taken by them at the agreed price of \$750, it was worth but \$350. They also contended that their expenditure of \$162.65 on the old car was necessary to put it in condition for the market. They insisted, therefore, that the old car had not been sold for more than \$1,900, and that plaintiff could not recover. Defendants had judgment that plaintiff take nothing, and the latter appeals.

Although the points argued in the briefs are many, they really depend in the main upon the settlement of but two questions: (1) Had respondents the right to make expenditures on the old car in order to render it fit for sale or exchange? (2) Can appellant insist that as between him and respondents the Chevrolet car shall stand as the equivalent of \$750?

[1] We take these questions up in their order. It is to be remembered that the contract between the parties provided that the old car was to sold for as much more than \$1,900 as possible, the "net balance" to be credited to appellant. The expression "net balance" is not difficult to understand. Moreover, it has been defined in terms which fit sufficiently the present case. The phrase was employed in a telegram concerning a sale of stocks, the wire reading, in part:

"We will give you net balance tomorrow in Philadelphia."

It was said by the court before which the transaction came for consideration:

"As applied to the proceeds of the sale of stock, the phrase 'net balance' means, in commercial usage, the balance of the proceeds after deducting the expenses incident to the sale." *Evans v. Waln*, 71 Pa. 69.

[2] Taking this just definition for our guide, we are to determine whether respondents' expenditures in repair of the old car were expenses incident to its sale. As a preliminary to the settlement of this question, it is to be observed that the interests of the parties to be subserved by a sale of the car were identical, at least to the extent that a sale for no less than \$1,900 was desirable. The parties must have contracted with that idea in mind. The particular interest of appellant was that the car should sell for more than \$1,900, and he must have contracted with that idea in mind. All this in effect means that, if the car was in such condition that without repair it would not sell for \$1,900, considering the common interest of the parties, nor for more than that amount, considering the particular interest of appellant, such repairs as would be necessary to make it sell at the highest possible price must have been contemplated by appellant when the term "net balance" was inserted in the contract. Therefore are the repairs which were actually made upon the car to be considered as "necessary" repairs within the terms of the contract as thus understood? This question must be answered from the evidence, or, rather, from any part of the evidence which operates as a support to the finding of the trial court that the repairs were necessary, for the court did so find. On this subject a witness for respondents was asked:

"In your experience as an automobile man, were those repairs necessary in order to sell this Peerless roadster [the old car]?"

His answer was:

"The car had no worth unless it was in good running shape, so the repairs had to be made upon it to get any amount of money out of it."

Upon this evidence we have no hesitation in asserting that the finding of the trial court is supported, that the repairs were necessary, and that the net balance in favor of appellant which was to result from the sale could be ascertained only after a deduction of the cost of the repairs.

[3] The second question is even easier of solution. Appellant makes no contention that the old car should have been disposed of for cash. He seems entirely satisfied with the fact that it went for \$1,600 cash and the Chevrolet car, if he be permitted to insist that as between him and respondents this latter piece of road rolling stock should stand at \$750, although, as we have already observed, the assertion of his own brief is to the effect, only, that the Chevrolet was taken in by respondents at the "agreed figure" of \$750. This agreed figure, it is to be understood, of course, was agreed between respondents and the taker of the old car, at the same time the one who bade adieu to the Chevrolet. What they may have agreed to

as the value of the latter car is of no concern to appellant. It is obvious to us that as to him the question is as to the actual worth of the Chevrolet. There was ample evidence to support the finding of the trial court that the car was worth but \$350. We are convinced, then, that appellant can consider it only as the equivalent of that amount, not of \$750.

[4] Appellant asserts that the trial court erred in respect to various rulings admitting and rejecting evidence, but we assume from certain remarks in the brief that all the questions thus attempted to be raised are disposed of by what we have said above. If they are not, however, we need not be concerned about them for the reason that they are not adequately presented. Counsel merely states in each instance that the court erred, and follows the statement with a reference to the transcript, leaving us to follow up the reference and thus ascertain the nature of question, objection, and ruling. In a somewhat similar situation we said:

"Such a casual presentation of points, if followed up, would impose upon us a labor which is within the peculiar province of counsel, and which does not come within the range of our duty. We are not called upon to consider points so presented." *People v. Zarate* (Cal. App.) 201 Pac. 955.

Judgment affirmed.

We concur: FINLAYSON, P. J.; CRAIG, J.

(56 Cal. App. 679)

A. MEISTER & SONS CO. v. HARRISON et al. (Civ. 4115.)

(District Court of Appeal, First District, Division 2, California. March 1, 1922. Hearing Denied by Supreme Court April 27, 1922.)

1. Sales $\S$ 480(5)—Seller who reserved title could recover full value against third parties who took possession of goods from buyers with notice of seller's rights.

Where seller reserved title with the right to retain installments paid in event of buyer's default, the seller, in action for possession or their value against third parties who with notice of seller's rights took possession after buyer's default, could recover the full value of the goods, without having deducted therefrom the amount the buyer had paid, under Code Civ. Proc. $\S$ 667.

2. Subrogation $\S$ 1—Sellers of trucks, who took possession thereof on buyer's default, not subrogated to buyer's rights against seller of motor bus bodies attached.

Where sellers of trucks took possession thereof after motor bus bodies had been attached, on buyer's default but the seller of the bus bodies, who had reserved title, was entitled to the bodies because of buyer's default in payment of installment upon purchase price, the

sellers of the trucks were not entitled to be subrogated to the rights of the buyer against such seller of motor bus bodies.

3. Subrogation —22—Sellers of trucks not subrogated to the rights of buyer against seller of motor bus bodies on default in payment of price, in absence of tender to seller of bodies of the balance due.

In action for conversion by seller of motor bus bodies, who had reserved title and was entitled to possession because of buyer's default against defendants who had sold buyer trucks and had taken possession because of buyer's default, the defendants, not having tendered the balance due upon the purchase price of the bodies to the plaintiff, were not entitled to be subrogated to the rights of buyer against plaintiff, even if they would otherwise have been entitled thereto.

4. Sales —480(5)—Seller of automobile bodies, suing sellers of trucks, who had retaken possession with bodies attached, for possession or the value, held not chargeable with expense incurred by defendants in recovering the automobile busses.

Seller of motor bus bodies, who had reserved title and was entitled to possession because of buyer's default, suing sellers of trucks, who had retaken possession of the trucks, with bodies attached, on buyer's default, held not chargeable with a part of the expense incurred by defendants in recovering the automobile busses, in the absence of evidence that plaintiff would have been put to expense in recovering its bodies.

5. Sales —480(2)—That defendants lost money in transaction despite appropriation of plaintiff's property no defense.

In an action for possession or the value of motor bus bodies, brought by the seller, who had reserved title and was entitled to possession because of buyer's default, against defendants, who had sold buyer the trucks and had retaken possession of the trucks with bodies attached because of buyer's default, it was no defense that defendants had lost money on their contract with the buyer, despite the appropriation of plaintiff's property.

Appeal from Superior Court, City and County of San Francisco; George H. Cabaniss, Judge.

Action by A. Meister & Sons Company, a corporation, against H. O. Harrison and J. W. McAlister, copartners, doing business under the name and style of the Harrison Motor Car Company. Judgment for plaintiff, and defendants appeal. Affirmed.

Redman & Alexander, of San Francisco, for appellants.

Charles B. Harris, of San Francisco, for respondent.

LANGDON, P. J. This is an appeal by the defendants from a judgment against them for \$2,500 in an action brought by plaintiff to recover two 23-passenger motor bus bodies, or their value, alleged to be \$3,-

000. The trial court found that the plaintiff was the owner of said motor bus bodies, and that the defendant had, on June 13, 1918, wrongfully taken possession of them; that plaintiff had demanded their return, which demand was refused; that plaintiff was entitled to be restored to the possession of said motor bus bodies, or, in the event that defendants were unable to deliver them to plaintiff, plaintiff was entitled to judgment for \$2,500, said sum being the value of said articles of personal property. Judgment was given accordingly.

The facts are: Defendants, doing business in San Francisco, sold to one Hark, a resident of Reno, Nev., two Republic motor trucks. Hark secured from plaintiff the motor bus bodies in controversy, and had them attached to the trucks. In doing this, some minor alterations were made in the trucks, such as changing the location of the gasoline tanks, etc. The motor bus bodies were secured by Hark under a lease contract with Meister & Sons Company. This contract recited the receipt of \$1,000 by Meister & Sons Company, and provided for monthly payments of \$166.67 until the sum of \$3,000 should be paid by Hark. It also recited that no agreement of sale was to be implied until the payment of all the installments under the contract, and that upon default in any payment, Meister & Sons Company might, at its option, and without notice, terminate the agreement, and with or without legal process take and retain said automobiles wherever situated, and in the event of such termination of said contract all money paid by Hark prior to such default should be compensation for the use of said automobiles prior to such default. Hark defaulted in the first payment due under the contract. Mr. Meister, the vice president and superintendent of the plaintiff company, then directed his attorney to take possession of the motor bus bodies. However, plaintiff had not recovered possession of the bodies in July, 1918, when defendants, through their attorneys, sought to recover possession of their trucks because of the default of Hark in his payments under his contract with them. Defendants took possession, not only of their trucks, but of the motor bus bodies attached thereto, and had the automobile busses sent from Reno, Nev., to San Francisco, Cal. Plaintiff demanded its bus bodies, and offered to remove the same from the trucks and to place the trucks in the condition in which they were before the attachment of the bodies, but defendants refused to surrender the bodies and sold them on the trucks.

[1] Appellant complains that the judgment rendered is inequitable because the plaintiff has already been paid \$1,000 on its bodies, which were to be sold for \$3,000, and that

by this judgment of \$2,500 against the defendant, the plaintiff has gained \$500 more than it would have had if Hark had completed his contract. We cannot see that this matter has any relevancy in this action. The plaintiff had protected itself under its contract so that it was possible, in the event of Hark's default, for plaintiff to realize much more for the trucks than the price at which they were to be sold to Hark. For instance, if Hark had paid \$2,500 of the \$3,000 purchase price of the bodies and had then defaulted, plaintiff might have recovered possession of the bodies, and might, conceivably, have sold them for \$2,000, or some other sum larger than the amount unpaid on the contract. Defendants are unconcerned with this phase of the matter. They had no right to sell this property, which belonged to plaintiff. They had notice of plaintiff's rights, and if they chose to sell property belonging to another, they must respond to the owner for its value, regardless of the price at which they may choose to sell it. Section 667, Code Civ. Proc.; *Pelberg v. Gorham*, 23 Cal. 349, 352; *Faulkner v. First National Bank*, 130 Cal. 258, 62 Pac. 463; *De Thomas v. Witherby*, 61 Cal. 92, 97, 44 Am. Rep. 542; *Burke v. Koch*, 75 Cal. 356, 17 Pac. 228; *Hisler v. Carr*, 34 Cal. 644, 645; *Phillips v. Sutherland*, 2 Cal. Unrep. 241, 2 Pac. 32.

[2, 3] We think there is no merit in the contention that defendants should be subrogated to the rights of the vendee Hark. The defendants were not even attaching creditors. But even if we were to concede that the defendants might have acquired the rights of Hark in his contract with the plaintiff by tendering the balance due upon the purchase price of the bodies to the vendor, defendants would be in no better position; for they made no tender or offer to pay the money due by Hark under the contract, but denied plaintiff's right to the bodies, and, as in the cases of *Morris v. Allen*, 17 Cal. App. 684, 121 Pac. 690, and *King v. Cline*, (Cal. App.) 194 Pac. 290, defendants would be without right to subrogation for this reason alone, if for no other.

[4] As to the claim that the plaintiff should have been charged with a part of the expense incurred by defendants in recovering the automobile busses, we see no merit in this point. There is no evidence that the plaintiff would have been put to any expense in recovering its bodies. Its contract provided that upon default it might retake the bodies with or without legal process. If defendants had not taken possession of the bodies and sent them to San Francisco, without the consent of plaintiff, Hark might have surrendered them willingly to plaintiff. The record is without proof on this question, and defendants were without authority to

recover the bodies for the plaintiff, and were mere volunteers even though we were to take the position, contrary to the facts, that the recovery was for the benefit of plaintiff. Defendant, therefore, cannot recover for any expense incurred in securing possession of its trucks with plaintiff's bus bodies attached thereto. *Hisler v. Carr*, 34 Cal. 644. The bodies were attached to the trucks in a manner which permitted an easy separation, without damage to the trucks. Plaintiff was entitled to the possession of its property upon Hark's default, and the defendants were without right in their entire dealings with the plaintiff's property. *De Thomas v. Witherby*, supra, 61 Cal. 98, 44 Am. Rep. 542.

[5] Appellants contend that they should have been permitted to show that they lost money on their contract with Hark for the sale of the trucks, despite the appropriation of plaintiff's property. That is entirely immaterial in this action; defendants may not recoup their losses out of any possible advantage which plaintiff may have gained by reason of having made a more advantageous contract with Hark than defendants made.

The court has found that \$2,500 was the value of the bodies taken by defendants. This valuation is based upon testimony in the record, and there is no testimony showing a lesser value.

The judgment is affirmed.

We concur: NOURSE, J.; STURTEVANT, J.

56 Cal. App. 689

HATHAWAY v. MCGILLYCUDDY. (Civ. 4121.)

(District Court of Appeal, First District, Division 2, California. March 3, 1921.)

1. Principal and agent ⇨103(6)—Agent to sell stock has no authority to agree to give additional stock.

An agent authorized to sell plaintiff's corporate stock to defendant has no implied authority to make a supplemental agreement with defendant that plaintiff would give to defendant other stock in addition to that sold.

2. Gifts ⇨49(1)—Evidence contradicting defendant's testimony as to agreement with deceased agent held to sustain finding for plaintiff.

Defendant's testimony that plaintiff's agent, dead at the time of the trial, had agreed that plaintiff would give to defendant corporate stock in addition to that sold, and that the stock delivered was that given, not that sold, is contradicted by evidence that, when the note for the stock matured, plaintiff claimed only an agreement for extension of the time, and that the agent wrote plaintiff that he knew no reason why plaintiff should not then pay

the note, so that the court's finding against the agreement for gift was sustained by evidence.

3. Evidence 258(2)—Evidence held to sustain finding deceased agent represented both parties.

Evidence that the agent through whom plaintiff sold stock to defendant for which the notes in suit were given was a stockholder in the corporation, and that he made the sale to induce defendant to remain as manager of the corporation, and persuaded the plaintiff to sell the stock for that purpose against the plaintiff's desires, *held* to sustain the trial court's conclusion that the agent represented both parties, so that communications between the plaintiff and the agent were admissible against defendant.

4. Appeal and error 1050(1)—Improper admission of cumulative evidence does not compel reversal.

The admission of evidence, even if erroneous, does not compel a reversal of the judgment where such evidence was only cumulative of other evidence.

5. Costs 238(3)—Appellee offering to reduce judgment by improper amount can recover costs notwithstanding modification.

Where the judgment for plaintiff inadvertently included an allowance of interest to which he was not entitled, but plaintiff offered to stipulate that the judgment might be reduced by that amount, to which stipulation defendant refused consent, because it might prejudice his rights on appeal, plaintiff can recover costs on the appeal notwithstanding the modification of his judgment by eliminating that item.

Appeal from Superior Court, Alameda County; A. F. St. Sure, Judge.

Action by W. L. Hathaway against V. T. McGillycuddy, to recover on promissory notes. Judgment for plaintiff, and defendant appeals. Affirmed.

James A. Ballentine and Leo J. McEnerney, both of San Francisco, for appellant.

John Douglas Short, of Fresno, and F. Eldred Boland, of San Francisco, for respondent.

LANGDON, P. J. This is an appeal by the defendant from a judgment against him for \$5,000 and interest, upon two promissory notes.

Defendant's answer admits the execution of the notes, but alleges that they were delivered to the defendant without the authority of the maker and contrary to his express direction; that defendant has never received anything of value for said notes, and that they were given without consideration. Defendant also filed a "supplemental answer" in which he alleged that the notes were made and delivered by the defendant to be delivered to the plaintiff as and for the purchase price of 15,000 shares of the Los Verjels Land & Water Company; that the certi-

ates of stock claimed to have been delivered by plaintiff as a consideration therefor were delivered on or about June 18, 1913; that, at the time of the delivery of said stock to the defendant, the plaintiff did not own the said shares, but the said corporation was the true owner thereof; that the plaintiff was one of the promoters and organizers of the said corporation, and caused the said 15,000 shares of stock to be issued to himself, with other shares, as a secret profit to himself, without giving any consideration therefor; that since the filing of the amended answer the said corporation rescinded the said issue of said shares because of said fraudulent acts of plaintiff; that the defendant has received no consideration or thing of value for the promissory notes.

After a very thorough examination into all the facts surrounding the entire transaction by means of the testimony of numerous witnesses and the letters written by various parties connected with the matter, the trial court found: That the defendant executed and delivered the notes to plaintiff for a valuable consideration; that at the time of the commencement of the action the plaintiff was the owner and holder thereof; that no part of the principal or interest due upon said notes has been paid; that the plaintiff gave to the defendant valuable and ample consideration for each of said notes, and received possession of the same upon giving such consideration; that said notes were executed and delivered to plaintiff as and for the purchase price of certain shares of the capital stock of Los Verjels Land & Water Company; that defendant received such stock and still holds the same as and for the consideration of said notes. It was also found that, at the time of the delivery of the stock by plaintiff to defendant, the Los Verjels Land & Water Company was not the owner of said stock, and that the plaintiff was the owner and holder thereof; that after the commencement of this action the Los Verjels Land & Water Company attempted to rescind the issue of certain shares of stock issued to plaintiff, but that said company did not rescind said contract; that no shares of stock were ever issued to plaintiff by reason of any fraud on his part, or without any consideration moving from him.

The principal attack made by appellant is that the findings relating to the delivery of the notes, the consideration therefor, and the delivery to defendant of the stock for which they were given, are not supported by the evidence. We have carefully read the reporter's transcript, and find that this contention is entirely without merit, in view of the rule that this court will not interfere with findings made upon conflicting evidence. The testimony of the plaintiff, the letters between the plaintiff and defendant, the letters of defendant to the bank, and to one to

whom the notes had been intrusted for collection, all support the conclusions of the trial court.

It is admitted that defendant agreed to purchase from plaintiff 15,000 shares of stock in said company for \$5,000, to be paid for with his notes. The negotiations were carried on principally through one Kelly, although there also appears in the record direct correspondence between the parties hereto covering the transaction, and they discussed the matter personally on at least one occasion.

However, defendant asserts that at the time he made this agreement with Kelly, who was representing the plaintiff, he and Kelly also made another agreement. In order to understand the contention regarding the second agreement, it is necessary to state that it had been agreed among the parties interested that the defendant was to assume the management of the Los Verjels Land & Water Company, in which he was one of the original stockholders; that he was to receive a monthly salary for such services, payable in stock of the company. Defendant testified that, as an additional inducement to him to assume the management of this company, several of the stockholders were to donate various amounts of stock, amounting in all to 20,000 shares, which were to be turned over to the defendant without any consideration; that of this 20,000 shares to be so given to defendant Kelly represented and agreed that the plaintiff, Hathaway, would contribute 10,000 shares. This constituted the alleged second agreement. Defendant maintains that he executed and delivered the notes in controversy to Kelly, to be delivered to plaintiff when plaintiff should have delivered the 15,000 shares of stock which he had agreed to sell defendant, and not before; that Kelly took the notes upon that understanding. He admits that Kelly delivered to him at the time of receiving the notes for Hathaway certificates for 15,000 shares of stock, which certificates were shown to have belonged to Hathaway. These 15,000 shares were found by the court to have been delivered in execution of the agreement of sale, and as the consideration for the execution and delivery of the notes. Defendant contends that they were delivered in partial execution of said alleged second agreement between himself and Kelly by which he was to get 20,000 shares of stock as a bonus, and that the remaining 5,000 shares of this bonus stock were delivered to him directly by Turner, another stockholder who contributed the same, and that the 15,000 shares to be delivered by plaintiff under the agreement of sale and for which the notes were executed were never delivered at all.

Mr. Kelly, who negotiated the sale of the stock, died before the commencement of this action. Mr. Hathaway, the plaintiff, denied absolutely that he ever agreed to give de-

fendant any stock, or that he authorized any one to make such an agreement for him. He stated that the only agreement between himself and the defendant was the agreement for a sale; that the first understanding between the parties was for a sale of 12,500 shares for \$5,000, as shown by the correspondence between them; that later, upon the solicitation of Kelly, and the representation that Kelly and other stockholders, personally, would have to give 2,500 additional shares to defendant to satisfy him and induce him to act as manager of the company, Hathaway reluctantly consented to give the additional 2,500 shares without additional consideration in order to prevent his associates from parting with their more meager holdings. This resulted in the transfer of 15,000 shares instead of 12,500, in consideration of the notes.

[1] But plaintiff's positive denial of the agreement to give his stock to McGillycuddy without consideration is met by appellant with this argument: Defendant has testified that Kelly made the two agreements with him, and plaintiff was not present at the interviews, and cannot contradict this; Kelly is dead and cannot speak with reference to the matter. The testimony of defendant, therefore, stands uncontradicted that Kelly made these two agreements with defendant on behalf of Hathaway, and that, on behalf of Hathaway, Kelly executed only the agreement for a gift, and not the one for a sale. Regardless of plaintiff's testimony that he never made this second agreement, Kelly was his agent, and, it appearing without contradiction in the record that he made this agreement for a gift as the representative of plaintiff, plaintiff is bound thereby. The answer to this contention seems obvious. In the first place, if we concede that Kelly was the agent for Hathaway in the matter of the sale of this stock to McGillycuddy, this does not embrace, by implication, a further agency to make agreements for a gift of such stock. By no possible method of reasoning can an agency for the sale of stock be construed to include authority to give the same away. There is nothing in the record that could fasten upon Hathaway, by the law of either express or implied agency, any agreement that Kelly might have made with defendant—conceding that he did make one—to give away the property of Hathaway.

[2] But, even if this were not true, the finding of the trial court would be conclusive against defendant as to the making of this gift agreement, because McGillycuddy's testimony regarding this bonus stock agreement made with Kelly does not stand absolutely uncontradicted in the record, as he contends, even though Kelly was dead at the time of the trial. The contradiction of defendant's testimony appears from the following facts: After the notes involved here became due, they were sent to a bank for col-

lection. The bank wrote McGillicuddy, demanding payment. McGillicuddy did not state then that he had received no consideration for the notes, nor that the stock for which they were given had not been delivered. On the contrary, he wrote the bank on June 13, 1914, stating that he could not make payment at that time; that the notes had been given under a verbal agreement with Kelly, as agent for Hathaway; that the time of payment was not important, and that ample time would be given in extensions, etc.; that a demand for payment was not in keeping with said agreement. Kelly was alive at this time, and on May 22, 1914, McGillicuddy wrote to him as follows:

"I will be unable to meet this note at the time indicated. About a year ago, you, acting as agent for Mr. Hathaway, entered into a certain business arrangement with me. Certain notes were given by me, and of the inducements used by you to secure said notes was a promise on behalf of Mr. Hathaway, which was virtually an agreement 'that time of payment of the notes was not important, and that the time would be extended.' Some time prior Mr. Hathaway, in conversation with me, stated the same. I am not asking for an accommodation, but expect that the agreement entered into will be lived up to."

We then find in the record a letter from Mr. Kelly to McGillicuddy which contradicts, by implication at least, the defendant's testimony regarding the gift agreement between Hathaway and himself, through Kelly's agency. For in this letter Kelly disclaims knowledge of any agreement or anything which would justify the refusal to pay these notes. This letter is dated May 30, 1914, and reads as follows:

"I have read with some surprise copy of letter which you recently addressed to the Bank of California regarding the note for \$2,500 due June 15, 1914, drawn in Mr. Hathaway's favor wherein you state that I can tell them why you cannot take up the note when due, and this is to advise you that I know of no reason why you should not, and every reason why you should, particularly as you stated to me most positively that you would take up these notes when they were due, and I so informed Mr. Hathaway."

In view of the fact that McGillicuddy testified that Kelly knew that the stock for the notes had not been delivered and that the stock actually delivered was delivered in execution of the gift agreement, this letter of Kelly's furnishes a flat contradiction of his testimony.

Our discussion of the evidence is not intended to be exhaustive. It is our intention merely to point out that there was ample justification for the finding of the trial court that the stock was delivered to defendant by Kelly as agent of Hathaway in consideration of the execution and delivery of the notes by defendant. In view of this situation, the

elaborate discussion by appellant of the evidence appearing in the record which supports defendant's contention regarding this matter is quite immaterial.

[3] The next objection of appellant is to the admission of certain testimony of Mr. Hathaway, the plaintiff. This had reference to conversations between Hathaway and Kelly. Hathaway testified that, after he had written the first letter to McGillicuddy offering him the stock for \$5,000, and after all arrangements had been made, he sent Kelly with the two notes to McGillicuddy for signatures; that in an hour or so Kelly returned and stated that McGillicuddy had said that he would not sign the notes until he got the stock. There was other testimony regarding the conversations between Kelly and Hathaway, and statements made by Kelly as to what McGillicuddy had said and done. Appellant contends that this testimony was hearsay, and was improperly admitted, as it was not binding upon McGillicuddy. Defendant introduced similar hearsay testimony by McGillicuddy regarding statements made by Kelly to him with reference to Hathaway's statements and actions concerning the transaction. But appellant seeks to differentiate the two cases by contending that, as to Hathaway, Kelly was an agent, and therefore his statements were binding upon Hathaway; but, as to McGillicuddy, he was not an agent, and could not bind him by any statements. The situation here was peculiar. All three men were interested in the success of the company. They were all original stockholders, and apparently working earnestly to achieve success. Kelly appears to have been actuated as much, if not more, by a desire to satisfy McGillicuddy, and keep him as the manager of the company, than by any desire or duty to sell stock belonging to Hathaway. Indeed, Hathaway stated very positively that he did not desire to sell his stock, and only agreed to do so upon the repeated solicitations of Kelly and upon his representations that McGillicuddy would not be satisfied to work with the company unless he owned more of its stock. The full circumstances concerning Kelly's activities were disclosed to both parties. Under such a state of facts, he might well be the agent of both; indeed, a reading of the entire record induces such an opinion. The trial court evidently so concluded, and upon this theory admitted the testimony of which complaint is made. We cannot say that such a conclusion was unwarranted, and, consequently, we do not think it is one with which we are called upon to interfere.

[4] However, though we were to concede that the testimony was improperly admitted against McGillicuddy, we should still be bound to say that we do not consider it prejudicial under all the facts disclosed by the record. At the most, it was but cumulative evidence of matters upon which the record

contains some other evidence. It would not therefore compel a reversal of this judgment.

[5] The only other point discussed by appellant is with reference to the allowance of interest. The notes provide on their face that they are to bear interest from "due date," which was June 15, 1914. They are dated June 15, 1913. The trial court in its judgment, by an inadvertence, allowed interest from the date of the notes. This makes the judgment excessive to the extent of \$300. Respondent does not oppose appellant's contention upon this matter, but asserts that upon discovery of the error he offered to enter into a stipulation with defendant to reduce the judgment by \$300. Appellant admits this, and states that he declined to enter into such stipulation fearing to prejudice his rights upon appeal. These matters are recited herein merely as affecting the question of allowance of costs upon appeal in modifying the judgment.

The judgment appealed from is modified by reducing the interest allowed by the sum of \$300, so that the same will read, "two thousand dollars as interest from the 15th day of June, 1914." In all other respects the judgment is affirmed; the respondent to recover his costs upon this appeal.

We concur: STURTEVANT, J.; NOURSE, J.

56 Cal. App. 668

WILBUR v. GRIFFINS. (Civ. 3948.)

(District Court of Appeal, First District, Division 1, California. Feb. 28, 1922. Hearing Denied by Supreme Court April 27, 1922.)

1. Interest — 14.8 per cent. interest held not so excessive as to constitute transaction unconscionable one.

The charging of interest on \$60,000 loan at the rate of 14.8 per cent. per annum, prior to the repeal of Civ. Code, § 1918, entitling the parties to agree in writing for the payment of any rate of interest, held not so excessive as to constitute the transaction an unconscionable one.

2. Bills and notes — 92(4) — Giving lender bonus of 14.8 per cent. of loan held based on consideration.

Note giving lender bonus of 14.8 per cent., where only security was corporate stock in a land company, which would not be accepted as security by banks, held based on a consideration.

3. Bills and notes — 92(4) — Inadequacy of consideration no defense.

Under Civ. Code, § 3391, a note for which there is a consideration must be held valid in the absence of fraud and undue influence, though the consideration is inadequate, since it is not necessary that the consideration of a note shall equal in pecuniary value the obligation.

4. Corporations — 123(10) — Evidence held not to show that pledgee of stock in requiring a bonus of 14.8 per cent. of loan took an unfair advantage of pledgor.

In action to enjoin the sale of corporate stock pledged for a loan, evidence held not to show that defendant, in requiring a bonus of 14.8 per cent. for making the loan, took an unfair advantage of the plaintiff.

5. Bills and notes — 114 — Additional loan held a sufficient consideration for ratification of previous loan.

Where maker obtained additional loan from payee and executed a new note for amount thereof, and amount previously borrowed, the additional loan was a sufficient consideration for the ratification of the original loan.

6. Bills and notes — 114 — Forbearance to sue a sufficient consideration for ratification.

Forbearance to sue held a sufficient consideration for the ratification of note.

7. Corporations — 123(10) — Complaint seeking to enjoin sale of corporate stock pledged for a loan held insufficient for failure to plead tender of amount due.

In an action to enjoin sale of corporate stock pledged for a loan, complaint held insufficient for failure to plead tender of amount due, notwithstanding defendant's refusal during the trial to accept plaintiff's offer to pay amount less than claimed by defendant to be due.

8. Corporations — 123(10) — Pledgor required to tender amount due as condition to action to enjoin sale of pledged stock notwithstanding dispute as to amount due.

Pledgor, as a condition precedent to an action to enjoin sale of corporate stock pledged for a loan, was required to tender amount due notwithstanding dispute as to amount.

Appeal from Superior Court, City and County of San Francisco; George E. Crothers, Judge.

Action by Edith M. Wilbur against B. H. Griffins. Judgment for plaintiff, and defendant appeals. Affirmed.

C. W. Eastin and H. Slikerman, both of San Francisco, for appellant.

John S. Partridge and Karl C. Partridge, both of San Francisco, for respondent.

KNIGHT, Justice pro tem. This is a suit in equity, brought for the primary purpose of enjoining the sale of corporate stock pledged as security for a loan. Judgment was awarded to defendant, and plaintiff appeals. The complaint is a lengthy one, and more than half of it is devoted to the allegation of matters which in our opinion are utterly foreign to the real controversy between the parties. The record on appeal is also voluminous, consisting of some 1,960 typewritten pages, the greater portion of which is made up of evidence received in support of those immaterial issues. Stripped of extrinsic mat-

ters, the facts of the case may be stated as follows:

On September 3, 1915, plaintiff borrowed from defendant the sum of \$38,000, for which she gave him a promissory note for \$45,000. The amount of the note in excess of the amount of the loan was a bonus demanded by defendant at the rate of \$2,000 for every \$10,000 loaned. The note was secured by a pledge of 2,500 shares of the capital stock of the Harbor Center Land Company, which stock plaintiff valued at \$500,000. On November 3, 1915, plaintiff applied to defendant for an additional loan of \$12,000, which the defendant granted, and at that time defendant exacted a new note for the sum of \$60,000, which included a bonus of \$10,000 for the making of the loan. That note was made payable two years and ten months after date, with interest at 7 per cent., compounded monthly, and provided that if the interest was not paid as agreed the entire principal sum should forthwith become due and payable. The stock was again pledged as security for the second note. On February 18, 1918, the interest on the loan was fourteen months in arrears. Defendant demanded payment of the note, and thereupon plaintiff, for the purpose of obtaining an extension of time until September 3, 1918, assigned to defendant as additional security the sum of \$14,072.60, owing to her from said Harbor Center Land Company and appearing on its books. On September 26, 1918, the plaintiff, then being in arrears about one year and ten months in the payment of the interest, was served with a notice by defendant to the effect that he would, under the terms of the note and collateral agreement proceed to sell the stock so pledged. This action was then brought to enjoin the sale of the stock and for an accounting to determine the amount due. During the trial of the action and just before it concluded, to wit, on October 1, 1919, upon the joint demand of plaintiff and defendant, the Harbor Center Land Company paid its indebtedness to plaintiff, which then amounted to the sum of \$23,168.46, and defendant credited that amount as a payment on the said note, leaving a balance due on March 1, 1920, of the sum of \$51,296.90, with accruing interest from that date.

At the time of the commencement of the action, plaintiff made no pretense that the note was not due or that she had paid anything thereon, but her suit in equity was based upon these principal propositions: First, that the bonus of \$10,000 was void and may not be collected; secondly, that defendant took an undue advantage of plaintiff in obtaining the collateral agreement; third, that defendant purposely failed to collect the book account due from the Harbor Center Land Company, and thereby prevented her from obtaining part of the money to pay off

the loan; fourth, that the defendant and George S. Wall, the president of the Harbor Center Land Company, acted in collusion to prevent plaintiff from obtaining money due her from said land company, and also to prevent her from ascertaining the true condition of the company's affairs.

While in this state the precise question of the validity of a bonus as it has arisen and is being presented on this appeal has apparently never been passed upon, yet in a number of cases similar questions, such as excessive rates of interest and agreements to pay "premiums" for making loans, have been considered, and in all of those cases it has been consistently held that in the absence of fraud, duress, undue influence, or confidential relations courts of equity will not interfere with the agreements made by the parties.

Norris v. Wright, 36 Cal. App. 278, 171 Pac. 1087, was an action for damages claimed to have been sustained by plaintiff by reason of an alleged inequitable sale of plaintiff's interest in an estate. Plaintiff borrowed money from defendant at various times, for which she gave her promissory notes, secured by mortgages on her interest in the estate. The notes were executed for much larger sums than the actual amount of the loans, and besides bore interest at the rate of 2 per cent. per month. When the total amount of those notes reached the sum of \$900, defendant refused to loan more money, but purchased plaintiff's interest for \$1,500, by paying plaintiff an additional \$400, and the balance of the \$1,500 was made up of "expenses," etc., including the payment to the defendant of a commission of \$75 for making the sale to himself. The court said:

"It is perfectly apparent that the plaintiff was unfamiliar with business affairs and that the defendant imposed unconscionable burdens upon her; but it is not claimed that at the time of the transactions she was an infant, or incompetent, or that the relations between her and the defendant were confidential. No evidence was introduced to show that the defendant made any misstatements or misrepresentations of fact to the plaintiff, or that he practiced upon her any deceit or fraud."

It was held that the appellate court was powerless, as was the court of first instance, to afford plaintiff any relief.

In Boyce v. Fisk, 110 Cal. 107, 42 Pac. 473, plaintiff sought to be relieved of a mortgage given to secure a small loan bearing interest at the rate of 48 per cent. per annum, and compounded monthly. It was held that where the parties agree by a contract in writing for the payment of any rate of interest it must be allowed according to the terms of the agreement, and the fact that the bargain is a very hard and unreasonable one is not sufficient per se to induce the court of equity to interfere with the contract of the parties, for the reason that courts of

equity are as much bound by the laws of the land as courts of law.

In *McNamara v. Oakland B. & L. Ass'n*, 131 Cal. 345, 63 Pac. 670, the question arose in an action brought by plaintiff to cancel a mortgage. Among the other points urged by the plaintiff was one that while he had signed a note for \$1,200 he actually received a loan of only \$960. The balance, \$240, was retained as a "premium" by the building and loan association of which plaintiff was a member. The court held that plaintiff entered into the transaction knowingly and that he was consequently bound by the terms of his contract.

The case of *Long v. Newman*, 10 Cal. App. 430, 102 Pac. 534, was also a building and loan case in which plaintiff agreed to pay as a "premium," in addition to the interest, \$10.50 per month for a period of 120 months, or \$1,260, on a loan of \$4,200. The suit was one for an injunction and accounting and the court held that the terms of the contract were themselves clear and plain and that plaintiff was bound thereby.

[1] In states where usury laws exist the courts treat the question of bonus as additional interest by adding it to the normal rate of interest provided for in the contract. Where the sum of the normal rate of interest, plus the bonus, is above the legal rate, the contract is held to be tainted with usury; where it is below the legal rate the contract is upheld. 39 Cyc. 972; *Fowler v. Equitable Trust Co.*, 141 U. S. 384, 12 Sup. Ct. 1, 35 L. Ed. 786; *Id.*, 141 U. S. 409, 12 Sup. Ct. 7, 35 L. Ed. 793; *Id.*, 141 U. S. 411, 12 Sup. Ct. 8, 35 L. Ed. 794. If the bonus here be regarded as interest the contract must be upheld, for the reason that section 1918 of the Civil Code as it stood at the time of these transactions and up to the time of its repeal in November, 1918, provided that—

"Parties may agree in writing for the payment of any rate of interest, and it shall be allowed, according to the terms of the agreement, until the entry of judgment."

Applying the rule of computation followed in the states having usury laws to this case and adding to the rate of interest thus found additional interest on the bonus of \$10,000 at the rate of 7 per cent. per annum, and fixing the period of the loan at three years, the total rate of interest on the amount actually loaned, to wit, \$50,000, would be 14.8 per cent. per annum, providing the loan was paid at maturity. If not paid at maturity the rate of interest would, of course, be less. Bearing in mind that in *Boyce v. Fisk*, supra, the rate of interest was 48 per cent. per annum, and in *Norris v. Wright*, supra, it was 24 per cent. per annum, and that the contract in each of those cases was sustained, we are unable to say here that the rate of interest of 14.8 per cent. per annum is so excessive

as to constitute the transaction an unconscionable one.

[2] Treating the question of bonus as one of consideration we are unable to see that plaintiff's position is any stronger. The consideration for the execution of the note for \$60,000 was admittedly the loan made by the defendant of the sum of \$50,000. The stock pledged as security was issued by a company whose business was that of subdividing a large tract of land and disposing of it in smaller parcels. Defendant explained that his reason for exacting the bonus was that the security offered by plaintiff was not bankable and that it would necessarily take time to realize upon it; that is, that banks would not loan money on that character of security and therefore borrowers would be obliged to obtain loans either from private lenders, who would necessarily take the chance either of a loss or of a long delayed repayment. This assertion seems to find support in the allegations of the plaintiff, for it is there alleged that while the pledged stock has a value of \$500,000, plaintiff has been unable to obtain sufficient money thereon from others to redeem the stock, and that she verily believes that if the stock is sold by defendant either the defendant or some confidential agent of his will become the purchaser, thereby preventing plaintiff from recovering the same.

[3] There being a consideration for the note, the note must be held valid, even though the consideration is inadequate for the reason that it is not necessary that the consideration of a note shall be equal in pecuniary value to the obligation incurred, and mere inadequacy of consideration, except as a circumstance bearing upon the question of fraud or undue influence, is not a defense to the note. *Daniels on Negotiable Instruments*, § 180; *Earl v. Peck*, 64 N. Y. 598. The only effect of inadequacy of consideration is that the contract cannot be specifically enforced in equity. Section 3391, Civ. Code.

In support of the contention that the bonus is void appellant relies mainly upon two cases, neither of which in our opinion is controlling here. In *More v. Calkins*, 85 Cal. 177, 24 Pac. 729, and *Id.*, 95 Cal. 435, 30 Pac. 583, 29 Am. St. Rep. 128, the sole question involved was whether or not a mere naked promise in a deed of trust to pay the trustee the sum of \$10,000 in addition to the other sums therein agreed to be paid, was supported by a consideration. By the terms of the deed the trustee was empowered under certain conditions to sell the property conveyed to him and from the proceeds to deduct first, the reasonable expenses of the management of said lands and of the execution of the trust; secondly, to deduct the sum of \$15,000 with interest at 10 per cent. per annum, which amount the grantor had borrowed from the trustee, "together with the additional sum of \$10,000 without interest"; and, third,

to reimburse the trustee for any sums advanced by him in satisfying a mortgage with which the property was incumbered. It was claimed by the plaintiff and alleged in the complaint that said sum of \$10,000 was intended to be paid to said trustee only in the event that an option then outstanding for the purchase of the property for \$103,000 was not exercised, and that the trustee should thereafter sell the property to some other purchaser for that amount. The Supreme Court held, on the first appeal, which was an appeal from an order sustaining a demurrer to the complaint, that—

"The fact that it appears upon the face of the instrument that payment for all loans and advances, and compensation for all services, with extraordinary interest, is provided for, exclusive of the promise to pay ten thousand dollars without interest, tends to corroborate the averment that there was no consideration for the promise to pay the ten thousand dollars."

And the Supreme Court goes on to say:

"But for the presumption that there is a consideration for every promise in writing, there would appear to be no consideration for the promise to pay the ten thousand dollars without interest."

Upon the second appeal, which was after the action had been tried on the merits, the Supreme Court, after quoting the above language, held that—

"The construction thus placed upon the deed had become the law of the case, and the question of its correctness is not open to consideration upon this appeal."

And it was further held that because it had not been shown that the trustee had furnished any other money, or assumed any other obligations, or rendered any other services, than appeared from the deed itself, there was no consideration shown for the promise to pay the \$10,000. It will thus be seen that the provision for the payment of the \$10,000 was, in the agreement and by the Supreme Court treated as a transaction having no connection either with the loan of the \$15,000 or with the management of the trust property. It presumably was intended, as alleged in the complaint, to be paid as a commission to the trustee in the event he sold the property for the sum of \$103,000, which admittedly he did not do.

In the case of *Bridge v. Kedon*, 163 Cal. 493, 126 Pac. 149, 43 L. R. A. (N. S.) 404, also cited by appellant, plaintiff sued to enforce an assignment of the expectant interest of the defendant in the estate of his mother, who at the time of the assignment was living, but who died prior to the commencement of the suit. The assignment was taken to secure a loan made by plaintiff to defendant bearing interest at the rate of 2½ and 3 per cent. per month. The main question involv-

ed in the case and on the appeal was whether or not a court of equity, notwithstanding the provisions of sections 700-703 and 1045 of the Civil Code, would enforce a release by an heir of his expectancy in the estate of his ancestor after it had devolved upon him by the death of his ancestor. The trial court decreed the enforcement of the assignment, but before doing so, reduced the interest on the loan to an amount it believed was reasonable. Such power in a court of equity is unquestioned. It cannot be disputed that a court of equity has not ample power to eliminate from a contract, sought to be enforced in equity any unfair and inequitable elements contained therein, provided it may be done without making a new contract for the parties. But in this case it was not the holder of the contract, who was dissatisfied with the exercise of the court's power in this respect. It was the defendant who appealed, and his appeal was not taken upon the ground that the court had no power to reduce the interest, but upon the ground of the invalidity of the assignment itself, and that was the real question considered by the Supreme Court on appeal.

The case of *Reed v. Bernal*, 40 Cal. 628, cited by plaintiff, is not in point. The court there merely held that a penalty inserted in a promissory note for its nonpayment was void. None of the other cases cited by plaintiff are similar in their facts to the case at bar and therefore they cannot be held as controlling here.

[4] The contention made by appellant that an unfair advantage was taken of her by the defendant in this transaction, both at the time of and subsequent to the execution of the promissory note and collateral agreement, might well be dismissed with the statement that the evidence bearing upon these points shows that at best there is a mere conflict of proof. But we have, nevertheless, examined the evidence, and find that there is no merit in appellant's claim and we are entirely satisfied that the findings of the trial court are fully supported by the facts.

[5, 6] The plaintiff was a woman of much business experience. She had been the owner of a great deal of property, both real and personal, and had bought and sold much property extensively. She had also borrowed and repaid much money. She was the owner of a one-half interest in the Harbor Center Land Company and frequently examined its books and discussed and participated in its affairs. While it is alleged in the complaint that the defendant had been the attorney for appellant's mother and that she (plaintiff) trusted and had confidence in him, no fiduciary relation between plaintiff and defendant is alleged or claimed. When plaintiff first applied for the loan and defendant stated his terms, she flatly rejected them. Subsequently she returned and accepted the

loan on the terms stated. Several weeks elapsed between those two periods of time, during which she was in active consultation with various attorneys. At the time the loan was made defendant stated that it was a loan of money on a speculative stock at highly inflated values. It is evident that plaintiff was unable to obtain the loan from others, on better terms, because she had ample time to do so. If she believed that she had been victimized by an "unconscionable" contract, she took no steps to relieve herself from it by a rescission or repudiation. But, on the contrary, she ratified the transaction in various ways. She borrowed the first \$33,000 on September 3, 1915, at which time she agreed to the terms. Sixty days afterwards she borrowed \$2,000 more on the same terms, and more than two years thereafter again ratified the transaction by assigning to defendant upon his demand additional security. The subsequent ratifications were supported by a sufficient consideration—the first by the additional loan and the second by a forbearance to sue. *Belloc v. Davis*, 38 Cal. 242; *Burkle v. Levy*, 70 Cal. 252, 11 Pac. 643. If she desired to rescind, she should have done so promptly (section 1691, Civ. Code), and her failure to rescind promptly after a knowledge of the facts must be regarded as a ratification (*Schmidt v. Mesner*, 116 Cal. 271, 48 Pac. 54).

So far as concerns the charge that defendant refused to assist plaintiff in certain proceedings she desired to take against the Harbor Center Land Company and its selling agency, the New Richmond Land Company, we are entirely satisfied that the conclusions of the trial court in favor of the defendant are sound. The complete answer to this charge is that defendant did not agree with plaintiff in her interpretation of the matters involved, nor did he support her inclination to start proceedings, legal or otherwise, against those companies, but, on the contrary, declined to lend his aid to proposed litigation against either company, for the reason that he believed such proceedings and litigation would result in disaster to his security.

Another reason why, in our opinion, plaintiff cannot prevail in this action, is that the allegations of her complaint and the proof offered by her would not support a judgment in her favor if granted.

[7, 8] It is admitted in the complaint that at the time of the commencement of the action plaintiff was indebted to defendant in the sum of \$59,000. No sufficient tender of that amount, however, is alleged or proved. Without making such tender plaintiff will not be heard to complain in equity. 1 *Joyce on Injunctions*, § 607; *Buena Vista F. & V. Co. v. Tuohy*, 107 Cal. 243, 40 Pac. 386; *Mad-dock v. Russell*, 109 Cal. 425, 42 Pac. 139;

Wolfe v. Titus, 124 Cal. 264, 56 Pac. 1042. Nor will a dispute about the amount excuse a tender. *Bell v. Bank of California*, 153 Cal. 234, 94 Pac. 889. True, there is an attempt made to plead a tender in the complaint, but upon an analysis of it, it will be found to contain certain conditions and limitations which completely destroy its usefulness and purpose as a tender. *Perkins v. Maier, etc.*, 134 Cal. 372, 66 Pac. 482. Appellant endeavors to justify the failure to plead a tender upon the ground that it would have been useless and it is argued that the rejection by defendant of appellant's offer made during the trial to pay \$36,000 in addition to allowing defendant to take the book account of \$24,000 was sufficient to prove defendant would not have accepted any amount which did not include the bonus of \$10,000. But whether or not defendant refused to accept such offer in court did not relieve appellant from pleading in the beginning a tender of the amount she admitted was due and of afterwards offering proof of her ability to perform. *Doak v. Bruson*, 152 Cal. 17, 91 Pac. 1001. The immaterial matters first mentioned herein relate to various transactions between plaintiff and the Harbor Center Land Company, which occurred prior to the making of this loan. They throw no light on the controversy concerning the loan, and we have therefore refrained from discussing them.

Finding no error in the record, the judgment is affirmed.

We concur: TYLER, P. J.; KERRIGAN, J.

56 Cal. App. 621

Ex parte KOESTER. (Cr. 603.)

(District Court of Appeal, Third District, California. Feb. 24, 1922.)

1. War ⚡32—Military jurisdiction over soldier within states not exclusive even in time of war.

Notwithstanding Articles of War, art. 74 (U. S. Comp. St. § 2308a), requiring a soldier to be delivered to civil authorities for trial for an alleged crime except in time of war, the jurisdiction of the military courts over a soldier is not exclusive of the civil court even during time of war, if the soldier was stationed within one of the states where the civil courts were functioning and where no actual hostilities were in progress.

2. Habeas corpus ⚡54—Allegation in petition by one in the military service held not to establish fact defeating jurisdiction.

An allegation, in a petition for habeas corpus to secure petitioner's release from confinement under sentence by the superior court, that petitioner at the time he was sentenced was a soldier in the United States army in time of war, does not entitle petitioner to dis-

charge, even if the court had no jurisdiction over a soldier at that time, in the absence of any showing in the record on which the judgment was rendered of that fact, since the petition is a collateral attack upon the judgment of a court of competent jurisdiction, which can not be nullified by statement of facts outside of the record.

3. Habeas corpus §85(1)—Presumed consent of military authorities to trial of soldier was given if necessary.

If it was necessary to give the superior court jurisdiction to try a soldier for a felony in time of war that permission of the military authorities be given, it must be presumed, in support of a conviction of such soldier, that the permission was given.

Original application for habeas corpus by Edward Chesley Koester, to be directed to the Warden of Folsom State Prison to secure the release of the petitioner on the ground that he was illegally restrained. Writ denied.

Robert H. Schwab, of Sacramento, for petitioner.

U. S. Webb, Atty. Gen., and J. Chas. Jones, Deputy Atty. Gen., for respondent.

HART, J. The petitioner is a prisoner confined in the state prison at Folsom, under a judgment of sentence for an indeterminate term, rendered by the superior court in and for the city and county of San Francisco on the 25th day of February, 1920, for the crime of the forgery of a telegraphic money order. Claiming that his restraint under said judgment is illegal and void, he has applied to this court for his release from the custody of the warden of said prison through the writ of habeas corpus. The ground upon which he bases the contention that he is illegally restrained of his liberty may be gathered from the language of the petition for the writ, as follows:

"That your petitioner was from the 25th day of April, 1919, to the 24th day of March, 1920, a soldier in the army of the United States, and stationed at Ft. Rosecrans; that on the 7th day of October, 1919, your petitioner was arrested in the city and county of San Francisco, and that thereafter, and on the 25th day of February, 1920, by judgment of the superior court of the city and county of San Francisco, sentenced to an indefinite period by said superior court upon a charge of forgery of a telegraphic money order; that at the time of his arrest he requested permission to send a telegram to his commanding officer, which request was denied; that at no time thereafter was your petitioner permitted to notify his commanding officer at Ft. Rosecrans of the fact that he was in custody upon said alleged charge; that your petitioner during all of said times was under the control of and subject to the military laws and regulations of the United States, and not subject to the jurisdiction of the courts of the state of California, except by permission of

the Army of the United States; that the enforcement of said military laws and regulations fall within the jurisdiction of the Secretary of War; that at the time the judgment was rendered by the superior court of the state of California in and for the city and county of San Francisco, said court did not have jurisdiction over the person of this defendant, and that said judgment is null and void."

[1] Briefly stated, the specific contention is that, the petitioner, being, at the time of the alleged commission of the crime for which he is now suffering punishment and also at the time of his prosecution for and conviction thereof, a soldier in the army of the United States, in time of war, the jurisdiction to try him for the said crime was exclusively in the military department of the government, unless jurisdiction of his person was yielded by the military to the civil authorities for that purpose, and that, therefore, since (as is the claim) permission to try him for the offense by the civil courts was not granted by the military authorities, his trial and conviction by the civil authorities was void ab initio, and wholly nugatory. It is argued that, notwithstanding that at the time that the petitioner committed the crime, and also at the time he was tried therefor, there had been and was a complete cessation of actual or active hostilities between this country and Germany, yet, in contemplation of law, this country was still in a state of war with Germany, and remained so until peace was officially declared, which declaration was not made until a date subsequent to the commission of the crime, and that, such being the case, the jurisdiction to try the petitioner for the offense charged against him was as much within the exclusive jurisdiction of the military department of the government as though actual or active hostilities were being prosecuted at the time of the commission of the offense. In support of this position reliance is placed largely upon the language of article 74 of the Articles of War (U. S. Comp. St. § 2308a), to the effect that when a person subject to military law is accused of a crime or an offense committed within the geographical limits of the states of the Union and the District of Columbia, and punishable by the laws of the land,

"the commanding officer is required, *except in time of war*, upon application duly made, to use his utmost endeavor to deliver over such accused person to the civil authorities, or to aid the officers of justice in apprehending and securing him, in order that he may be brought to trial."

There are conceivable circumstances under which it no doubt could and should be held that the military department of the government is vested with exclusive jurisdiction to try and punish soldiers of the United States army for offenses committed by them against the law of the land. For instance, if

the armies of the United States were in the enemy's country, the military tribunals would then undoubtedly and, for obvious reasons, should have, under the Articles of War as established by our government, exclusive jurisdiction of trying and punishing offenses of every grade committed by persons in the military service. *Coleman v. Tennessee*, 97 U. S. 509, 24 L. Ed. 1119. But we would not say that, where our armies are not in the enemy's territory and where there is an absence of actual hostilities at the time of the commission of the alleged offense, such exclusive jurisdiction exists, albeit a state of war may still exist in contemplation of law between this and another country, only, however, because peace has not been formally declared. In such a situation it seems to be the view of the cases that the jurisdiction of the military and civil tribunals is concurrent. *Ex parte McRoberts*, 16 Iowa, 600; *Coleman v. Tennessee*, 97 U. S. 509, 24 L. Ed. 1119; *Grafton v. United States*, 206 U. S. 348, 27 Sup. Ct. 749, 51 L. Ed. 1085, 11 Ann. Cas. 640; *United States v. Clark*, (C. C.) 31 Fed. 710, 712; 6 Op. Atty. Gen. 419; *State v. Rogers*, 37 Mo. 367, 368.

In *Grafton v. United States*, supra, it is said:

"While, however, the jurisdiction of general courts martial extends to all crimes, not capital, committed against public law by an officer or soldier of the army within limits of the territory in which he is serving, this jurisdiction is not exclusive, but only concurrent with that of the civil courts."

In *Coleman v. Tennessee*, supra, speaking of a section of the articles of war, which is in language similar to that of section 74, above referred to, it is said:

"But the section does not make the jurisdiction of the military tribunals exclusive of that of the state courts. It does not declare that soldiers committing the offenses named [murder, robbery, arson, burglary, and the like] shall not be amenable to punishment by the state courts."

Again, in the same case, it is said:

"We do not mean to intimate that it was not within the competency of Congress to confer exclusive jurisdiction upon military courts over offenses committed by persons in the military service of the United States. * * * All we now affirm is, that by the law to which we are referred, the thirtieth section of the Enrollment Act, no such exclusive jurisdiction is vested in the military tribunals mentioned. No public policy would have been subserved by investing them with such jurisdiction, and many reasons may be suggested against it. * * * In denying to the military tribunals exclusive jurisdiction, under the section in question, over the offenses mentioned, when committed by persons in the military service of the United States and subject to the Articles of War, we have reference to them when they were held in states occupying, as members of the Union, their normal and constitutional relations to the

federal government, in which the supremacy of that government was recognized, and the civil courts were open and in the undisturbed exercise of their jurisdiction. When the armies of the United States were in the territory of insurgent states, banded together in hostility to the national government and making war against it; in other words, when the armies of the United States were in the enemy's country, the military tribunals mentioned had, under the laws of war, and the authority conferred by the section named, exclusive jurisdiction to try and punish offenses of every grade committed by persons in the military service. Officers and soldiers of the armies of the Union were not subject during the war to the laws of the enemy, or amenable to his tribunals for offenses committed by them."

[2] Thus we think a definitive answer is returned to the claim of the petitioner that he is entitled to be released from his present restraint upon the ground upon which he relies, as stated above. But, even if we were compelled to yield the position above taken, there is still another and, indeed, a conclusive reply to the petitioner's claim for release in this proceeding. It does not appear from the record before us, except only by the averments of the petition, that the petitioner was a soldier of the United States armies at the time of the commission of the offense of which he was convicted; nor, if such soldier, that jurisdiction of his person for the purposes of his trial was not yielded to the civil by the military authorities. Neither the information nor a copy thereof is before us, and we may assume that, since an averment in that pleading that he was a soldier would have been wholly unnecessary and, indeed, supererogatory, in the statement of the offense charged, the fact that he was a soldier, if it was a fact, was not stated therein, nor that if a soldier his trial in the superior court was not with the permission of the military authorities. Nor is it made to appear in the warden's return to this writ, accompanying which return is the commitment which, as a matter of fact, is a copy of the judgment, that the petitioner was a soldier in the army of the United States.

[3] There is no proposition in law better understood or more thoroughly settled than that, where a person has been tried and convicted of an offense so denounced by a valid law, in a court of competent jurisdiction, the judgment of conviction, being, in all respects valid upon its face, cannot, in a collateral attack thereon, be nullified or disturbed, and it therefore follows that the mere statement of facts in a petition for a jurisdictional writ impeaching such judgment cannot of themselves have the effect of countervailing the legal force of such judgment. And in every collateral attack upon a judgment valid on its face, all presumptions and intendments must be indulged to support it, and it is therefore to be presumed in this collateral attack upon the judgment against the pe-

itioner that he presented every defense against the crime charged against him and every excuse against the right of the superior court to proceed with his trial which were available to him, and that the issue thus presented was tried and determined against him at the trial. At any rate, assuming that the petitioner was at the time of the commission of the crime a soldier in the United States army in time of war, it is to be presumed that, if necessary, the permission of the military authorities to try him for the offense with which he was charged was granted to the civil authorities, or that the petitioner himself submitted himself to the jurisdiction of the superior court, waiving any right that he might conceive that he had to be tried by a military tribunal by failing to set up the plea that the jurisdiction to try him was exclusively in the latter tribunal. Of course, it is not questioned, and, indeed, it could not be, that the superior court of the city and county of San Francisco has under the law jurisdiction of the offense of which the petitioner was convicted, and that it also had jurisdiction of his person, so long as such jurisdiction was not ousted by the timely interposition of some authority having superior jurisdiction over his person with regard to the offense charged against him.

No reason has been shown why the prisoner should be enlarged, and the writ is therefore discharged, and the petitioner remanded to the custody of the warden of the state prison at Folsom.

We concur: FINCH, P. J.; BURNETT, J.

56 Cal. App. 520

PEOPLE v. TOMASOVICH. (Cr. 587.)

(District Court of Appeal, Third District, California, Feb. 17, 1922. Hearing Denied by Supreme Court April 17, 1922.)

1. Criminal law §163(2)—Denial of challenge to juror must be shown prejudicial.

An accused must show that he was prejudiced by denial of challenge to juror for cause, though in peremptorily challenging such juror he exhausted his full legal quota of challenging.

2. Jury §85—Action on challenge of juror held discretionary.

Where juror upon his voir dire in a prosecution for a violation of a liquor law stated that, while he entertained a strong feeling of hostility against intoxicating liquors, he could and would, if accepted as a juror, give the defendant a fair and impartial trial, but answered in the affirmative to the question, "You do not feel that you can sit in a case of this kind as a fair and impartial juror, do you?" it was entirely within the discretion of the court to determine whether or not the juror was subject to challenge for cause.

3. Criminal law §1152(2)—Determination of qualification of juror conclusive upon reviewing court.

Court's determination that a juror challenged for implied bias, under Pen. Code, § 1072, was not subject to challenge for cause, was a discretionary matter, and is as conclusive upon a reviewing court as is any other question of fact decided at nisi prius upon evidence in which there is substantial conflict; the juror having given contradictory replies to questions upon his voir dire.

4. Witnesses §267—Not abuse of discretion for the court to stop inquiry on cross-examination by defendant on its own motion.

It was not an abuse of discretion for the court to stop an inquiry on cross-examination by the accused which could avail nothing, though prosecuting attorney had not objected.

5. Criminal law §404(4)—Sufficient foundation laid for introduction of liquor in evidence.

In a prosecution for violation of a prohibition law, there was a proper foundation for permitting introduction in evidence of jugs of liquor where testimony showed that they, with their contents, were delivered by defendant to witness, who delivered them to the sheriff and were placed in a vault in the latter's office and kept locked there until removed for analysis.

6. Criminal law §656(9)—Improper for court to state that fact is proved.

It is not proper for a trial court to state in the presence of the jury that any material or important fact has been proved.

7. Criminal law §656(9)—Statement of court that fact was proved held not misleading.

Accused cannot complain that the court stated in the presence of the jury that a certain fact was proved where the court intended to say that there was testimony tending to establish such fact, and the matter was explained to the jury.

8. Criminal law §1166½(12)—Statement of court held not to require reversal.

Statement of court to defendant's attorney, "You cannot trap me, sir," held not to have prejudiced the accused.

9. Criminal law §1166½(12)—Misconduct of court must have prejudiced accused.

A statement of the court tending to place accused's attorney in an unfavorable light in the eyes of the jury must have been such as to make it manifestly plain that it brought about a result in the trial which would not otherwise have been effected before a reviewing court will nullify a conviction.

10. Criminal law §1172(6)—Instruction concerning intent not prejudicial where intent not material.

An instruction: "The word 'willfully,' when applied to the intent with which an act is done or omitted, implies simply a purpose or willingness to commit the act or make the omission referred to. It does not require any intent to violate law or to injure another or to acquire any advantage"—if error, could not have prej-

udiced defendant in prosecution for sale of liquor where all that there was necessary for the jury to find was that defendant sold the liquor.

11. Criminal law ⚭1172(2)—Instruction on reasonable doubt not prejudicial.

An instruction on reasonable doubt that the law "prohibits you from going outside of the evidence to hunt up doubt upon which to acquit the defendant," if it transcended the province of the jury by instructing upon a question of fact, was not prejudicial.

12. Criminal law ⚭304(8)—Doubtful whether judicial notice is taken of particular places in city.

While the courts take judicial notice of the existence and bounds of a city (St. 1889, p. 372), it is doubtful whether they may take judicial notice of the fact that any particular place or locality is not within the limits of an incorporated city.

13. Criminal law ⚭1168(1)—Taking judicial notice of location held not prejudicial if error.

If the court erred in an instruction in taking judicial notice of the fact that a particular locality was not within the limits of an incorporated city, there was no prejudicial error where the uncontradicted evidence was that such place was not within the limits of an incorporated city.

14. Criminal law ⚭37, 772(6) — Defendant held not enticed to commit crime by officers, and instruction thereon was unnecessary.

Where officers were informed that accused was bootlegging, and went to his place out of the county and purchased whisky, to be delivered in the county on the following day, there was no improper enticement, and his conviction for the sale of whisky was not opposed to public policy, and court did not err in refusing to instruct concerning enticement.

15. Criminal law ⚭112(1)—Whether title to liquor passed one of intention of parties.

Where three jugs of whisky were ordered in one county, and part of the purchase price paid, and on the following day the defendant delivered the jugs in another county, the question as to whether the title to the liquor passed in the first county was one as to the intention of the parties to be gathered from the language of the parties, considered in the light of all the circumstances, under Civ. Code, §§ 1140, 1141.

16. Criminal law ⚭564(7)—Finding that sale was within county held warranted.

In a prosecution for sale of intoxicating liquor, partially paid for in another county and delivered within the county, held, that the jury were warranted in finding that there was no completed sale until the delivery of the liquor within the county.

17. Intoxicating liquors ⚭132—County ordinance imposing greater penalty than federal statute not invalid.

A county ordinance concerning the sale of intoxicating liquors is not in conflict with the

Volstead Act and invalid because it imposes a greater or less penalty.

18. Intoxicating liquors ⚭13, 132—County may adopt ordinances prohibiting traffic notwithstanding Eighteenth Amendment and Volstead Act.

Under Const. art. 11, § 11, a county may adopt and enforce ordinances prohibiting the manufacture, sale, transportation, or unlawful possession of intoxicating liquors, notwithstanding the Eighteenth Amendment to the federal Constitution and the Volstead Act.

Appeal from Superior Court, Sutter County; K. S. Mahon, Judge.

Michael Tomasovich was convicted of a violation of a county liquor ordinance, and appeals. Affirmed.

W. E. Davies, of Marysville, for appellant.
U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

HART, J. The defendant, under an indictment returned by the grand jury of the county of Sutter, was tried for and convicted of the violation of certain provisions of an ordinance of the said county penalizing the "sale, manufacture, unlawful possession or transportation of intoxicating liquors" within the limits of said county. Said ordinance, which was introduced in evidence, and which was regularly passed by the board of supervisors of the county of Sutter on the 8th day of March, 1921, is in its provisions fashioned after the law passed by Congress to enforce the inhibition of the Eighteenth Amendment of the federal Constitution against the sale, transportation, and unlawful possession of intoxicating liquors, and known as the "Volstead Act." 41 Stat. 305.

The appeal is from the judgment of conviction and the order denying defendant's motion for a new trial.

The verdict is assailed on a number of different grounds, which may be stated as follows: (1) That there was error, prejudicial to the rights of the accused, in the order denying defendant's challenge of Juror Noyes for cause; (2) that the court, of its own initiative, improperly interfered with and thus curtailed the cross-examination by the defendant's counsel of one of the witnesses for the people; (3) that prejudicial error was committed by the admission of certain evidence; (4) that the court prejudiced the rights of the defendant by making a certain comment upon the testimony during the progress of the trial; (5) that the court erred, to the serious detriment of the rights of the accused, in giving and also in refusing to give certain instructions; (6) that the conviction of the defendant is against public policy, and cannot, therefore, be upheld, inasmuch (so it is asserted) as the evidence discloses that the accused would not have

committed the act constituting the foundation for his prosecution, conviction, and punishment but for the inducements originated by the public officers themselves, and by them held out to him, to commit said act; that, in other words, he was trapped into the commission of the act by said officers; (7) that the evidence is insufficient to support the verdict, in that it was thereby shown that, if any crime at all was committed by the defendant, it was committed within the limits of Butte, and not within the limits of Sutter county; and (8) lastly, that the ordinance upon which the indictment is based is in conflict with a "general law," and is consequently invalid, in that the penalty therein prescribed for the violation of its provisions is in excess of or greater than that prescribed for the same act by the Volstead Law.

The specific charge against the defendant is that, on the 9th day of June, 1921, in the said county of Sutter, and outside the limits of any incorporated city or town therein, he sold intoxicating liquors, to wit, "whisky and liquor containing one-half of one per cent. and more of alcohol by volume, which was then and there fit for beverage purposes," etc.

From the evidence it appears that, a few months prior to the day on which the defendant was arrested upon the charge stated in the indictment, one M. A. Carpenter had been appointed a deputy sheriff, and as such charged with the special duty of "rounding up bootleggers." Carpenter had received information through various sources that the defendant, who resided in Butte county, "about two-tenths of a mile above the Sutter county line," was engaged in bootlegging or in the illicit traffic of intoxicating liquors. After obtaining this information, Carpenter called at defendant's house on several different occasions prior to the date of the arrest, and on one of said occasions—May 21, 1921—in the course of a conversation with the defendant the subject of intoxicating liquors arose and was discussed by and between them. Carpenter asked defendant if he had any wine, to which the former replied: "No, I haven't got any, and if I had I would not be afraid to sell it to you. * * * I could get you some jackass brandy." The officer answered that he did not like such liquor, but preferred wine, and ventured the suggestion that he could buy wine at Napa at \$2 a gallon, to which suggestion defendant retorted: "You ought to get some, and you can sell it for \$4 a gallon." On another visit of Carpenter to the defendant's home, Carpenter, having taken some wine with him, invited the defendant to take a drink of the liquor and the latter accepted the invitation, taking two or three drinks. There is, however, no evidence that the wine so drunk by the defendant made him intoxicated, or had any perceptible effect upon him. Early in the month of June, 1921, Carpenter, accompanied by another deputy sheriff of Sutter

county, named Baker, and one A. A. Laskey, again visited the defendant at his home. These parties took with them three half gallon empty jugs, which they left with the defendant. At this time, it appears, Carpenter and his companions entered into an arrangement with the defendant whereby the latter was to deliver to them, on the 9th day of June, 1921, at a point near "Dago Corners," in Sutter county, the three jugs filled with whisky. The price agreed upon for the liquor was \$30, or \$10 per jug, and Carpenter gave to the defendant the sum of \$5 as in part payment for the whisky.

On the day appointed for the delivery of the whisky (the day after the agreement for the purchase of the liquor was made) the defendant, accompanied by his wife and a young son, appeared in his automobile at "Gomez Station," located on the Northeastern Railway, in Sutter county, and near "Dago Corners," at about 8 o'clock in the morning. Carpenter, Laskey, and Baker, in accordance with a prearrangement with the defendant, were at "Gomez Station" at the hour named, having arrived there before the defendant made his appearance at that point. The defendant, upon reaching Gomez Station, saw the officers in an automobile at said station, and at the same time the officers saw him, and one of the latter signaled the defendant to follow them. The officers then drove the machine in which they were riding from the highway onto a private road a short distance from the station and stopped, the defendant following, and upon reaching the point at which the officers had stopped saying that he had "the stuff" in a suit case in his machine. Carpenter thereupon stepped to the defendant's automobile and took therefrom the suit case, and handed it to Baker, who removed therefrom the jugs, which were filled with what the defendant then said was "corn whisky," and placed them in their own machine, then returning the suit case to the defendant. Thereupon the officers paid the defendant the sum of \$25, being the balance due for the liquor according to the arrangement made with the latter at his home the preceding day, Carpenter paying the defendant \$15 and Laskey paying him, by check, \$10 for the jug of whisky which he (Laskey) was, under the arrangement, to receive. On one occasion on which Carpenter, Baker, and Laskey together visited the defendant's home—whether the day they contracted for the purchase of the whisky or some previous occasion does not appear clear from the record, these three parties having on more than one occasion visited the defendant together—the defendant proposed to sell to the officers a recipe that he claimed to have for making whisky, stating to them that they could make their own whisky "and sell it for \$25 less than he gave for it." It should also be stated that Carpenter testified that he, Baker, and Laskey had bought liquor of the

defendant at his home previously to the day on which the agreement to sell and deliver the liquor at "Gomez Station" was made. And it may further be added that the test made by a pharmacist of the contents of the jugs as they were delivered to the officers by the defendant showed that the liquid therein contained was "corn whisky," which registered "90 proof," or "45 per cent. alcohol."

The above statement of facts is gleaned from the testimony of witnesses introduced by the people. As a matter of fact, the defendant did not take the witness stand in his own behalf, or otherwise introduce any testimony in opposition to that presented by the people in support of the charge.

[1-3] 1. Juror Noyes, in reply to questions upon his voir dire, and touching his qualifications to sit as a juror in the case, repeatedly stated to the district attorney and to the court that, while he entertained a strong feeling of hostility against intoxicating liquors and the traffic therein, he nevertheless could, and would, if accepted as a juror, give the defendant, with whom he was not personally or otherwise acquainted, and as to whom he entertained no feeling of personal prejudice, a fair and impartial trial, according to the evidence adduced and the law as declared to the jury by the court. Upon being questioned at considerable length by the counsel for the defendant, and after repeating that he could try the case fairly and impartially, notwithstanding that he had "always had a very strong prejudice against liquor," he returned an affirmative answer to this question: "As a matter of fact, you do not feel that you can sit in a case of this kind as a fair and impartial juror, do you?" Thereupon counsel challenged the juror for implied bias as defined by the second subdivision of section 1072 of the Penal Code. The court then questioned Noyes further, and brought from him a repetition of the statement he had made to the district attorney that he could try the accused fairly and impartially, and that he would not favor his conviction in the absence of proof of his guilt to a moral certainty and beyond all reasonable doubt. The court denied the challenge, and counsel for the defendant later peremptorily challenged and so excused the juror from sitting in the case. Even if it were necessary to hold that the denial of the challenge was erroneous, it is not shown that, although exhausting his full legal quota of peremptory challenges, the defendant was prejudiced by the order denying the challenge, since it is not made to appear that, by reason of the denial, an objectionable juror was forced upon him. In other words, it is not shown by the record that the defendant "desired to exercise any additional challenge, or that he had the slightest objection to any juror sworn to try the cause, or any disposition to have any such juror excused." *Peo-*

ple v. Kromphold, 172 Cal. 512, 520, 157 Pac. 599, 602; *People v. Schafer*, 161 Cal. 573, 577, 119 Pac. 920, 921; *People v. Tinnen* (Cal. App.) 192 Pac. 557, 560. But we think that the examination of the juror was such that it was entirely within the discretion of the court to determine, upon a consideration of said examination as a whole, whether the juror was or was not subject to a challenge for cause upon the ground upon which the challenge was interposed, and the court's determination of that matter in this case is as conclusive upon a reviewing court as is any other question of fact decided at nisi prius upon evidence in which there is substantial conflict.

[4] 2. There is no substantial merit in the assignment that the court interfered with and thereby cut off legitimate cross-examination of a witness for the people by defendant's counsel. The incident about which the defendant complains in this particular arose in this way: The witness Carpenter was asked by defendant's attorney if he was not at the request of the district attorney appointed as a deputy sheriff a short time prior to the arrest of the accused, and before an answer was returned by the witness, the court interrupted to say that the question called for immaterial testimony, and that the witness would not be permitted to answer the same. The attorney thereupon stated that he desired "to get down to the approximate date of the appointment," and insisted that he was entitled to have the formal appointment in writing produced in court. The court replied that the appointment was on file in the clerk's office, and that counsel could procure and introduce it in the case if he so desired. Subsequently the same witness, having given as his reason for stopping at the house of the defendant some time during the winter preceding the date of the latter's arrest that the automobile of a party with whom he had no personal acquaintance had broken down near defendant's house, and that the owner of said machine desired to ride "to town" with the witness, was asked on cross-examination to state to whom said machine belonged, to which question the witness replied that he did not know; that he did not inquire as to whom the machine belonged. Counsel then asked, "It was not your machine?" the witness replying in the negative; and again the witness was asked, "What kind of a machine were you driving?" the witness replying that it was a Ford. The court then interrupted this cross-examination with the statement: "That is immaterial. I will stop it. If the district attorney does not object to this line of questions, I will myself." The attorney for the defendant did not offer any sound explanation as to the particular purpose he had in view in asking the questions to which the court, *sua sponte*, objected, nor was it shown what, if any, relevancy the testimony

thus sought to be elicited would have to the ultimate question to be determined by the jury. Upon their face the questions called for testimony that was neither relevant nor material to the issue. We cannot perceive wherein the fact, if it were a fact, of the district attorney's request for the appointment of Carpenter as a deputy sheriff would show or tend to show when said appointment was made, which was the only reason counsel gave for asking that question. If the date of the appointment was important, it could easily be shown, as was later developed, by the introduction of the written appointment itself in evidence. Nor are we able to see that whether the machine which was broken down at defendant's house was that of the witness Carpenter or some other person, a stranger to Carpenter, could shed any light on the issue before the jury. Since the prosecuting attorney failed to object to the examination, as it was his duty to have done so far as anything to the contrary appears from this record, it was not an abuse of discretion or authority on the part of the court to stop an inquiry which could avail nothing but a useless or purposeless consumption of time.

[5] 3. This assignment brings into question the propriety of the action of the court in admitting in evidence and as exhibits against the accused the three half gallon jugs containing the whisky alleged to have been sold by the defendant. The ruling allowing this evidence was over objection by the attorney for the defendant, upon the ground that no proper foundation was laid for the evidence, in that it was not shown that the jugs, as they were introduced in evidence, were in the same condition as when delivered to the sheriff by the witness Carpenter. The complaint against this testimony is not supported by the record. The testimony shows that the jugs with their contents were delivered by the witness Carpenter to the sheriff in the same condition that they were in when the witness received the same from the defendant, and that the sheriff immediately placed them in a vault in his office, kept them locked therein, and did not remove them from the time that he received them until the time the trial was called and was proceeded with, save on one occasion when they were taken by the witness Carpenter to a druggist in the city of Marysville for the purpose of having their contents analyzed and tested with the view of determining the character and the extent of the alcoholic content of the liquid contained therein. It is reasonably clear from all the testimony upon this proposition that the contents of the jugs were precisely what they were when sold and delivered to the officers by the defendant.

In connection herewith we may dispose of assignment No. 4 in the order in which the assignments are above enumerated, in-

volving the charge that the court virtually instructed the jury upon a question of fact when ruling upon the offer of the district attorney to have the jugs with their contents admitted in evidence. The attorney for the defendant, as above stated, objected to the introduction of the jugs in evidence on the ground that a proper foundation had not previously been laid therefor, and the court in ruling said:

"It has been proven that he (witness Carpenter) got them out there in that machine and the sheriff made no change in them, and here he says he delivered them to the sheriff and he said he never made any change in them and the sheriff said they were locked in the cell there and they never made any change."

The following colloquy then occurred between court and counsel:

"Mr. Davies: Your honor said it was proved.

"The Court: That is the testimony before the court.

"Mr. Davies: Did you say it was proved?

"The Court: I said it was the testimony.

"Mr. Davies: I thought your honor said it was proved.

"The Court: You cannot trap me, sir.

"Mr. Davies: I am not trying to.

"The Court: I advise you not to try it."

[6, 7] Of course it is not proper for a trial court to state in the presence of a jury during the progress of the trial that any material or important fact has been proved. Such a statement would clearly involve a trespass upon the domain of fact and an invasion of the function of the jury. Undoubtedly the statement made by the court that the facts referred to were proved was wholly inadvertent. What the court really intended to say, as it explained was its purpose, was that there was testimony before the jury tending to establish those facts. The explanation by the judge that he intended merely to refer to the testimony in the case, and not to what was proved by the testimony, supplemented by the instruction embraced in the charge of the court that whether any fact essential to the conviction of the defendant was or was not proved was a matter solely for the jury's determination, may well be supposed to have been sufficient to demonstrate to the jury that they were not to be influenced in arriving at a verdict by any chance remark of the court involving what might appear to be a suggestion as to what was proved in the case. The fact is that the explanation of the judge was itself in effect an admonition to the jury that they were not to consider or be influenced in their deliberations by the remark referred to, and assuming, as we certainly may, that the jury was composed of persons of common intelligence, we think they must have heeded such admonition. At any rate, considering the entire record, we do not believe that a miscarriage of justice followed from the making of the remark.

[8, 9] It is further contended, in connection with the present consideration, that the court's statement in addressing the defendant's attorney, "You cannot trap me, sir," had the effect of placing the attorney in an unfavorable light in the eyes of the jury, with the result that the defendant was likewise prejudiced. The court perhaps should not thus have censured the attorney, or insinuated that he was attempting to mislead it, but it too often happens that during the trial of a case, particularly where it is zealously contested by counsel, both counsel and the court will stray away from that cool and calm mental attitude which should characterize both in the performance of duties of such grave importance, but, if cases were to be reversed, and sent back for retrial for such a reason, there would be very many reversals which would not accord with justice. The misconduct of a court in that particular must be such as to make it manifestly plain that it has brought about a result in the trial which would not otherwise have been effected before a reviewing court will, solely for that reason, nullify the judgment or the order.

[10] 5. The latter clause of the following given instruction is complained of:

"The word 'willfully' when applied to the intent with which an act is done or omitted, implied simply a purpose or willingness to commit the act or make the omission referred to. *It does not require any intent to violate law or to injure another or to acquire any advantage.*"

This instruction is in the precise language of subdivision 1 of section 7 of the Penal Code. It is contended, however, that said instruction is inconsistent with the instruction given by the court that "in every crime there must exist a union of act and intent." In the case of *People v. Stennett* (Cal. App.) 197 Pac. 372, the particular language here criticised was under review, and it was therein said that said language, although embodied in the Code section, would, in the ordinary criminal cases, tend to mislead or confuse the jury, and therefore should not have been given. We still adhere to the suggestion so made. But in this case the instruction could not in any view have the effect of confusing the jury or leading to an unjust result; for it is not necessary to the consummation of the crime charged in the indictment in this case that there should exist and be shown an intent to commit the act. All that it was necessary for the jury to find was that the defendant sold the liquor as charged in the indictment to justify them in arriving at a verdict of guilty. *People v. Pera*, 36 Cal. App. 292, 304, 171 Pac. 1091, 1096. In the case just cited it is said:

"The decisions appear to be quite uniform upon the proposition that where, in invoking and applying the police power, the Legislature has prohibited certain acts and denounced them

as criminal, the mere commission of such acts, regardless of the intent with which they were committed, is sufficient to constitute the crime so denounced. There are, perhaps, certain exceptions to this rule, as, for instance, where the statute itself uses language in describing or defining the crime indicating that scienter or a specific intent to do the act was essential to constitute it a crime. But particularly in cases interdicting the traffic in intoxicating liquors the rule generally is that the mere commission of the act is sufficient to consummate the offense, and in the present case the law authorizing the establishment of 'no license territories' uses no language indicating an intention in the Legislature to make the intent with which the act of keeping a resort for the purpose of selling intoxicating liquors is committed an ingredient of the offense"—citing *Commonwealth v. Holstine*, 132 Pa. 357, 19 Atl. 273, wherein it is expressly held that to sustain a conviction for selling intoxicating liquors under a statute of the state of Pennsylvania penalizing the sale thereof it is not requisite to prove a criminal intent.

These observations, of course, answer the criticism here made against the instruction to the effect that—

"The commission of the offense constitutes the crime and the specific intent or intention with which it is done is immaterial."

[11] The legal soundness of the instruction read by the court upon the rule of reasonable doubt is challenged upon the ground that therein the court transcended its province by instructing upon a question of fact, in that it was declared in said instruction that the law "prohibits you (the jury) from going outside of the evidence to hunt up doubt upon which to acquit the defendant." An instruction containing precisely the same statement, but otherwise even more vulnerable than the one here complained of, was considered in the case of *People v. Del Cerro*, 9 Cal. App. 764, 770 et seq., 100 Pac. 887, and, while the opinion in that case condemned the instruction, and cautioned, as the Supreme Court had repeatedly done previously, trial judges, in instructing on the doctrine of reasonable doubt, to adhere to the statement of that rule as it was given in *Commonwealth v. Webster*, 5 Cush. 295, 52 Am. Dec. 711, held upon a careful analysis of the instruction that it was not so far afield in the statement of the rule as to compel a reversal of the case. We refer to the *Del Cerro* Case and others therein cited as a reply to the complaint urged against the instruction under consideration.

[12, 13] The next assignment under this head is that the court erred in taking judicial notice of the fact that the place where the liquor was sold in Sutter county was not within the limits of an incorporated city, and so instructing the jury. While the courts take judicial notice of the existence and bounds of a city (Stats. 1889, p. 372; *People v. Mueller*, 168 Cal. 521, 524, 143 Pac. 748,

L. R. A. 1918B, 788), it is extremely doubtful whether the courts may take judicial notice of the fact that any particular place or locality is not within the limits of an incorporated city. But there is no evidence in this case or any pretense that either Gomez Station or Dago Corners is situated within the limits of any municipal corporation, or that either is itself a municipal corporation. To the contrary, the uncontradicted evidence is that those places were not within the limits of an incorporated city. It is therefore manifest that the instruction, even if erroneous, could not have operated prejudicially against the rights of the accused.

The court refused the following instructions requested by the defendant:

"I further instruct you that unless you find that this defendant originated the criminal design of which he is accused and with the criminal attempt to carry out the crime of which he is charged after it was suggested to him you must find him not guilty."

"I further charge you that a person entrapped into the commission of a wrongful act without any original criminal design upon his part, and without any attempt to carry out a criminal purpose of his own conception, does not therefor become guilty of crime."

[14] The foregoing instructions bring up the point assigned as No. 6 in the order in which the points are stated above, to wit, that the defendant was enticed, upon a design initiated by the officers of the law themselves, into the commission of the act of selling the liquor, and that, as a consequence, his conviction and the punishment to follow, if the conviction be sustained, are opposed to public policy.

There are many decisions upon the proposition to which the refused instructions are addressed by both the state and the federal courts, and in many instances the judicial views crystallized from facts substantially similar are rather divergent.

The theory of the rule thus sought to be invoked by the defendant is that it is as well the duty of peace officers to prevent as to detect and punish crime, and that therefore, where a crime is entirely of the creation of such officers, and not that of the person by whose direct act the crime has been committed—that is, where the officers themselves have originated the design to have a crime committed, and have by some artful means induced another, wholly innocent of criminal intent until by such officers his mind has thus been corrupted, to execute such design—it is in such case the policy of the law to condemn rather than to encourage convictions thus brought about.

The rule is not, however, uniformly applicable to all cases of crime, but it is unnecessary here to enter into an examination of the reasons for the distinction (they being obvious on reflection), since we are convinced, not only from the evidence, but from the na-

ture of the offense charged in the indictment, that the rule cannot be applied in this case. In the first place, it is to be remarked that it is commonly known that everybody of normal intelligence is fully cognizant of the fact that the act constituting the crime charged against the defendant is and has been unlawful ever since the enactment of the congressional legislation the purpose of which was to enforce the Eighteenth Amendment to the federal Constitution. Indeed, the evidence in this case very clearly shows that the defendant well knew that the traffic in alcoholic liquors or the possession thereof not for a purpose allowed by the law was in direct violation, if not of a county ordinance, of the provisions of the so-called "Volstead Act." His statement to the officer that he would not be afraid to sell him intoxicating liquor, accompanied by his offer to sell the officer "jackass brandy," was itself sufficient to show that he had full knowledge of the wrong involved in the act of selling such liquor. Also his proposition to sell the officer a recipe for manufacturing such liquor showed that he knew that the matter concerning which he was negotiating with the officer, if carried out, would involve a violation of the law and an act denounced as criminal. The evidence further shows, as we have seen, that prior to the first visit of any of the officers to the home of the defendant the former had received information that the defendant was engaged in the business of bootlegging, and it is a fair and reasonable inference from all the evidence that the officers took no steps towards arresting the accused until they had received such information, and then they, as it was their duty to do, proceeded to make an investigation and to use any reasonable means for securing evidence against the defendant. The manner in which they prosecuted their investigation was consistent with the usual legitimate methods adopted by detectives in ferreting out crime. The fact that the officers purchased liquor from the defendant does not tend to show that the defendant was improperly induced or enticed by the officers to commit the crime. If he was engaged habitually in the unlawful business of dispensing alcoholic liquors, as the officers appeared to have probable cause for believing that he was, then it may be said that his purpose to commit the crime was not the result of anything that the officers did or said. As was said in *State v. Spiker*, 88 Kan. 644, 129 Pac. 195:

The fact that "purchases of liquor were made by persons seeking to ascertain if the seller was engaged in the unlawful sale thereof constitutes no defense to the charge, nor does it render their testimony incompetent."

[15] 7. The proposition that the evidence is insufficient to support the verdict involves, it is manifest, a question of venue or juris-

diction. The contention is that the transaction at the defendant's home between the latter and the officers, in which the arrangement was made for the delivery of the whisky to the officers at the point above indicated in Sutter county, amounted to a completed or absolute sale of the whisky, and that title thereto passed to the officers in Butte county. Of course, if this were true, the venue of the defendant's crime would be in Butte and not in Sutter county.

The testimony does not show just what occurred, or precisely what the conversation was, at the defendant's house between the latter and the officers on the day preceding that on which the liquor was delivered near Gomez Station. It was shown, however, that the officers visited the defendant at his house on said day; that they left the three empty half gallon jugs with the defendant; that Carpenter paid the former five dollars in cash; that the defendant on the following morning, according to prearrangement, as may well be inferred from the fact that the circumstance occurred at a very early hour in the day, met the officers near Gomez Station and returned to them the jugs filled with whisky, and that the balance of the purchase price of the whisky, \$25, was paid by the officers to the defendant. From these circumstances the jury were clearly warranted in finding that the defendant had agreed to sell to the officers three half gallon jugs of whisky for the sum of \$30, and was to deliver the same to said officers on the morning following the 8th day of June at or near Gomez Station, in Sutter county. There still remains, though, the question whether the transaction above explained involved a sale or a mere agreement to sell. There was no testimony showing or tending to show that at the time the officers arranged with the defendant for the delivery of the whisky to them at Gomez Station there was any whisky in the possession of the latter at his home. In other words, there is no evidence to show that the defendant had whisky in bulk from which the officers could have purchased or agreed to purchase any quantity of the article. On the other hand, it was shown, as we have seen, that a short time prior to the 8th day of June, 1921, at the home of the defendant, the latter, upon being asked by Carpenter if he (defendant) had any wine for sale, replied that he did not have wine, but that he could get some "jackass brandy" for the officer, and that the latter said that he did not want that kind of liquor, from which statement it is to be inferred that the defendant did not keep liquor at his home in stock. Furthermore, the liquor was not measured out, and therefore the particular whisky proposed to be purchased by the officers was not identified. Civ. Code, § 1140. And thus, moreover, there is no evidence that at the time the officers delivered the jugs

to the defendant the latter had so prepared the liquor or put it in such condition as to make it capable of being delivered. Nor is there any evidence that he offered to deliver it at that time to the officers, or otherwise showed any intention of then vesting in them the title thereto. Civ. Code, § 1141. Indeed, there is no evidence that at the time referred to the officers saw any liquor in the possession of the defendant, or had reason to believe that the defendant then had in his possession any liquor from which he could have furnished them that article. It hence appears that there was still something to be done in connection with the whisky proposed to be purchased to put it into a deliverable state or condition.

In *Benjamin on Sales*, b. 2, c. 3 (7th Ed.) p. 270, it is said:

"Where by the agreement the vendor is to do anything to the goods for the purpose of putting them into that state in which the purchaser is to be bound to accept them, or, as it is sometimes worded, into a deliverable state, the performance of those things shall, in the absence of circumstances indicating a contrary intention, be taken to be a condition precedent to the vesting of the property."

Again the same learned author gives the following rule:

"Where anything remains to be done to the goods for the purpose of ascertaining the price, as by weighing, measuring, or testing the goods, where the price is to depend on the quantity or quality of the goods, the performance of these things also shall be a condition precedent to the transfer of the property, although the individual goods be ascertained, and they are in the state in which they ought to be accepted."

It is well settled that the question as to whether the title has passed is one as to the intention of the parties, and such intention is, as a matter of course, to be gathered from the language of the parties, considered in the light of all the circumstances of the case. There are, however, certain circumstances which have a controlling force where the intent is not clearly shown by other evidence or by the express language of the parties to the transaction. In *Blackwood v. Cutting Packing Co.*, 76 Cal. 212, 216, 18 Pac. 248, 250 (9 Am. St. Rep. 199), it is said:

"If the condition of payment is not waived, the title does not pass until the price is paid. *Peabody v. Maguire*, 79 Me. 585; *Evansville R. Co. v. Erwin*, 84 Ind. 464, 465; *Turner v. Moore*, 58 Vt. 456; *Adams v. O'Connor*, 100 Mass. 515, 1 Am. Rep. 137; *Hoffman v. Culver*, 7 Bradw. 454. It frequently happens that the seller will deliver the goods notwithstanding the failure to fulfill the condition of payment; and in such cases the question arises as to whether such delivery is not to be considered a waiver of the condition. Some courts hold that, in the absence of circumstances showing a contrary intention, the condition is waived, and that the title passes. But where, as

here, there was neither delivery nor payment, there can be no doubt but that the title does not pass. *Dixon v. Duke*, 85 Ind. 435, 436."

Again, in the same case, 76 Cal. at page 217, 18 Pac. 251, 9 Am. St. Rep. 199, the court said:

"So far as concerns the proposition that where weighing or measuring is necessary to the identification of the goods, the title does not pass until they have been weighed or measured, the American cases are generally in accord with the above rule. * * * Some of the American cases are not in accord with the rule laid down by Mr. Benjamin in this: That if the goods are identified, it does not matter that weighing or measuring is necessary to ascertain the price or the quantity and this seems to be the law in California for the Civil Code contains the following: [Here quoting section 1140 of said Code.] This section does not dispense with identification. On the contrary, it requires it. It only dispenses with segregation when the property is otherwise identified. Therefore, where the identification consists in the segregation, weighing, or measuring, they are still necessary."

See, also, *Horr v. Barker*, 8 Cal. 608; *McLaughlin v. Piatti*, 27 Cal. 463; *Caruthers v. McGarvey*, 41 Cal. 15; *Gianelli et al. v. Globe Grain & Milling Co.* (Cal. App.) 191 Pac. 720, and cases therein cited.

[16] Our conclusion upon this branch of the discussion is that, from all the circumstances of the case, tested by the terms of the above-named Code sections as they are expounded by our own courts, there can be no doubt that the jury were warranted in finding that, notwithstanding that Carpenter paid \$5 cash down at the time that the agreement was made, the payment of the remaining portion of the total price of \$30 for the whisky was intended as a condition precedent to the vesting of title, that therefore there was no sale of the liquor effected on the 8th day of June, 1921, and that, consequently, the venue of the crime was in Sutter county. In other words, applying to the evidence the touchstone of the legal principles which must govern in the solution of the question now before us, it cannot justly be declared, as a matter of law, that there was a completed sale of the liquor prior to the delivery thereof by the defendant to the officers on the morning of June 9, 1921, at or near Gomez Station, in Sutter county, and therefore the implied finding of the jury, from the circumstances as revealed by the evidence, that the sale was

effected in Sutter county is conclusive upon this court.

[17, 18] 8. The contention that the ordinance under which the defendant was prosecuted, in so far as the penalty prescribed is concerned, is in conflict with the Volstead Act, and is therefore invalid, is conclusively answered by the recent case of *In re Volpi* (Cal. App.) 199 Pac. 1090, decided by this court. It is therein said:

"The fact that the statute or ordinance of the lesser jurisdiction is more exacting, or that the penalty imposed is more or less severe, than that of the greater, does not constitute a conflict. If prosecuted under the one, a defendant is entitled to the protection which that law affords him; if under the other, his rights are governed by its provisions. *In re Hoffman*, 155 Cal. 114."

Of course, it will be conceded, as is clearly pointed out by Presiding Justice Finch in the case of *In re Volpi*, supra, that counties, in the exercise of the power of police conferred upon them by the state Constitution (article 11, § 11), may adopt and enforce ordinances prohibiting the manufacture, sale, transportation or unlawful possession of intoxicating liquors. This power has not been taken from them by the Eighteenth Amendment to the federal Constitution, and the fact that the Congress has passed a law for the enforcement of that provision does not impair the right of the states to put into action the power of police for the same purpose. Indeed, the Eighteenth Amendment expressly provides that the federal and state governments shall have concurrent power in the enactment of legislation for the enforcement of its terms, and an ordinance of a county designed to accomplish that purpose, whatever the penalty prescribed therein may be, does not conflict with any general law within the meaning of section 11 or article 11 of our state Constitution merely because the penalty so prescribed is greater than that prescribed by the act of Congress designed for the same purpose.

We have examined this record with much care, and thus we have been persuaded to the conviction, after a painstaking investigation of all the points urged for a reversal, that the verdict should remain undisturbed.

Accordingly the judgment and the order appealed from are affirmed.

We concur: FINCH, P. J.; BURNETT, J.

56 Cal. App. 593

FAHEY v. MADDEN et al. (Civ. 2412.)

(District Court of Appeal, Third District, California. Feb. 23, 1922. Hearing Denied by Supreme Court April 24, 1922.)

1. Appeal and error ⇨933(4)—Motion presumed not to have been granted for insufficiency of evidence.

Where defendant's motion for a new trial was made on all the statutory grounds and the order granting the new trial did not specify the ground on which it was granted, it must be presumed, under Code of Civ. Proc. § 657, that it was not based on the insufficiency of the evidence to sustain the verdict.

2. Appeal and error ⇨241—Sufficiency of evidence to be reviewed where motion for nonsuit or request for instructed verdict was denied.

On appeal from an order granting defendant's motion for a new trial which did not specify the ground, the sufficiency of the evidence can be reviewed where defendant had moved for a new trial at the close of plaintiff's evidence and moved for a directed verdict in his favor at the close of the entire case, which motions were denied.

3. Master and servant ⇨332(1)—Evidence of automobile driver's agency for owner held insufficient for jury.

Where the evidence was undisputed that the driver of an automobile, though he was driving it with the consent of the owner, was doing so for his own purposes, and had never been the agent or the employee of the owner, the inference of agency from the fact of ownership and consent to use of the automobile is not sufficient to contradict that evidence so as to justify refusal of a directed verdict for the owner.

4. Master and servant ⇨330(1)—Automobile driver's agency for consenting owner not presumed.

The conclusion which the jury may draw from the fact that the driver of an automobile with the owner's consent was the agent of the owner is only an inference which they may draw, and not a presumption which they must follow in the absence of conflicting evidence.

5. Master and servant ⇨332(4)—Instruction on evidence of automobile driver's agency for owner held erroneous.

An instruction that proof that defendant was the owner of the automobile which caused plaintiff's injury made a prima facie case that the driver was engaged in his service, and that if the jury found the automobile was not loaned by the owner to the driver they must find for plaintiff, was erroneous, as requiring the jury to draw an inference which they might or might not draw, under Code Civ. Proc. § 1961, and imposing the burden of disproving agency on the owner.

6. Master and servant ⇨330(1)—Automobile driver's agency for owner must be proved.

In an action for personal injuries against the owner of an automobile driven by another,

the plaintiff has the burden of proving the driver was the agent of the owner, and the fact that the jury may infer such agency, in the absence of other evidence, from proof of ownership and consent to the taking of the automobile, does not relieve the plaintiff of his burden of establishing that fact by a preponderance of all the evidence on the issue.

Appeal from Superior Court, Solano County; W. T. O'Donnell, Judge.

Action by T. H. Fahey against Winfield Madden and Robert Boen to recover damages for personal injuries. Verdict for plaintiff. From an order granting the motion of defendant Madden for new trial, plaintiff appeals. Affirmed.

W. H. Morrissey, of San Francisco, and P. B. Lynch, of Vallejo, for appellant.

Elmer W. Armfield and Arthur B. Eddy, both of Woodland, for respondent.

FINCH, P. J. [1] Plaintiff appeals from the order of the trial court granting defendant Madden's motion for a new trial. The motion was made on all the statutory grounds. It appears from the briefs that the only ground argued in support of the motion was the insufficiency of the evidence to justify the verdict. The order granting a new trial does not specify the ground upon which it was granted and, therefore, under the provisions of section 657 of the Code of Civil Procedure, it must be presumed that it was not based upon the ground of insufficiency of the evidence to sustain the verdict.

[2] At the close of plaintiff's case, the respondent moved for a nonsuit, and, after all the evidence of both parties was concluded, he renewed his motion and also requested the court to instruct the jury to find for respondent. Both motions were denied, and the request for an instructed verdict was refused. In reviewing these rulings, notwithstanding the provisions of section 657, the evidence may be examined to ascertain whether it is sufficient to make a prima facie case for the plaintiff. *Carter v. Cauty*, 181 Cal. 749, 186 Pac. 346; *Beeson v. Schloss*, 183 Cal. 618, 192 Pac. 292; *Williams v. Bullock Tractor Co.* (Cal. Sup.) 198 Pac. 780.

The judgment is for personal injuries to plaintiff alleged to have been caused by the negligence of the defendants. While walking along the highway the plaintiff was struck by an automobile owned by defendant Madden and being then driven by defendant Boen. It is admitted that Madden was the owner of the automobile and that Boen was driving it with Madden's knowledge and consent. The plaintiff introduced evidence tending to show that his injuries resulted from Boen's negligent driving and the amount of damages suffered by plaintiff and then rested.

From the testimony of Boen, Madden, and the persons riding in the car with the former,

it appears without contradiction that Boen had arranged to take some young women and their chaperon from Dixon to a basket ball game at Suisun on the evening of the accident; that the automobile in which he intended to take them "got out of commission" after he had made such arrangements; that he endeavored to secure another machine and tried unsuccessfully to hire one from the garage; that he then called Madden on the telephone, explained the circumstances to him, and asked to borrow the latter's car, and that Madden loaned it to Boen for the use stated; that Madden was not invited to go and did not accompany Boen on the trip; that those who rode in the machine did so at Boen's invitation; that Boen had never been employed by Madden and had never driven the latter's machine prior to the time in question; that in driving the car Boen was not on any business for Madden; and that the latter had nothing whatever to do with the matter further than to loan his machine.

[3] The question is whether Boen was operating the automobile as Madden's agent at the time of the accident. It is conceded that such agency may be inferred from proof of Madden's ownership of the car and Boen's operation thereof with the knowledge and consent of the former. Appellant contends that the testimony introduced by the defendants in rebuttal of such prima facie case merely created a conflict, and that it was for the jury to determine whether or not such testimony was sufficient to overcome the inference arising from proof of ownership and operation as aforesaid. The language of some of the decisions lends support to appellant's contention, but the facts stated therein are essentially different from those of the instant case. In *McWhirter v. Fuller*, 35 Cal. App. 288, 170 Pac. 417, no attempt was made to rebut the inference of agency arising from proof of ownership and permissive use. In denying a hearing the Supreme Court said:

"As we understand the opinion as to the effect of proof that the car in question was owned by the appellant and was being operated by his wife at the time of the accident with his express consent and permission, it is simply that a prima facie case was thereby established, authorizing an inference by court or jury, in the absence of substantial proof to the contrary, that the wife was using the car as the agent of the husband."

In *Grantham v. Ordway*, 40 Cal. App. 758, 182 Pac. 73, the operator of the car was in the employment of the owner and the testimony tending to rebut the inference of agency was not "free from justifiable doubt." In *Randolph v. Hunt*, 41 Cal. App. 739, 183 Pac. 358, the owner was riding in the machine at the time of the accident, but claimed that he had loaned it to the driver and was riding as the latter's guest. The Supreme Court de-

nied a hearing on the single ground that the question of agency "was resolved against appellant on conflicting evidence." In *Dierks v. Newsom* (Cal. App.) 194 Pac. 518, the evidence offered to rebut the inference of agency was conflicting.

There is no distinction in principle between the case under consideration and that of *Maupin v. Solomon*, 41 Cal. App. 323, 183 Pac. 198. There the plaintiff proved "that the automobile belonged to the appellant and was being operated by its employee at the time of the collision." To meet the prima facie proof of agency so made, the defendant introduced evidence to the effect that at the time of the accident the driver of the automobile "was engaged in a pursuit wholly his own," and that his use of the machine for such purpose was without the consent and against the instructions of the defendant. Respondent there contended that the inference of agency arising from proof of such ownership and use "remained in the case in spite of the clear, positive, and uncontradicted evidence" to the contrary, "and created a substantial conflict in the evidence, with the result that the action of the court in denying a motion for a new trial must be sustained upon appeal." The District Court of Appeal held to the contrary and reversed the judgment. In denying a hearing in the Supreme Court it was said:

"We desire to point out that respondent's prima facie case was based solely on an 'inference,' and not on any 'presumption' declared by law. When we say that a certain inference is warranted by certain facts proved, we mean no more than that the jury is reasonably warranted in making that deduction from those facts. Code Civ. Proc. § 1958. In this case the direct uncontradicted evidence introduced in response to the prima facie case as to the circumstances under which the employee of appellant was driving appellant's automobile was of such a nature as to leave no reasonable ground for an inference based solely on the fact of appellant's ownership of the automobile and the further fact that the person driving was an employee of appellant, that the driver was acting within the scope of his employment at the time of the accident. The verdict, therefore, was contrary to the evidence."

In that case the defendant admitted its ownership of the automobile and that the driver was its employee, but denied that the driver was acting within the scope of his employment at the time of the accident or using the machine for a purpose for which the owner had consented. In this case the respondent admits ownership of the automobile and its use by the operator with respondent's consent, but denies that the operator was acting as respondent's agent at the time of the accident. The principle of law involved is the same in both cases. The question is whether the inference on which the prima facie case of agency is based creates a substantial conflict as against clear, posi-

tive, and uncontradicted evidence to the contrary. Evidence could not well be more clear and positive than that given by defendants' witnesses relative to the subject under discussion, and it is apparently free from suspicion. Under such circumstances, it must be held, on the authority of *Maupin v. Solomon*, supra, that, as to the defendant Madden, it was error to submit the case to the jury. See, also, *Brown v. Chevrolet Motor Co.*, 39 Cal. App. 738, 179 Pac. 697; *Gousse v. Lowe*, 41 Cal. App. 715, 183 Pac. 295; *Martinelli v. Bond*, 42 Cal. App. 209, 183 Pac. 461; *Gates v. Pendleton* (Cal. Sup.) 195 Pac. 664.

[4] The foregoing authorities establish the proposition that the deduction which the jury may make from proof of ownership of an automobile by one person and its use by another is an inference and not a presumption of law. In his closing brief appellant says:

"If the deduction be an inference, it having its source 'in the reason of the jury,' the jury may or may not make the inference as its reason dictates, even though no controverting evidence be offered. *Davis v. Hearst*, 160 Cal. 143, 178, 116 Pac. 530."

The case cited supports the statement in the brief.

[5] The court instructed the jury at plaintiff's request as follows:

"It is admitted by the pleadings that the defendant Madden was the owner of the automobile at the time of the accident and that the defendant Boen was driving the automobile at the time of the accident with the permission, consent and approval of the defendant Madden. This is prima facie proof that the driver was engaged in the owner's service and a presumption arises that the automobile was in use for the owner's benefit. Testimony that the automobile was loaned to Boen does not, as a matter of law, destroy the presumption unless from the evidence you find that it was loaned as claimed by the defense. If you should find that the said automobile was not loaned to said Boen as claimed by the defense, and if you also find that the injury to Fahey was the result of the negligent operation of the automobile your verdict must be for the plaintiff, and against defendants Madden and Boen unless you further find that the plaintiff was guilty of contributory negligence."

To so instruct is to tell the jurors that, from the admitted facts, "in the absence of rebutting evidence they not only may find for plaintiff but must do so, since the jury are bound to find according to the presumption, if not controverted. Code Civ. Proc. § 1961." *Davis v. Hearst*, supra. The instruction not only states that a presumption of agency arises from the admitted facts but, in plain language, declares that the jury must find for plaintiff on the prima facie showing, in the absence of controverting evidence.

[6] The burden of proof on the issue of

agency was on the plaintiff. The effect of the inference arising from the admitted facts was not to shift to the defendant the burden of proving the contrary by a preponderance of the evidence, but the burden remained with the plaintiff to prove by a preponderance of the whole evidence that at the time of the accident Boen was acting as Madden's agent. *Cody v. Market St. Railway Co.*, 148 Cal. 93, 82 Pac. 666; *Koyer v. Willmon*, 12 Cal. App. 87, 106 Pac. 599; *Onell v. Chappell*, 38 Cal. App. 375, 176 Pac. 370; *White v. Hines* (N. C.) 109 S. E. 31. The error in giving such instruction furnishes sufficient ground for a new trial.

The order appealed from is affirmed.

HART, J., concurs.

BURNETT, J. I concur upon the ground that the court erred in giving said instruction, and I desire to add a few words in reference to the opinion in *Randolph v. Hunt*, 41 Cal. App. 739, 183 Pac. 358. Therein it could be said properly, as pointed out by this court and also by the Supreme Court, that a conflict existed in the showing as to agency. Even if the inference arising from the ownership of the machine should not be considered sufficient when standing alone, it was strengthened by certain circumstances, which are indicated in the opinion. It may be added that an inaccuracy occurred therein in the use of the term "presumption" in the discussion of the proposition. Correctly speaking, it is not a "presumption," but rather an "inference," as clearly shown by the presiding justice in the main opinion herein. The terms are sometimes loosely used as interchangeable, but, of course, there is a clear distinction between them when accurately employed.

56 Cal. App. 659

GRACE et al. v. CRONINGER et al.
(Civ. 3992.)

(District Court of Appeal, First District, Division 1, California. Feb. 28, 1922. Rehearing Denied April 27, 1922.)

1. Landlord and tenant ⇨208(2)—Lease held enforceable against assignees though they procured liquor license in the name of a partner instead of the partnership.

An assigned lease held a completed contract free from conditions or contingencies and binding upon all the parties immediately upon its execution and not rendered ineffectual because a liquor license was not granted to the lessee partnership but only to one of the partners.

2. Landlord and tenant ⇨208(2)—Assigned lease for saloon business is enforceable though license was not obtained prior to commencement of term.

An assigned lease of premises held not rendered unenforceable on the theory that it was

entered into with the understanding that the assignees were to conduct a saloon business thereon without having a license, merely because the license was not obtained prior to the commencement of the term.

3. Guaranty ⚡78(1)—Guarantor of rent can claim no greater rights than lessee.

In landlord's suit for rent, the guarantor, if entitled to urge all the defenses in law available to the tenants, such as an eviction because of a flooding of premises with sewage, can claim no greater rights.

4. Guaranty ⚡91—In suit against guarantor of rent, evidence held not to show eviction of tenant.

In landlord's action against tenants and guarantor to recover rent, where set-off was claimed by guarantor on account of alleged eviction by flooding with sewage, evidence held to show no eviction of tenants or that they were deprived of the reasonable use and enjoyment of the premises.

5. Guaranty ⚡71—Guarantor of tenant not discharged by landlord's failure to pursue remedies against tenant.

Guarantor of assignees of lease was not discharged from liability for rent by failure of lessor, at his request, to pursue certain remedies against the tenants that were not available to him but were to the lessor.

6. Guaranty ⚡53(2)—Assignment of lease did not release guarantor from liability for rent.

Assignment of lease without lessor's consent did not release lessee's guarantor, where lease required lessor's consent.

7. Guaranty ⚡36(8)—Guarantor of rent held liable under lease and assignment for attorney's fees of landlord.

Where a lease provided that, if the lessor prevailed in any suit brought under it or any provision of it, the lessee should be liable for attorney's fees, and an assignment provided that assignees' guarantor would pay said rent and perform said covenants in case of failure of assignees to do so, the guarantor was liable for attorney's fees, in view of Civ. Code, § 2808.

Appeal from Superior Court, City and County of San Francisco; John T. Nourse, Judge.

Action by Theodosia Cook Grace and husband against Hermann Croninger and others, in which the action was dismissed as to the defendants Jasper Williams, Frank J. Ruhstaller, and Peter Christensen, and judgment was rendered in favor of the plaintiff against the defendants Hermann Croninger and Ernest Mohr, as lessees, and against W. A. Frederick, as grantor, and the latter appeals. *Affirmed.*

Keyes & Erskine, of San Francisco, for appellant.

Goodfellow, Eells, Moore & Orrick, of San Francisco (C. J. Goodell, of San Francisco, of counsel), for plaintiffs respondents.

Herbert Choynski, Henry L. Corson, and Jos. E. Bien, all of San Francisco, for defendants respondents.

KNIGHT, Justice pro tem. Plaintiff Theodosia Cook Grace, as the owner and lessor of certain premises situate in the city and county of San Francisco, was given judgment in this action against the defendants Hermann Croninger and Ernest Mohr as lessees, and against W. A. Frederick as guarantor, for the sum of \$9,100, due as rent for the use of those premises, together with \$750.05 interest, and \$910 attorney's fees. From that judgment the defendant Frederick alone appeals. The action was dismissed as against the defendants Williams, Ruhstaller, and Christensen.

The lessees Croninger and Mohr occupied the demised premises under an assigned lease, dated August 6, 1912. Jasper Williams was named therein as the original lessee, and Ruhstaller was his guarantor. On October 15, 1913, said lease was by and with the consent of the owner assigned to Croninger and Mohr, at which time the defendant Frederick became the guarantor. The premises were leased for a period of seven years, commencing on November 1, 1912, at the monthly rental of \$650, "for the purpose of therein carrying on the business of a saloon and cigar store and for no other purpose or purposes whatsoever." Croninger and Mohr upon the execution of the assignment went into possession of the premises and under a permit and license issued by the city and county of San Francisco in the name of Croninger alone conducted a saloon therein until the end of July, 1917, at which time Croninger and Mohr sold their interests in said saloon to one Andrew Christensen and attempted to assign to Christensen their interest in said lease. Plaintiff Mrs. Grace repudiates said purported assignment to Christensen, and the trial court found that she was not bound thereby since she had not consented to the assignment nor subsequently ratified the same. Christensen nevertheless thereafter conducted said saloon under license issued in the name of Peter Christensen, and it was while the saloon was thus conducted by Christensen that there was a default in the payment of the rent for which plaintiff in this action was given judgment.

The respective answers of Croninger and Mohr contain no special defenses. They consist merely of denials of their liability for the rent incurred subsequent to the date on which they disposed of their interests to Christensen. The appellant Frederick in his answer has pleaded seven special defenses, three of which have been abandoned, and the trial court found against him on the remaining four. It is upon the findings upon these special defenses, and upon the further ground that the court was without legal au-

thority to incorporate in its judgment an allowance for attorney's fees, that the defendant Frederick appeals.

[1] It is first contended by appellant that the assigned lease from Williams to Croninger and Mohr never became effectual because no liquor license was ever issued to Croninger and Mohr in the firm name, as required by the municipal ordinance. Appellant argues that the assigned lease was inchoate and ineffectual until a license was issued in the joint names of the lessees, which admittedly was not done; the license, as above stated, having been granted to Croninger alone. In support of his position, appellant relies principally upon the case of *Smith v. Luning Co.*, 111 Cal. 308, 43 Pac. 967. We do not consider the case in point. In that case *Smith*, a street contractor, endeavored to recover upon a contract for the construction of a sewer, and it was held that the instrument sued upon never became a completed contract, not because the plaintiff had not obtained the necessary permit to do the work, as claimed by appellant, but for the simple reason that the contract had not been signed by the requisite number of property owners in that block so as to make it a binding contract. The decision also rested largely upon the ground that the plaintiff *Smith* had performed no part of the work for which he was endeavoring to collect. In the instant case there was a completed contract, duly signed by the necessary parties, free from any conditions or contingencies, and binding upon all parties immediately upon its execution.

[2] Appellant also contends that the assigned lease is unenforceable because it was entered into with the understanding that the assignees were to carry on an illegal business, that is, the saloon business, without having a license for that purpose. It is the theory of appellant that because the license was not obtained prior to the commencement of the term of the lease it permeated and made void the entire transaction. In this respect appellant cites the following cases: *Teachout v. Bogy*, 175 Cal. 481, 166 Pac. 319; *Riley v. Jordan*, 122 Mass. 231; *Mound v. Barker*, 71 Vt. 253, 44 Atl. 346, 76 Am. St. Rep. 767. But the fatal weakness with that theory lies in the fact that the essential element of the rule announced in those cases is entirely lacking here, namely, that there was an understanding, agreement, or contemplation on the part of the one who seeks to take advantage of the contract or lease that a violation of law was contemplated or was necessarily bound to result from the operation of the business conducted under the lease. There is not the slightest evidence here to the effect that the plaintiff *Mrs. Grace*, when she consented to the assignment, contemplated or understood that a saloon was to be conducted illegally. The very terms of the lease show that her understanding was exactly to

the contrary, for in the lease it is provided that—

The "tenants shall not do anything in the premises * * * which shall conflict * * * with any rules, regulations, or ordinances established by the board of supervisors * * * or any other board or department of the city and county of San Francisco."

The case in this respect is not unlike the case of *Burke v. San Francisco Breweries Co.*, 21 Cal. App. 198, 131 Pac. 83. There the defendant, after leasing certain premises from plaintiff for the purpose of conducting a saloon and lodging house therein, was subsequently denied a renewal of its liquor license by the municipal authorities. Upon that ground defendant sought to evade the payment of the rent, claiming, as is claimed here, "that the contract of lease was against public policy and therefore void from its inception." Such contention was "based upon the assumption that by the terms of the lease the defendant was obligated to continue for the period of five years in a business which might at any time after the execution of the lease be declared unlawful." Such contentions were held unsound, the court saying:

"They are founded upon the rule of law that no recovery can be had by either party to a contract the performance of which involves the violation of an existing law. This rule of law has no application to the facts of the present case. The lease in question does not purport to require the performance of an act in contravention of an existing law."

And then in quoting from a similar case (*Burgett v. Loeb*, 43 Ind. App. 657, 88 N. E. 346), the court says:

"At the time of entering into the contract, that he [the lessee] might subsequently, by the proper authorities, be denied a license, was a probability well known to him. [Citing cases.] With this knowledge appellant made his terms unconditionally. He took the risk of being held liable for the rents, even though performance became impossible by reason of circumstances beyond his control."

The case of *Dunn v. Stegemann*, 10 Cal. App. 38, 101 Pac. 25, cited by respondents, serves as a good illustration of the application of the doctrine contended for by appellant. In that case the parties, in the face of the provisions of a municipal ordinance prohibiting saloons within 150 feet of any church or school, entered into a lease for the use of certain premises as a saloon within 150 feet of a church. The court held that the lease had for its very object the violation of law, and it left both parties where it found them.

Appellant has cited cases on two other principles of law, one to the effect that

where personal services, such as those of a physician, are performed by a person who has no license to perform the same the services rendered are illegal and no recovery can be had therefor; the other to the effect that when a partnership has been conducted in violation of law the partnership transactions may not become the basis of legal action at the instance of any one of those who have participated in the illegal transactions. Neither of those principles is involved in the case at bar. For the reasons above stated we hold that the assigned lease was legal and binding upon the parties to it.

[3, 4] Appellant next urges that he has been released from liability as a guarantor because, as he claims, the demised premises were through the negligence and fault of the lessor "frequently flooded" with sewage, which interfered with the use of the premises to such an extent as to constitute a breach of the covenants of quiet enjoyment. In this respect appellant contends that as guarantor he is subrogated to all the rights which the tenants may have to any damages sustained by the tenants by reason of said sewage, and may plead and rely upon the same as an offset to the payment of rent. Appellant fixes the amount of those damages in the sum of \$10,000. Incidentally, appellant further contends that by reason of those damages the contract has been altered and his remedies have been impaired to such an extent as to release him as guarantor.

Although Croninger and Mohr were likewise sued for the rent, neither of them in their respective answers make any complaint about the sewage, nor do they plead a breach of the covenant of quiet enjoyment or make any claim as an offset or counterclaim by reason thereof. Conceding, however, the right of appellant as guarantor to plead this defense over the shoulders of his principals, the answer to his contention is that the evidence disclosed by the record is insufficient in law to constitute a breach of the covenant of quiet enjoyment, and the trial court so found.

The saloon and cigar store in question was located in the basement of a five-story building, the upper floors of which were operated as a hotel. There is one sewer system for the entire building, the drains for the saloon being the last to connect with the building sewer before it empties into the main sewer in the street. On several occasions rags and other debris were carelessly thrown into the sewer, either by the tenants of the hotel or by those using the toilets in the saloon, which caused a stoppage of the sewer below the saloon toilets and thereby caused the water to "back up" through the bowls of the saloon toilets and overflow a portion of the saloon floor. When the overflow came, the toilet doors were immediately locked and remained so until the trouble was relieved, which was

usually accomplished by the employees of the saloon by the use of a force pump or by stopping up the outlet to the toilets and thereby preventing further overflow, until the sewer cleared itself. On two occasions, once in 1916, and again in 1918, a plumber was called in, and he relieved the situation by opening up the sewer and removing the rags therefrom. On his first call his work consumed about 2 hours' time, and on the second only 20 minutes; the entire bill for his services and materials aggregating \$6.75. The overflow was caused wholly from the improper use of the toilets and not, as appellant contends, from an inadequately and improperly constructed sewer. The evidence fully establishes the fact that the sewer system was standard and modern in every way, adequate in size, and conformed to all municipal requirements. The plumber testified that the trouble was something that was "liable to happen to any system of plumbing." From this and the other proof disclosed by the record we are satisfied that there is ample evidence to support the finding of the trial court that "the overflows were not of long duration nor continuous, but were occasional and of short duration," and that the "flooding" was only "to a small extent." While it may be conceded that appellant, as guarantor, is entitled to urge all of the defenses allowed in law to the tenants, he is entitled to no greater rights, and it is obvious from the acts and conduct of the tenants themselves, both before and after the expiration of the lease, that they did not regard the sewer trouble with any degree of seriousness. They continued to occupy the premises without interruption or threat of abandonment. The doors of the saloon were never closed during the term of the lease, except when the law required all similar places to close, nor did the tenants ever demand a deduction from the rent on account of the sewer, except on one occasion when \$50 was withheld for three days from one month's rent. And although both Croninger and Mohr are charged here jointly with Frederick for the default in the rent, they have wholly failed to plead in any of their various answers an offset based upon the sewer trouble. The fact that they have not done so justifies the conclusion that the facts of the case did not authorize such a defense. *Callahan v. Loughran*, 102 Cal. 476, 36 Pac. 835; *Bell v. Haun*, 9 Cal. App. 41, 97 Pac. 1126; *Evinger v. Moran*, 14 Cal. App. 328, 112 Pac. 68. On this branch of the case we fully agree with the conclusions of the trial court that there was no eviction on account of the sewer trouble, nor did it deprive the tenants of the reasonable use and enjoyment of the premises at any time during the period of the lease.

[5] The next and third point made by appellant is that the owner, Mrs. Grace, upon

the demand of Frederick, failed to pursue certain remedies that were not available to him but which were available to her, and that her refusal to comply with such demand exonerated him as such guarantor. This contention is based upon the assumption that Frederick was a surety and not a guarantor, but a mere inspection of the terms of the assignment of the lease which Frederick signed will suffice to show that he was a guarantor. *S. F. Theological Seminary v. Monterey County G. & E. Co.*, 179 Cal. 166, 175 Pac. 693. Therefore this point is not available to appellant.

[6] Appellant's fourth point is that Mrs. Grace consented to the assignment of the lease from Croninger and Mohr to Christensen, and thereby released appellant as guarantor. The court found that Mrs. Grace did not consent to such assignment, and the evidence supports this finding. The lease itself provided that it could not be assigned without the written consent of the lessor, which it is conceded was not obtained, and the evidence falls far short of proving that Mrs. Grace, as lessor, afterwards ratified the assignment. *German-American Savings Bank v. Gollmer*, 155 Cal. 683, 102 Pac. 932, 24 L. R. A. (N. S.) 1066.

[7] Lastly, appellant claims that the court erred in charging Frederick with counsel fees. The lease provided:

"In case the lessor prevail in any suit brought by her under this lease or any provision thereof the lessee shall be liable to the lessor for the fees of her attorney in a reasonable amount to be fixed by the court, and the amount so allowed for fees shall be taxed as part of the costs in such suit."

In the assignment of the lease which Frederick signed it was stated:

"And the undersigned, W. A. Frederick, agrees with said Theodosia Cook Grace that in the event of the failure of said Hermann Croninger and Ernest Mohr or either of them to pay any of said rent or perform any of said covenant in said manner, that he, the said W. A. Frederick will pay said rent and perform said covenants at the time and in the manner in said lease provided."

It is apparent from the clause in the lease that Mohr and Croninger were liable for attorney's fees, and the liability of Frederick under the terms of the assignment is commensurate with the liability of Croninger and Mohr. *Section 2808, Civ. Code; Bagley v. Cohen*, 121 Cal. 606, 53 Pac. 1117.

Judgment affirmed.

We concur: TYLER, P. J.; KERRIGAN, J.

56 Cal. App. 507

INDUSTRIAL DEVELOPMENT & LAND CO. v. GOLDSCHMIDT et al.
(Civ. 3516; L. A. 7260.)

(District Court of Appeal, Second District, Division 1, California. Feb. 17, 1922. Hearing Denied by Supreme Court April 17, 1922.)

1. Contracts $\S$ 309(1)—Become inoperative when object becomes unlawful.

A contract which contemplates the doing of a thing, at first lawful, but which afterwards and during the running of the contract term becomes unlawful, ceases to be operative upon the taking of effect of the prohibitory law.

2. Landlord and tenant $\S$ 29(1)—Lease restrictive as to business becomes inoperative on passage of law prohibiting business.

A lease restrictive in its terms as to the business permitted to be done on the premises becomes inoperative upon the event that the law shall prohibit the doing of that business, but such is not true where the reference in the lease to the business to be done is merely permissive.

3. Landlord and tenant $\S$ 199½—Lease held to restrict use of premises to that of winery.

A lease, providing that the "lessees further agree that they will use and occupy the said premises for the purpose of conducting thereon a general winery" and not for any other business, held to restrict the use of the premises to that of conducting a liquor business, and lessees were not liable for rent after the passage of the Eighteenth Amendment to the federal Constitution, in view of Civ. Code, $\S$ 1930.

On Hearing in Supreme Court.

4. Landlord and tenant $\S$ 199½—Lessees under inoperative lease must surrender premises to escape payment of rent.

Where a lease becomes inoperative by reason of the passage of a law prohibiting the business for which the premises were to be used, the lessees must surrender the premises in order to escape payment of rent after the passage of the prohibitory law.

Appeal from Superior Court, Los Angeles County; Charles Wellborn, Judge.

Action by the Industrial Development & Land Company against Max Goldschmidt and another. Judgment for defendants, and plaintiff appeals. Affirmed in District Court of Appeals, and hearing denied in Supreme Court.

Ben F. Gray, of Los Angeles, for appellant. Loewenthal, Collins & Loewenthal and E. B. Coil, all of Los Angeles, for respondents.

JAMES, J. Plaintiff on the 1st day of July, 1915, leased to defendants certain real property located within the city of Los Angeles. The lease term was five years, at a monthly rental of \$250. The purpose for which the defendants desired to use the prop-

erty was to conduct thereon a winery and wholesale and retail liquor business. In January, 1920, the national prohibition law became effective, which made it unlawful for the defendants to conduct on the leased premises the business referred to. They tendered to the lessor unpaid rental accruing up to the 16th day of January, 1920, amounting to \$133.07, which tender was refused, the lessor insisting that the lease was not abrogated, but that it continued binding for the full remainder of the five-year term, notwithstanding the adoption of constitutional amendment No. 18. The trial court sustained the contention of the defendants, and rendered judgment in favor of the plaintiff only for the amount of rental theretofore tendered, no costs being allowed to either side. From that judgment plaintiff has appealed.

[1] Appellant advances first the broad contention that, where a lease of real property is made, binding the lessee to the requirement that he shall not use the property for any other than a specified purpose, even though such use becomes thereafter unlawful as being prohibited by law, the lessee is not relieved from his contract. The second contention is that in no event is a lessee relieved under a lease contract because of the fact that the business to which he desires to devote the property is afterwards prohibited, provided that the lease is not so restrictive in terms as to definitely bind the lessee to one particular use. Authorities may be found which do sustain the first contention advanced by appellant. The leading ones are referred to and cited in *Hecht v. Acme Coal Co.*, 19 Wyo. 18, 113 Pac. 788, 117 Pac. 132, 34 L. R. A. (N. S.) 773, 777, Ann. Cas. 1913E, 258. Citations to the same conclusion may also be found in the notes appended to the text in 16 R. C. L. p. 742 et seq. In any of these decisions the courts seem to have proceeded upon the assumption that there must be an eviction of the tenant worked through some act of the landlord, before the former can complain, and they declare that such an eviction does not occur where the law operates to take away the right to the particular use; further, that the contingency is one which should have been guarded against by express terms of the lease contract, the omission to provide which will leave the lessee bound for the full term stated in his contract. The opposite view, which is declared in a number of well-considered cases, places the argument upon a sounder basis, and points to a fundamental rule of the law of contracts. A contract in its inception must possess the essentials of having competent parties, a legal object, and a sufficient consideration. Lacking any one of these, no binding obligations result; hence a contract which contemplates the doing of a thing which is unlawful at the time of the making thereof is void. For the same reason a con-

tract which contemplates the doing of a thing, at first lawful, but which afterwards and during the running of the contract term becomes unlawful, is affected in the same way, and ceases to be operative upon the taking effect of a prohibitory law. A number of authorities applicable are cited in the case of *Stratford, Inc., v. Seattle Brewing & Malting Co.*, 94 Wash. 125, 162 Pac. 31, L. R. A. 1917C, 931. See, also, to the same point *Brunswick-Balke-Collender Co. v. Seattle Brewing & Malting Co.*, 98 Wash. 12, 167 Pac. 58.

[2, 3] Concluding, therefore, as we do, that a lease restrictive in its terms as to the business permitted to be done upon the premises becomes inoperative upon the event that the law shall prohibit the doing of that business, we have then to determine whether the conditions of the lease entered into between plaintiff and defendants, in its reference to the business to be done upon the premises, is restrictive or merely permissive. It has been held that, where a lease provided that the lessee "may during the life of this lease" carry on a certain business, such term is permissive and not restrictive, but that where the language was that "the premises are hereby leased to the lessee for the purpose of conducting a saloon and selling liquors at retail therein," such condition is restrictive, and will not permit of any use other than the one referred to. The latter condition was the one considered in *Brunswick-Balke-Collender Co. v. Seattle Brewing & Malting Co.*, supra. Respondent has cited the case of *Security Trust & Savings Bank v. Claussen*, decided by this court and reported in 187 Pac. 142. The court there held that a term of the lease was permissive where it provided that premises were to be "used for the purpose of conducting and carrying on the business pertaining to a general retail liquor establishment." The construction given to the language was a liberal one in favor of the lessor, but no doubt expressed the intention of the parties, as it could be gathered from the whole text of the lease contract. As respondent suggests, in a consideration of the question presented here, the terms of section 1930, Civil Code, are not to be left out of view. That section provides as follows:

"When a thing is let for a particular purpose the hirer must not use it for any other purpose; and if he does, he is liable to the letter for all damages resulting from such use, or the letter may treat the contract as thereby rescinded."

In the light of the foregoing observations, we may now examine the terms of the lease contract as it was expressed in the writing which defined the obligation of the parties hereto. We quote those portions of the lease having to do with the restrictive conditions affecting the use to be made of the premises:

"The said lessees further agree that they will use and occupy the said premises for the purpose of conducting thereon a general winery and/or wholesale and/or retail liquor business; * * * and the said lessees further covenant and agree that they will not suffer or permit the said premises or any part thereof to be used for any other purposes than the purposes hereinafter recited; provided that by agreement between the parties hereto said premises may be used for other purposes. * * * The parties of the second part hereby agree that they will, during the term of said lease, well and truly pay or cause to be paid to the said lessor, the said rents at the time and in the manner specified, and will not, without the written consent of the said lessor, let or underlet, or sublet the whole or any part of said premises, or suffer or permit the same to be used by any other person, without the said consent of the said lessor; and it being further provided that in the event the said lessees desire to sublet the said premises or any part thereof, that they shall submit to the lessor herein, the name or names of the proposed subtenants in writing, at least fifteen days prior to the date of the proposed subletting; and in the event that the said subtenants so proposed by party of the second part are not satisfactory to the lessor herein, then and in that event the subletting of the said premises shall not be made; it being agreed, however, that lessor will not withhold his consent to a subletting or a sublease if the proposed business to be carried on is a legitimate one, and the proposed sublessee is responsible and of good character."

It appears from the terms quoted that the lessees agreed not to use the premises for purposes other than those enumerated. Such a condition most certainly is restrictive in character. The condition that the parties might by agreement provide for other uses to be made of the premises is entitled to no weight in determining the character of the condition, for had the added term been omitted entirely, the parties might, of course, at their option, change the terms of the lease by supplemental agreement. The restrictive clauses make it appear definitely enough that the lessees were bound to use the premises for the purpose of conducting a winery or wholesale or retail liquor business, or for all of such purposes, and that such uses could not be varied at their option. The lessor could arbitrarily refuse to permit any change to be made in such use while the defendants were occupying his land. The conditions as to subletting we do not think can be considered as modifying or changing this restriction as to the defendants' use in any manner whatsoever. In our opinion the trial judge correctly determined that the lease became inoperative as against these defendants on the taking effect of the prohibition amendment.

The judgment is affirmed.

We concur: CONREY, P. J.; SHAW, J.

Opinion of Supreme Court in Bank Denying Hearing.

PER CURIAM. [4] The petition for rehearing in the Supreme Court is denied. The opinion of the District Court of Appeal declares that the obligation of the defendants to pay the rent agreed upon became inoperative when the business to be carried on by the lessees in the premises became unlawful by reason of a law enacted after the term began. It does not mention the fact, agreed to by the parties and found by the lower court, that when such law took effect the defendants, because of the effect of such law, vacated the premises, surrendered them to the plaintiff, and never afterwards occupied or used the same. We are satisfied with the judgment denying a recovery to the plaintiff for the rent accruing after the vacation and surrender of the premises to the landlord. The opinion might be understood to hold that the lessee, in such a case, could continue to hold possession of the premises after the prescribed business became unlawful, and escape payment of the rent on the ground of such illegality, without surrendering to the lessor. We do not think this is the law, and the opinion must not be so understood.

SHAW, C. J., LAWLOR, J., RICHARDS, Justice pro tem., WILBUR, J., and LENNON, J., concur.

56 Cal. App. 600

STANDARD IRON WORKS v. MARYLAND CASUALTY CO. (Civ. 4153.)

(District Court of Appeal, First District, Division 1, California. Feb. 23, 1922. Hearing Denied by Supreme Court April 24, 1922.)

1. Mechanics' liens §317—Subcontractor may sue surety on contractor's bond without filing lien.

A subcontractor may bring suit to enforce its claim for work done and materials furnished against the surety on the contractor's bond, without having filed a lien.

2. Appeal and error §768—Appellant's statement as to when complaint was filed accepted as correct where not denied in reply brief.

Where the record does not show when the original complaint was filed, but plaintiff's statement as to the date of filing is not denied in defendant's reply brief, the court will accept such statement as correct.

3. Mechanics' liens §317—Complaint filed by subcontractor against sureties on contractor's bond within 120 days after notice of completion of building held in time.

Under a contractor's bond, conditioned as required by Code Civ. Proc. § 1183, for the payment of subcontractor's claims, and requiring that suit on the bond be instituted "within the time allowed by law for instituting suit to enforce a lien claim," which under section 1190,

must be within 90 days from the filing thereof, a complaint filed by a subcontractor, who filed no lien claim, after the expiration of 90 days, but before the expiration of 120 days from the filing of notice of the completion of the building, was in time, as the limitation did not begin to run until the expiration of the 30 days allowed for filing the lien.

Appeal from Superior Court, San Diego County; C. N. Andrews, Judge.

Action by the Standard Iron Works against the Maryland Casualty Company. From a judgment of nonsuit, plaintiff appeals. Reversed.

Arthur F. H. Wright, City Atty., of San Diego, for appellant.

Sweet, Stearns & Forward, of San Diego, for respondent.

KERRIGAN, J. This is an action to reform a bond, and to recover against the surety on the bond as reformed the contract price for furnishing and installing an elevator.

On August 21, 1919, B. F. Decker entered into an agreement with two certain persons to repair, add to, and alter a certain building in the city of San Diego known as the French Laundry. The plaintiff, Standard Iron Works, as a subcontractor, furnished and installed an elevator in said building under a contract so to do, but was not paid therefor. A bond had been furnished to the owners of the building by B. F. Decker, the original contractor, with the defendant Maryland Casualty Company, as surety thereon. This bond was conditioned, as required by section 1183 of the Code of Civil Procedure, for the payment of the claims of persons performing labor or furnishing materials upon said work, and it gives to such persons a right of action upon the bond directly or in any suit brought to foreclose the liens provided for by law. Said bond contains this provision:

"That any suit brought on this bond to recover any claim hereunder must be instituted within the time allowed by law for instituting a suit to enforce a lien claim."

[1] The alterations and additions to the building were completed early in December, 1919, and notice of completion was recorded December 15, 1919. The plaintiff filed no lien, and brings this suit to enforce its claim against the surety on the bond, a course of procedure sanctioned in this state. General El. Co. v. American Bonding Co., 180 Cal. 675, 182 Pac. 444.

[2] The record does not show when the original complaint was filed, but plaintiff states that it was filed April 8, 1920, and, as this statement is not denied in defendant's reply brief, we will accept it as stating the fact correctly. On September 20, 1920, the plaintiff filed an amended complaint, alleging that a mistake in the description of the premises concerned had been made by all

of the parties to the bond and contract, and, in addition to praying judgment for the value of the elevator furnished, asked that the bond be reformed to conform to the facts alleged.

[3] Upon plaintiff closing its case, having shown the facts to be as above stated, a motion for nonsuit was made by the defendant, which was granted on the ground that suit was not commenced upon the bond within 90 days from the filing of the notice of completion of the contract. It will thus be seen that the plaintiff filed its complaint after the expiration of 90 days, but before the expiration of 120 days, from the filing of notice of completion of the building; and the principal question for determination is, Was the action commenced in time in view of the above-quoted provision in the bond?

As we have seen, the bond provides that any suit brought thereon to recover any claim thereunder must be instituted within the time allowed by law for instituting a suit to enforce a lien claim. The time allowed for commencing an action to enforce a lien claim is 90 days from the filing of the claim of lien (Code Civ. Proc. § 1190); and the difficulty in the case at bar is to apply such provision to an action directly on the claim where no lien has been filed, and where, consequently, the starting point of the 90-day period is not precisely determined by that event.

It is argued by the respondent—and this view was adopted by the trial court—that the language found in the bond, "time allowed by law for instituting a suit to enforce a lien," is merely equivalent to the words "90 days," and, no lien having been filed, the 90-day period starts with the recording of notice of completion of the work. The appellant, on the other hand, contends that the language quoted from the bond contemplates the inclusion not only of the 90 days after the filing of the lien, but also of the time allowed for such filing.

We think the construction contended for by the respondent is too narrow. If the intention of the parties to the bond was to limit the time for commencing an action upon a claim as to which no lien had been created to 90 days from the recording of notice of the completion of the work, that intention could readily have been expressed without the slightest ambiguity. In adopting the language they did, their intention was to place the two kinds of action in the same situation as regards the time of commencement; in other words, the limit of time within which an action to foreclose a lien might be brought being 90 days after its filing, which period, however, might start to run at any time within 30 days of the notice of completion of the work, depending upon the date of the filing of the lien within said 30 days, the ultimate limit of time within which a suit to foreclose the lien could be brought is 30 plus 90 days. Broadly speaking, this is the

time allowed by law for instituting an action to foreclose a lien; and, as the parties to the bond, instead of designating a definite number of days for the commencement of an action directly upon the claim, attempted to limit it by a reference to a particular situation, we must take that situation as the measure to be applied. Its application warrants a maximum allowance of 30 plus 90 days for the bringing of the action here in question. There is certainly nothing in the language of the bond to disclose an intention that the latter sort of action must be brought within less time than the foreclosure suit would ordinarily be commenced in. It seems reasonable to suppose that the difference in the situation of the two actions in respect of the absence of a point of departure for the period allowed for the commencement of an action directly on the claim was not present to the minds of the parties to the bond, but that what was present was the general situation that the law had set a limit upon the time within which the foreclosure suit might be commenced, and they wished to make such provision applicable to a direct action on the claim. It must be borne in mind that, in the absence of this provision of the bond, such an action would be governed by the general provisions of the Code; and while the obligor in a bond may within reasonable limits stipulate for a shorter time, there is a point which would be held to be unreasonable; and, as between the respective periods contended for in the present case, that insisted upon by the appellant has at least the advantage of greater reasonableness.

We conclude that, as the present action was brought within 120 days from the recording of notice of completion of the work, it was in time, and that the court's action in granting a nonsuit based upon this ground was erroneous.

Other points are made by the respondent which he claims support the order granting said motion. We have examined them, and, having found them to be without substantial merit, no discussion of them is necessary.

For the reason given, the judgment is reversed.

We concur: TYLER, P. J.; RICHARDS, J.

(56 Cal. App. 615)

GOODWIN v. GROSSE. (Civ. 3464.)

(District Court of Appeal, Second District, Division 1, California. Feb. 24, 1922. Hearing Denied by Supreme Court April 24, 1922.)

1. Landlord and tenant §112(2)—Lessor may waive forfeiture by accepting rent with full knowledge of breach of covenant.

A lessor, having the right to forfeit the lease and terminate the tenancy because of a

subletting without his written consent, may waive the forfeiture by accepting the rent with full knowledge of the subletting.

2. Landlord and tenant §112(2)—Knowledge of occupation of premises by sublessees held not to constitute knowledge of sublease.

That lessor's agent was told by one of lessee's sublessees that they had located in lessee's building until they could get a storeroom for the lease of which they were negotiating with lessor was insufficient to apprise such agent that lessee had executed a sublease so as to impute such knowledge to lessor and constitute the acceptance of rent by her a waiver of a forfeiture arising therefrom; such fact being consistent with and indicating a temporary arrangement only under a license from lessor.

3. Landlord and tenant §112(2)—Evidence sufficient to show that lessor had no knowledge of sublease before accepting rent; "waiver."

In an action of unlawful detainer for subletting without lessor's written consent, evidence held sufficient to support the court's findings that plaintiff had no notice or knowledge of such subletting before accepting an installment of rent, and hence did not waive her right of forfeiture; a "waiver" being the relinquishment of a known right.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Waiver.]

4. Landlord and tenant §112(1)—Lessor need not notify lessee against subletting contrary to covenants.

Under a lease prohibiting subletting without lessor's written consent, lessor was not required to notify lessee that she would insist on strict performance of the covenants before exercising her right of forfeiture for a breach thereof; she having the right to assume that lessee would comply therewith.

5. Landlord and tenant §112(1)—Lessor not estopped to object to subletting by failure to object to previous subletting to another.

That lessor, with notice of a sublease made without her written consent, as required by the lease, interposed no objection, did not estop her from objecting to a subsequent subletting to others.

6. Landlord and tenant §112(1)—Lessor not estopped to assert forfeiture by collecting agent's unauthorized statements.

Under a lease prohibiting subletting without lessor's written consent statements of an agent authorized only to collect rents that no objection would be made to lessee's subletting if he remained on the premises did not estop lessor from asserting her right of forfeiture, in the absence of ratification.

Appeal from Superior Court, Los Angeles County; Russ Avery, Judge.

Action by Abbie A. Goodwin against Charles E. Grosse. Judgment for plaintiff, and defendant appeals. Affirmed.

Wilton W. Webster, of Pasadena, for appellant.

Chas. W. Fournl, of Los Angeles, for respondent.

SHAW, J. Plaintiff had judgment in an action for unlawful detainer, from which defendant has appealed.

It appears that plaintiff by a written lease let and demised to defendant certain premises consisting of two storerooms, one of which is designated as 66 North Broadway, in Pasadena, for a term of one year from October 31, 1919. This lease contained a provision as follows:

"It is understood and agreed that the party of the second part [the lessee] shall not assign or transfer this lease, nor sublet any portion of the premises without the written consent of the party of the first part; and furthermore that any attempted assignment or transfer of this lease, or any attempted subletting of said premises, without such written consent, shall be void. It is agreed and understood that if any * * * default be made in any of the covenants herein contained, it shall then be lawful for the party of the first part to re-enter said premises and to remove all persons therefrom."

It further appearing without controversy that on May 1, 1920, during the term for which the premises were so let and demised to defendant, and while he was occupying the same under the terms and conditions of said lease, he, without obtaining any written consent of plaintiff so to do, executed a written lease to Brinley Bros. whereby he demised and let unto them, for a term ending October 31, 1920 a part of said premises, to wit, those designated as No. 66 North Broadway; that on June 14, 1920, plaintiff caused to be served upon defendant a written notice of the termination of tenancy, alleging as a ground therefor the breach of the covenant contained in said lease whereby it was agreed that no part of the premises should be sublet without her written consent; and thereafter, to wit, on June 28, 1920, caused to be served upon defendant a three-day notice to quit the premises.

In his answer defendant, in substance, alleged that in the collection of rents and in all matters connected with the lease and defendant's acts thereunder, one H. F. Newell was plaintiff's agent; that as such agent Newell assured him there would be no objection to his subletting the premises to any one so long as defendant remained upon the premises; that thereafter, to wit, on May 1, 1920, defendant, acting in reliance upon the repeated assurances given by Newell as agent of plaintiff to the effect that there would be no objection to his subletting the premises so long as defendant remained thereon, sublet a portion of the same to Brinley Bros.; that for two or three weeks pri-

or to the 1st day of June, 1920, Newell as such agent had actual knowledge of the subletting to Brinley Bros., and that plaintiff prior to June 1, 1920, had knowledge of such fact; that with such knowledge Newell as agent of plaintiff, without objection, did on June 1, 1920, accept the rent for the month expiring July 1st thereafter, and made no objection to the subletting of which he had knowledge; and, further, that prior to the 1st day of June, 1920, plaintiff had knowledge of all the facts relating to the act of defendant in subleasing a part of the premises, and sanctioned and ratified the making of the same, and that the acts of defendant in so doing were had and done because of and in reliance upon the representations and conduct of plaintiff herein and her agent; as to all of which facts, other than that Newell was agent of plaintiff in the collection of the rental, the court found adversely to defendant.

Claiming that such findings are unsupported by the evidence, appellant insists: First, that the right of forfeiture, as disclosed by the testimony, was waived by acceptance of rent with notice of the subletting; second, that respondent is estopped from declaring a forfeiture; and, third, that the subletting was ratified by respondent.

[1] It is true, as held in numerous cases (among which see *Jones v. Durrer*, 96 Cal. 99, 30 Pac. 1027; *Randol v. Tatum*, 98 Cal. 390, 33 Pac. 433; *Spangler v. Spangler*, 11 Cal. App. 321, 104 Pac. 995; *Stevinson v. Joy*, 164 Cal. 279, 128 Pac. 751), that a lessor, having the right under the terms of a lease to forfeit the same and terminate the tenancy because of a subletting without the written consent of the lessor may, nevertheless, waive the same by an acceptance of rent from the lessee with full knowledge of the subletting or other facts constituting the breach of a covenant for which a forfeiture may be had. This principle, however, is not applicable to the facts, as found by the court, that Newell had not, as alleged, been informed prior to May 1st that defendant contemplated the execution of such sublease or any sublease and that neither plaintiff nor her agent had any notice or knowledge prior to June 1, 1920, when the rent was accepted for the month of June, of the making of the sublease, and that said agent did not assure defendant at any time or at all that the subletting of the property would be without objection on the part of plaintiff so long as defendant personally remained upon said premises, and that defendant's act in subletting a portion of the premises to Brinley Bros. for six months was not done in reliance upon any assurances given by said agent that there would be no objection to the same, providing he remained upon the premises, and that plaintiff never con-

sented to, sanctioned, or ratified the subletting, nor were the acts of defendant in so doing done in reliance upon any representation, permission, or conduct of plaintiff or her agent.

[2, 3] In our opinion, the evidence is ample to support the facts so found. The testimony of plaintiff, in most positive terms, is that she never learned that Brinley Bros. were in occupation of a part of the premises under sublease or otherwise, until about June 5th, after the rent for such month had been paid, and that at the time of the acceptance thereof she had no notice, knowledge, or information to the effect that defendant had violated the covenant of the lease for which the forfeiture is claimed. Appellant, however, insists that Newell as agent was cognizant of the subletting, and that his knowledge must be imputed to his principal. This contention is based, not upon testimony showing actual knowledge of such fact on the part of Newell, but it is claimed that such conclusion is the fair inference from his testimony. As to this, it appears that Newell, meeting one of the Brinley brothers, was told by him that they had vacated their old quarters, and located in the building with Mr. Grosse until they could get the storeroom designated as No. 68 North Broadway, owned by plaintiff, and for the leasing of which they had been negotiating. There was nothing in this information to apprise Newell of the fact that defendant had executed the sublease. Such fact was entirely consistent with and indicated a temporary arrangement only, under license from defendant, as distinguished from a sublease. *Shaw v. Caldwell*, 16 Cal. App. 7, 115 Pac. 941; *St. Louis U. Trust Co. v. Galloway* (C. C.) 193 Fed. 106.

[4] As said in *German-American Savings Bank v. Gollmer*, 155 Cal. 683, 102 Pac. 932, 24 L. R. A. (N. S.) 1066, "a waiver is the relinquishment of a known right." Hence there must be, as there stated, actual knowledge of the existence of the fact upon which such right can be predicated. It clearly appears, we think, that plaintiff was without any knowledge of the making of the sublease at the time the rent was paid. In view of the evidence referred to, and the fact that defendant testifies that he never at any time told plaintiff or her agent that the Brinleys were there, and never informed either of them that he had made a sublease of the property, the court was fully warranted in finding there was no waiver of the right of forfeiture, due to an acceptance of the rent after knowledge of the making of the sublease. Appellant appears to lay much

stress upon the fact that plaintiff never notified defendant that she would insist upon a strict performance of the covenants of the lease. Such act on her part was unnecessary. She had the right to assume that defendant would comply with his covenant not to sublease the property without her written consent and thus divest himself of all right to possession and control of the premises. Assuming that Newell as her agent was cognizant of the fact that Brinley Bros. were occupying a part of the premises, and that plaintiff was thereby chargeable with notice, the information obtained was wholly consistent with the fact that they were not in possession under a lease giving them the exclusive possession and control of the premises so occupied, but under a license for temporary occupation from the defendant.

[5, 6] The claim that plaintiff is estopped from insisting upon the forfeiture of the lease is based upon the alleged fact that Newell, as agent of plaintiff, assured defendant that no objection would be made by plaintiff to his subletting the property, provided he remained on the premises, and that, acting thereon, he had theretofore leased a part of the premises to one Foulke, who was a dealer in automobiles. Not only did Newell deny making the statements so attributed to him by defendant, which fact is sufficient to support the finding, but, assuming that plaintiff, having notice of the sublease to Foulke, interposed no objection thereto, she was not estopped by reason thereof to object to the subsequent subletting of the property to Brinley Bros. The character of the business conducted by Foulke may have been wholly unobjectionable, and that of Brinley Bros., engaged in the repair of automobiles, have been most damaging to the property. "The breach of a covenant against subletting is not a continuing one so far as there is only one subletting, but a lessor does not, by waiving his re-entry on one underletting, lose his right to re-enter on a subsequent underletting." 24 Cyc. 1363, and cases there cited. Moreover, the extent of the agent's authority was to collect the rents due from defendant to plaintiff, and since under the terms of the lease defendant could not sublet the property without the written consent of plaintiff, the acts of such agent, standing alone, could not estop plaintiff from asserting her rights.

From what is said, it is apparent there was no ratification on the part of plaintiff of defendant's act.

The judgment is affirmed.

We concur: CONREY, P. J.; JAMES, J.

58 Cal. App. 606

SAUBLE v. GARY SOUTH COAST AGENCY.
(Civ. 3646.)

(District Court of Appeal, Second District, Division 1, California. Feb. 24, 1922. Hearing Denied by Supreme Court April 24, 1922.)

1. Sales ⚡92—**Surrender of truck by buyer, and resale by seller, held to effect rescission.**

Under Civ. Code, § 1691, as to rescission, where the plaintiff redelivered to defendant seller a defective truck which plaintiff had purchased, defendant in reselling the truck ratified plaintiff's rescission.

2. Corporations ⚡425(5)—**Holding out manager and secretary as clothed with authority to sell held to estop corporation to deny their authority as to a particular sale.**

Where defendant corporation held out its sales manager and secretary-treasurer with whom plaintiff dealt in purchasing a truck from it, and later in contracting for its surrender, as being clothed with necessary authority to negotiate sales of its trucks, it was estopped to deny their authority existed when they negotiated with plaintiff.

Appeal from Superior Court, Los Angeles County; Charles S. Crall, Judge.

Action by Leonard E. Sauble against the Gary South Coast Agency. From a judgment for plaintiff, defendant appeals. Affirmed.

C. E. Spencer, of Los Angeles, for appellant.

H. H. Harris, of Los Angeles, and Clyde R. Moody, of San Fernando, for respondent.

JAMES, J. Plaintiff brought this action to recover the sum of \$1,200 alleged to be owing to him on a contract. The judgment was in his favor for the amount prayed for, and the defendant has appealed.

About the latter part of January, 1920, the plaintiff bargained with the defendant for the purchase of a truck. This truck he desired to operate for the purpose of earning his livelihood. At the time the negotiations with defendant were had, plaintiff owned an old truck which he offered to have credited upon account of the purchase of the one defendant was proposing to furnish him. It was finally agreed that the old truck should be received by the defendant at a price of \$1,000; that the plaintiff should add thereto the sum of \$200 in cash; and that this amount of \$1,200 should constitute the first payment on the truck purchased, the full price of which was \$3,750. This latter truck was not a new one and was not so understood to be by the plaintiff. The transaction was closed and a written contract signed which contained various terms, including stating the dates upon which installment payments were to be made, the amount due monthly as set forth therein being \$212.50. The written contract in one of its terms declared

that, "It is agreed that said motor truck is now in good repair and condition." The agreement contained other terms such as are commonly used in conditional sales contracts, such as that reserving title in the vendor until the full amount of the purchase price had been paid, and giving vendor the right to retake the property upon the happening of any default in the matter of payment of the installments. After receiving the truck, the plaintiff started to drive with it to a neighboring town. He had not gone far before the motor became disabled and the truck was towed back to defendant's place of business. The truck being again delivered to him, he attempted to operate it at his work, when, as he stated, another "bearing burned out," and it was once more returned to defendant's shops. The burning out of the bearings, according to the plaintiff's testimony, was due to the failure of the mechanics to make necessary oil connections in the motor. After receiving the truck the third time, the plaintiff again went to work with it, whereupon the gears refused to hold and upon being taken, at defendant's direction, to a machine shop, it was found that some of the parts thereof were so badly worn as to prevent the gears from performing their function. At this point the plaintiff requested the defendant to take back the truck and sell it, which he says it agreed to do. It is a fact that the truck was not again in the hands of plaintiff, but remained wholly under the control of the defendant, except as we will hereinafter state.

Plaintiff alleged in his complaint that defendant agreed to rescind the contract as made, to resell the truck, and return to him \$1,200. Defendant in its answer denied that any rescission of the contract had been made, and in connection with that denial alleged that—

"Defendant admits that plaintiff delivered said truck to it on or about March 1, 1920, but denies that it was in conformity with the agreement alleged in plaintiff's complaint."

In a further and separate defense alleged in the answer defendant stated:

"Defendant admits, for the purpose of this defense, that it did promise and agree with plaintiff to endeavor to sell said truck, and that if it did resell the same in a reasonable time it would return or refund to plaintiff all sums which it might find it had received over and above any balance due on said contract, plus all costs and expenses of reselling said truck; that said agreement was made on the express condition that plaintiff would make and pay the installments on his said contract; that defendant did endeavor to resell said truck, but did not do so until after June 7, 1920."

These allegations of the answer show at least a conditional rescission. Early in March the defendant delivered the truck to

one Hayden and received from him \$350, issuing a receipt therefor which recited that—

Said sum was received "as a deposit on the purchase of one White truck with the special agreement that if said truck cannot be placed on steady work within a period of thirty days, then the above amount to be returned to him, less what the truck had earned, less oil, gas, running expenses."

The receipt bore date of March 4th. The purchase price was \$4,000. Hayden retained the truck and later a more complete contract was entered into for the sale of the vehicle. Hayden, being called as a witness, testified regarding the contract made with the defendant for the purchase of the truck that—

"The first payment on the truck was to be \$1,300, if I kept it, and we made an agreement that I was to give them \$350 and the balance of it would be taken out of the earnings of the truck until the \$1,300 was paid; but later on, I think it was in June, they agreed to let me have the truck at \$750 the first payment, which I paid them, but I didn't get my contract until some time in July."

The same witness testified that "around the 1st of July," as he remembered it, a salesman of the defendant came and asked to be allowed to take the truck, saying that he was going to deliver it to "Mr. Sauble," the plaintiff here, "and, in the event that Mr. Sauble wanted to keep it, he wanted to know if it would be agreeable with me, and I told him yes; he said, 'If he don't want it, shall I bring it back to you?' and I said, 'Yes.'" The wife of the plaintiff testified that about the 12th of March she called at the place of business of the defendant and had a conversation with a Mr. Haight (he being the secretary-treasurer of the defendant corporation and the person who executed the contract with the plaintiff on behalf of his company), also with one Garfield, who was sales manager; that she inquired of them regarding the sale of the truck and wanted to know if the defendant could not advance some money; that Haight referred her to Garfield, saying that the latter was more conversant with the case than he was, whereupon Garfield came in and, upon being acquainted with the purpose of Mrs. Sauble's visit, said:

"We are doing our best, Mrs. Sauble, to sell that truck, and when we sell it we are going to give you—Mr. Sauble—his \$1,200 initial payment and only payment. \$1,200 was the initial payment of the truck, and we want to pay him his first money then and get our money out of the truck, as soon as we sell it." I says, 'Well, that doesn't give us our money now.' And he says: 'No, that doesn't. It isn't going to cost Mr. Sauble one cent, not one cent.' Mr. Haight spoke up and said, 'Well, it is out on work now and has been for three or four days.'"

A witness for the defendant testified that about the first of June, 1920, he took the truck in question to the place of residence

of plaintiff, left it across the street, and served upon plaintiff a notice which was signed by defendant corporation, by Haight, secretary. The notice was as follows:

"We hand you herewith statement of your account to June 1st, 1920, on account of a used White dump truck purchased from us, and have to advise you that unless payments on your contract are made within three days after the first day of June, we shall immediately declare all your rights to said truck forfeited and the truck will be sold for cost."

It will be remembered that a sale agreement had been made in March preceding between the defendant and Hayden, and that Hayden had had possession of the truck continuously under such agreement up to the time that the defendant came and got it for the purpose, as Hayden was informed, of offering it to the plaintiff. The witness who served the last demand upon the plaintiff did not testify that he offered to deliver the truck to the plaintiff, but testified that when he served the demand he did not show the truck to the former.

[1] Plainly enough it appears to us that the evidence as shown in the record was ample to sustain the judgment, and we find no errors of law which furnish any impediment to the making of an order of affirmance. The defendant offered no testimony at all contradicting the statements made by the plaintiff as to the defective condition of the truck, or as to the understanding that was had when the plaintiff last surrendered possession of the truck to it. By its answer it admitted that a conditional rescission was made—that is, that it did receive the truck back with the agreement to resell the same and refund to plaintiff the amount paid, alleging as an added condition, however, that the plaintiff should be required to pay all installments as they became due under the contract. There was no evidence to support the allegation as to such a condition having been imposed, and, in order to give any effect to it at all, we would be required to hold that all of the terms of the original contract remained in force, notwithstanding the surrender to and acceptance by the defendant of the truck, and this only upon the ground that the oral agreement was ineffectual to work a modification of the original contract. A vendor and vendee may effect a rescission of a written contract of sale by the vendee surrendering up the thing purchased and the vendor accepting the same, and an agreement on the part of the latter to refund the purchase price may then be enforced. Section 1691, Civ. Code. If we concede that the rescission was conditional and that the defendant would have had the right to return the truck to the plaintiff and require him to discharge the obligations of the original contract, nevertheless the defendant would become bound and the rescission effective whenever the latter made

sale of the truck to a third person. This the defendant did, by entering into the agreement with Hayden early in March and delivering the truck to the latter, who continued to have its possession and use it up to the time of the trial of the action, except for the temporary interval when the defendant took it at the time a settlement was demanded of the plaintiff in the manner already disclosed. The court was warranted in assuming that this temporary surrender was a mere borrowing done for the purpose of making a perfunctory technical showing of a readiness to deliver the truck to plaintiff. If defendant chose to make a conditional sale to Hayden upon terms of credit of its own choosing, the responsibility for such act was its own, and the plaintiff was not required to wait to see whether the proposed purchaser complied with the terms of his contract. The defendant, in reselling the truck, assumed complete ownership of it and thereby ratified the rescission of plaintiff's contract, if the rescission had not already become effective.

[2] The claim of appellant that the persons who assumed to act for defendant corporation were without authority to bind the latter is without merit. The persons with whom plaintiff dealt were those placed in charge of the business of the defendant. They were respectively the sales manager and the secretary-treasurer of the corporation. Plaintiff dealt with them in making his contract for the purchase of the truck, and he dealt with the same persons in making the contract for the surrender of the vehicle. The corporation, by every indication which the evidence shows, held out the two persons as being clothed with all necessary authority to negotiate sales of its trucks, and it would be estopped thereby from denying that authority existed in them to do any of the acts herein concerned.

The findings of the trial judge were responsive to the issues made by the pleadings and are sufficient to sustain the judgment. We find no errors in the court's rulings as to the admission or rejection of evidence.

The judgment is affirmed.

We concur: CONREY, P. J.; SHAW, J.

opportunity to object to the assessment and to be heard upon his objection or protest.

3. Municipal corporations $\S$ 514(1) — Reassessment covering work not included in resolution of intention held valid.

A reassessment for street work under Street Work Act 1913, $\S$ 12 $\frac{1}{4}$ was valid, though the original assessment was void because the plans and specifications included more work than that described in the resolution of intention.

4. Appeal and error $\S$ 1170(3)—Erroneous ruling as to pleading not reversible in absence of miscarriage of justice.

Overruling of objection to admission of evidence in an action to foreclose a lien under the Street Work Act because the complaint set out warrant containing notice that bonds would issue in certain event without alleging that a bond did issue touched a question concerning which pleaders might reasonably differ, and does not require a reversal, in the absence of a miscarriage of justice, under Const. art. 6, $\S$ 4 $\frac{1}{2}$.

In Bank.

Appeal from Superior Court, Los Angeles County; Leslie R. Hewitt, Judge.

Action by Peter L. Ferry against William O'Brien, Winifred F. Marr and others. Judgment for plaintiff, and the last-named defendant appeals. Affirmed.

Winifred F. Marr, in pro. per.

Hartley Shaw, of Los Angeles, for respondent.

RICHARDS, Justice pro tem. The following portion of the opinion of the District Court of Appeal for the Second Appellate District, Division 1, covering the facts of the case, and decisive of the main issues arising upon the trial and upon appeal, is hereby adopted as the opinion of this court:

"This is an action to foreclose a lien claimed by reason of an assessment for street work alleged to have been done under contract pursuant to the procedure outlined in the street work act of 1885, commonly known as the 'Vrooman Act,' St. 1885, p. 147. The defendant Winifred F. Marr appeals from the judgment.

"On the 8th day of February, 1915, the board of trustees of the city of Glendale adopted a resolution declaring its intention to order improvements as follows: That a bridge be constructed upon a portion of the roadway of Canada boulevard, across the Verdugo wash, in that city; also that a channel 50 feet in width be graded in the Verdugo wash from a point 150 feet northeasterly from the center point of the bridge to a point 585 feet southwesterly from the center point of the bridge; also that the banks of said channel be protected by levees, 'said grading, protection work and bridge to be constructed in accordance with plans Number 171 and 172 and special specifications adopted for said work by said board of trustees.' The resolution declared that the contemplated work was of more than local or ordinary public benefit, and expressed the in-

(188 Cal. 629)

FERRY v. O'BRIEN et al. (L. A. 6762.)

(Supreme Court of California. April 14, 1922.
Rehearing Denied May 11, 1922.)

1. Municipal corporations $\S$ 314—Plans and specifications for street improvements must conform to description in resolution of intention.

Under the Street Work Act of 1885, commonly known as the Vrooman Act, plans and specifications for street improvement, when prepared must conform to and be consistent with the description in the resolution of intention, and the fact that plans and specifications include more work than that directly described in the resolution, is not sufficient to extend the terms of the resolution so as to include the additional work.

2. Constitutional law $\S$ 290(3) — Municipal corporations $\S$ 407(1) — Legislature may provide that street work be ordered without notice, but assessments cannot be so made.

Though the Legislature may authorize an order for street improvement without notice, it cannot authorize an assessment to be made without notice, giving the property owner an

rention of the board to create an assessment district, including the territory benefited by the improvement and to be assessed to pay the costs and expenses thereof. It was stated in the resolution that the plans, profiles, and specifications therein mentioned were thereby referred to 'for a more particular description of said work and made a part hereof.' It was also declared to be the intention to issue serial bonds representing the assessments in accordance with the provisions of the Street Bond Act of 1893 (St. 1893, p. 33) as then in force. The subsequent resolution ordering said work, and the notices thereof, followed the resolution of intention in its statement that said channel was to commence at 'a point 150 feet northeasterly' from the center point of said bridge. The plans referred to in said resolution of intention showed that said channel was to commence 'at a point 1,500 feet northeasterly from the center point of said bridge.' The resolution was duly published, and thereafter it was ordered that the work be done. Notices inviting bids having been duly published, the contract for the work was entered into by plaintiff's assignor as contractor, and the work was performed in accordance with the terms of the contract. That contract provided for the channel work to commence at a point 1,500 feet northeasterly from the center point of the bridge. In other words, the channel contracted for extended to and included a distance of 1,350 feet, as indicated in the plans, notwithstanding the fact that this portion of the work had been omitted from the resolution of intention and from the resolution ordering the work, and from the notices thereof. The work described in the contract having been completed and accepted, an assessment was made and a diagram and warrant were issued in the usual form and recorded on November 26, 1915. After demand made for payment of assessments, as required by law, a return was made and recorded in due form. The assessment shown against the property of appellant was the sum of \$81.60, and the return showed the same to be wholly unpaid.

"On the 21st day of February, 1916, pursuant to petition filed by and on behalf of the contractor and its assignee, the board of trustees duly adopted a resolution whereby it found and declared that said assessment was invalid for the reason that the ordinance and notices were incorrectly passed, published, and given, as set forth in said petition, and set aside said former assessment, and ordered the superintendent of streets to issue a new assessment and warrant for the costs and expenses of the said work, which had been theretofore done, describing said work according to the description contained in the contract, and directed that a reassessment be made on the land in the district therein described, which the board by said resolution found and declared to be that actually benefited by said improvement, and which was the same district described in the original resolution of intention; and further directed that said reassessment be based upon the special and peculiar benefit to the respective lots, pieces, and parcels of land assessed at the time of making the reassessment, and that this total amount should not exceed the total amount of the original assessment. In accordance with said resolution of February 21,

1916, reassessment was made conforming to the requirements of said resolution. This reassessment, together with the necessary diagram, was made, approved, indorsed, and filed. Thereupon the board of trustees fixed a time for hearing on said reassessment and caused notice to be given and published of the time and place of the hearing, which notice described the work and the district on which the reassessment was made. At the time and place so fixed for said hearing, the board of trustees heard and considered the said reassessment and all objections thereto and adopted a resolution whereby it overruled and denied all objections to said reassessment and approved and confirmed said reassessment as filed and presented. Thereafter a warrant was issued and attached to the reassessment and after being recorded these documents were delivered to the assignee of the contractor. After demand made in due form, upon the land of appellant, as well as upon the other premises covered by the reassessment, a return was made and recorded upon which it appeared that the assessment against appellant's property was wholly unpaid. Thereafter the plaintiff prosecuted this action for the enforcement of the lien claimed against the property of appellant.

[1] "It seems to be conceded that the original assessment was void by reason of the fact that the resolution of intention did not include in its description all of the work on account of which that assessment was made. The fact that the plans and specifications included more work than that which was directly described in the resolution of intention was not sufficient to extend the terms of the resolution so as to include such additional work. Such plans and specifications when prepared must conform to and be consistent with the description in the resolution of intention. *Fay v. Reed*, 128 Cal. 357, 361, 60 Pac. 927; *Bay Rock Co. v. Bell*, 133 Cal. 150, 152, 65 Pac. 299.

"Respondent's claim of lien is rested upon alleged compliance with the provisions for reassessment as stated in section 12¼ of the Street Work Act, added to said act in the year 1913, Stats. 1913, p. 409. It is therein provided as follows: 'The city council may, at the request of the contractor, his assigns or the holder of the bonds representing the assessments, by resolution duly passed, set aside any assessment or assessments and bonds, as the case may be, and order a new assessment or assessments and bonds, to be made and issued without any decree having been obtained of or from any court regarding said matter, if in its opinion the assessment be invalid, and it may take all necessary steps and make and pass all necessary orders or ordinances to reassess and relevy such assessment, and may reassess and relevy the same with the same force and effect as an original levy. Such reassessment, whether made after decree of court has been rendered, or pursuant to a resolution of the council, shall be based upon the special and peculiar benefit of the work or improvement to the respective lots, pieces, or parcels of land assessed at the time of the making of the reassessment, and its total amount shall not exceed the total amount of the original assessments. Such reassessment so made shall become a

charge upon the property upon which the same is levied, notwithstanding any omission, failure or neglect of any officer, body or person to comply with the provisions of this statute, relating to or connected with the improvement and the issuing of the assessment or the bonds, and notwithstanding the fact that the proceedings of the city council, board of public works or any officer of the city or agent of the contractor or other person connected with such work, may have been irregular, illegal, informal, or defective, or not in full conformity with the requirements of this statute. It is hereby declared to be the true intent and meaning of this section to make the cost and expense of all local improvements actually made in the attempted exercise of the powers conferred upon municipalities under this statute, payable by the real estate benefited by such improvement by making a reassessment therefor which shall equitably apportion to each lot, piece or parcel of land thereby benefited the amount of the actual benefits derived from said improvement, notwithstanding that the proceedings of the city council and other officers or agents of the city, or of the contractor, may have been irregular, illegal or defective, or not in full conformity with the requirements of this statute. Such reassessment shall be made without a repetition of the proceedings had prior to the issuance of the assessment and shall be made and issued in the following manner: The superintendent of streets shall, upon the entering of a decree of court directing the reassessment, or upon the passage of a resolution of the city council directing a reassessment, proceed at once to make a reassessment in accordance with the said decree of court, or said resolution of the city council. Such reassessment shall be made upon the property fronting on the improvement or upon the district described in the resolution of intention for said work or improvement, as the case may be, and in the event that there shall have been informalities, uncertainties or ambiguities in the description of the limits of said district, then upon the district which the court or council shall find to be that actually benefited by said improvement, but in so finding said court or council shall follow the lines described in the resolution of intention so far as the same can be ascertained, and in all cases of uncertainty or ambiguity they shall give regard to the lines described and make such a determination as to the lines where there is any uncertainty or ambiguity in the resolution of intention as may be just and equitable. In the event that a portion of the work or improvement has been found to have been entirely without the power of said city to order done, then said assessment shall be for the remainder of the work or improvement only, and the benefits arising from the work entirely without the jurisdiction of the city to order shall not be considered in making the reassessment. Upon the completion of the reassessment it shall be presented to the city council and a day of hearing shall be fixed by it which shall be at least twenty (20) days after the filing of the reassessment. The city clerk shall then advertise the fact of said filing by publishing a notice in the newspaper in which the notice of award of contract was published, or in such other paper as the council may di-

rect, by five (5) insertions if the paper be a daily, and by two (2) insertions if it be a weekly or semiweekly newspaper, stating the fact that the reassessment has been filed with him and that objections to said reassessment will be heard at the time specified by the city council. At the time fixed for said hearing, or at such time or times to which the same may be thereafter adjourned, the city council shall consider the objections to said reassessment and in its discretion revise, correct and modify such reassessment in such manner as is most equitable and it shall thereupon pass a resolution approving and confirming such reassessment and such decision shall be a final determination of all matters relating to the actual benefits derived from the improvement by the respective lots, pieces and parcels of land enumerated in the reassessment. Said reassessment shall thereupon be recorded by the street superintendent, and it shall in all respects have the same effect and weight as the original assessment, and shall be enforced in the same manner. All payments made upon the original assessment shall be credited upon the reassessment and in the event that the reassessment in any instance is less than the amount of the original assessment, the excess shall be payable to the owner by the contractor.'

"In *Seattle v. Kelleher*, 195 U. S. 357, 25 Sup. Ct. 44, 49 L. Ed. 232, the following facts appeared: A street had been graded and sidewalks constructed for a distance including the frontage of the plaintiff's land. An assessment was levied, but this was held to be void. The work included certain planking. When the improvement was ordered, by the charter of the city of Seattle the planking was to be paid for out of the general taxes. Thereafter a statute was adopted authorizing a new assessment in cases where the old one had been declared void upon lands benefited, to the extent of their proportionate part of the expense of the improvement based upon its actual value at the time of its completion and having reference to the benefits received. Notice by publication of the time for hearing objections was provided for, with an appeal to the courts. By proceedings had in due form under this later statute, a reassessment was levied for the whole cost of the improvement, including the cost of said planking. The Circuit Court of the United States declared this assessment void under the Fourteenth Amendment, and enjoined the city against enforcing the same. This judgment was reversed by the Supreme Court. Responding to the objection based upon the fact that the planking was not authorized by the original ordinance under which the work was done, the court remarked that 'the city has done or adopted the work and presumably has paid for it. At the end the benefit was there, on the ground, at the city's expense. The principles of taxation are not those of contract. A special assessment may be levied upon an executed consideration, that is to say, for a public work already done. [Citations.] * * * The charge of planking on the general taxes was not a contract with the landowners, and no more prevented a special assessment being authorized for it later than silence of the laws at the same time as to how it should be paid for would have. In either case the Legislature could do as it thought best. Of course,

it does not matter that this is called a reassessment. A reassessment may be a new assessment. Whatever the Legislature could authorize if it were ordering an assessment for the first time it equally could authorize, notwithstanding a previous invalid attempt to assess. The previous attempt left the city free "to take such steps as were within its power to take, either under existing statutes, or under any authority that might thereafter be conferred upon it, to make a new assessment upon the plaintiff's abutting property" in any constitutional way. [Citations.]

[2] "It is true that the Street Work Act of 1885, as in force prior to the enactment of section 12 $\frac{1}{4}$, afforded no escape from the obligation to provide an opportunity to protest, and to be heard thereon, before the order could be made that the work be done. But the Legislature may authorize the waiver of any notice which is not essential to due process of law in the procedure that it prescribes. Whether the work shall be done, or not, is a question solely of public interest. Whether private property shall, or shall not, be assessed therefor, is a matter which directly touches upon the rights of the owner of that property. It is upon this matter that the incidence occurs, from which his right to be heard is derived. Therefore it has been held that the Legislature has power to authorize an order for street improvement without notice; but that, on the other hand, the Legislature has not power to authorize an assessment to be made without notice, whereby the property owner is given an opportunity to object to the assessment, and to be heard upon his objection or protest. *Goodrich v. Detroit*, 184 U. S. 432, 22 Sup. Ct. 397, 46 L. Ed. 627; *Londoner v. Denver*, 210 U. S. 373, 28 Sup. Ct. 708, 52 L. Ed. 1103; *Pasadena Park Improvement Co. v. Lelande*, 175 Cal. 511, 518, 166 Pac. 341.

[3] "In *Londoner v. Denver*, supra, which was a street assessment case, the statutory proceedings included an order for the street improvement, which order, made by the board of public works, was to be based upon the petition of a majority of the owners of the frontage to be assessed. It was necessary that this order be followed by an ordinance of the city council. It was provided in the statute that the finding of the city council should be conclusive that a proper petition was filed. The Supreme Court of Colorado held that such finding was conclusive. The matter having been brought before the Supreme Court of the United States on writ of error, that court, in discussing this particular question, said: 'The only question for this court is whether the charter provision authorizing such a finding, without notice to the landowners, denies to them due process of law. We think it does not. The proceedings, from the beginning up to and including the passage of the ordinance authorizing the work did not include any assessment or necessitate any assessment, although they laid the foundation for an assessment, which might or might not subsequently be made. Clearly all this might validly be done without hearing to the landowners, provided a hearing upon the assessment itself is afforded. *Voigt v. Detroit*, 184 U. S. 115 [46 L. Ed. 459, 22 Sup. Ct. Rep. 337]; *Goodrich v. Detroit*, 184 U. S. 432 [46 L. Ed. 627, 22 Sup. Ct. Rep.

397]. The Legislature might have authorized the making of improvements by the city council without any petition. If it chose to exact a petition as a security for wise and just action it could, so far as the federal Constitution is concerned, accompany that condition with a provision that the council, with or without notice, should determine finally whether it had been performed.' We think that in the case at bar there was a valid reassessment.

"At the commencement of the trial the appellant objected to the introduction of any evidence on the ground that the complaint did not state a cause of action since 'the complaint sets out a warrant containing notice that bonds would issue for all assessments over \$25 remaining unpaid for over 30 days; the assessment pleaded is dated over two years ago, and the amount thereof is over \$25, and there is no pleading that a bond did not issue, or that the owner of the property assessed ordered that no bond should issue to represent the costs of the assessment.' No evidence was introduced showing that the owner of the property assessed ordered no bond should issue; and of course, no finding was made on this point. Appellant continues to insist upon this objection, and urges that the finding that all the allegations are true does not support the judgment. Respondent replies that the issuance of a bond is clearly a matter of defense which should have been pleaded and proved by the defendant if in fact any bond did issue. The Street Work Act was supplemented by the Street Improvement Bond Act of 1893. Stats. 1893, p. 33. At the time of the proceeding in question in this action, section 4 of that act was in force in the form of its amendment in 1913. Stats. 1913, p. 847. Under this act it is provided that where street work is to be done under the Street Work Act of 1885, the city council may determine that serial bonds shall be issued to represent assessments of \$25 or more for the cost of any work authorized by said Street Work Act. When it has been so determined, this shall be so declared in the resolution of intention and in the notice of award. A procedure is set forth whereby, after the assessment has been perfected and recorded, a list is made and certified to the city treasurer of all assessments which are unpaid which amount to \$25 or over, and thereupon the treasurer is required to issue a separate bond for each such assessment. It is provided in section 4 as amended by St. 1913, p. 847, § 3, that 'if any person, or his authorized agent, shall at any time before the issuance of the bond for said assessment or reassessment upon his lot or parcel of land present to the city treasurer his affidavit made before a competent officer, that he is the owner of a lot or parcel of land in said list, accompanied by the certificate of a searcher of records that he is such owner of record, and shall with such affidavit and certificate notify said treasurer in writing that he desires no bond to be issued for the assessment upon said lot or parcel of land, then no such bond shall be issued therefor and the payee of the warrant, or his assigns, shall retain his right for enforcing collection of said assessment or reassessment as if said lot or parcel of land had not been so listed by the street superintendent.' The right which the payee, or his assigns, may thus re-

tain for enforcing collection is the right given in direct terms by sections 12 and 12 $\frac{1}{4}$ of the Street Work Act."

[4] The point of departure, as between the conclusions arrived at by the District Court of Appeal and those reached upon rehearing in this court, has reference to the question last above considered touching the sufficiency of the plaintiff's complaint in the absence of an averment that a bond had not issued covering the defendant's assessment, or that the owner of the property assessed had ordered that no such bond should issue. The appellant insists that this omission from the complaint is fatal upon her appeal from the judgment. Conceding, though not deciding, that the burden was upon the plaintiff to allege the nonissuance of a bond covering the amount of the defendant's assessment as a prerequisite to the existence of his lien and of his right of action to foreclose the same for such assessment, and conceding that the defendant's objection to the sufficiency of the complaint in that regard, made for the first time at the opening of the trial of the cause, was, nevertheless, timely, it does not therefore follow that there must or should be a reversal of the judgment herein on that ground. The alleged error of the trial court in refusing to sustain said objection was an error as to a matter of pleading. It was also an error, if it be such, touching a question concerning which pleaders might reasonably differ, and regarding which the trial court may excusably have been mistaken, in view of the conceded fact that the question of pleading involved is one of first impression and as to which no direct authority has been cited. For both of these reasons it is made the duty of this court under section 4 $\frac{1}{2}$ of article 6 of the Constitution to make an examination of the entire cause, including the evidence, for the purpose of determining whether the error complained of has resulted in a miscarriage of justice, before we are permitted to set aside a judgment on the ground of an error as to a matter of pleading. We have made such examination, and have approved and adopted the decision of the District Court of Appeal as to the main and meritorious issues of law and fact in the case.

Upon the question of fact as to whether or not a bond covering the amount of the defendant's assessment had been issued, the pleadings are silent, although the plaintiff's complaint is otherwise full and detailed as to the proceedings of the board of trustees of the city of Glendale leading up to the as-

essment and reassessment of the appellant's property and the creation of said assessment lien; and although the defendant's answer is filled with specific denials as to the validity of such proceedings and of said assessment lien; and although the proof of the various official steps leading up to the making of said assessment and reassessment and the creation of said assessment lien, responding to the issues thus framed, were full and detailed, including the introduction of the warrant, assessment, certificate, and diagram, with affidavit of service of demand and nonpayment, which are, by virtue of section 12 of the Vrooman Act (Stats. 1913, p. 408), made prima facie evidence of the right of the plaintiff to recover in the action. See, also, section 4 of the Street Bond Act (Stats. 1913, p. 847).

This being the state of the record, if, in fact, a bond had been issued and was outstanding when the plaintiff commenced and was prosecuting his action, that fact, if proven, would of itself have been fatal to said action, and would, if shown in evidence, have entirely avoided the necessity of any other or further defenses to said action, and would have also avoided the prolonged trial and the elaborate proofs and defenses presented therein. It is inconceivable that, under such circumstances, the defendant, with this fatal weapon in her hands, should have refrained from using it because of the doubtful question as to which of the parties should have pleaded the issuance or nonissuance of such bond. The conclusion would seem to be irresistible that no such bond had in fact been issued—that the defendant had no such weapon with which to utterly defeat the plaintiff's action—and hence resorted to the other defenses which her answer contains and which her offered proofs went to sustain.

This being the state of the record, and the evidence otherwise showing that the plaintiff was justly entitled to the foreclosure of his assessment lien, we cannot hold that the mere error of the trial court, if it were such, in a matter of pleading should be permitted to be successfully urged upon this appeal, since it is apparent that the error complained of has not resulted in any miscarriage of justice.

The judgment is affirmed.

We concur: SHURTLEFF, J.; SLOANE, J.; WILBUR, J.; LAWLOR, J.

SHAW, C. J., being disqualified by relationship to plaintiff's attorney, does not participate.

188 Cal. 798

FERRY v. MARR et al. (L. A. 6761.)

(Supreme Court of California. April 14, 1922.
Rehearing Denied May 11, 1922.)

In Bank.

Appeal from Superior Court, Los Angeles County; Leslie R. Hewitt, Judge.

Action by Peter L. Ferry against Winifred F. Marr and others. Judgment for plaintiff, and the named defendant appeals. Affirmed.

Winifred F. Marr, in pro. per.

Hartley Shaw, of Los Angeles, for respondent.

PER CURIAM. This appeal is identical, as to the questions involved, with the appeal in the case of *Ferry v. O'Brien*, L. A. No. 6762, 206 Pac. 449, this day decided, and for the reasons set forth in said decision the judgment herein is affirmed.

RICHARDS, Justice pro. tem., **SHURTELFEE**, J., **LAWLOR**, J., **SLOANE**, J., and **WILBUR**, J., concur.

SHAW, C. J., being disqualified by relationship to plaintiff's attorney, does not participate.

188 Cal. 574

McCLENAHAN v. KEYES. (S. F. 9933.)

(Supreme Court of California. April 4, 1922.
Rehearing Denied May 4, 1922.)

1. Witnesses ⇨159(9), 181—In action against executor on testatrix's contract plaintiff's testimony as to conversation with testator incompetent, but incompetency may be waived.

In action against executor plaintiff's testimony as to the testatrix's conversation, upon which his claim for compensation for personal services was based, was incompetent under Code Civ. Proc. § 1880, subd. 3, but the executor could waive such incompetency.

2. Witnesses ⇨178(4)—Executor waived incompetency of plaintiff as to conversation with testator by taking plaintiff's testimony by deposition.

In action against executor, the executor, by taking the deposition of the plaintiff as to his conversation with the testator, waived the incompetency of plaintiff's testimony as to testator's conversation under Code Civ. Proc. § 1880, subd. 3, notwithstanding section 2032, making introduction of deposition "subject to all legal exceptions."

3. Physicians and surgeons ⇨24(3)—Telegram instructing physician to render services held not admissible to bind defendant for services.

In physician's action against a mother's executor for services in attending daughter, telegram from son-in-law was not admissible to prove that mother agreed to pay for services, in the absence of a showing that the mother authorized the sending of the telegram.

4. Parent and child ⇨3(1)—Mother, in absence of contract, held not liable for medical services furnished wealthy adult daughter.

Where daughter was a wealthy woman and able to pay for medical services rendered to her, the mother was not liable for such services, in the absence of a contract on her part to pay therefor.

5. Physicians and surgeons ⇨13—One calling physician not liable for services in absence of express agreement.

Generally one who calls upon a physician to render services to another is not liable for those services, in the absence of an express agreement to pay therefor.

6. Physicians and surgeons ⇨24(3)—Evidence held insufficient to prove that mother agreed to pay for medical services furnished wealthy adult daughter.

In physician's action against mother's executor for services rendered for wealthy adult daughter, evidence held insufficient to prove that mother agreed to pay for such services.

7. Frauds, statute of ⇨26(2)—Physician rendering services for daughter on her credit could not recover against mother, in absence of her written promise to pay.

Physician, who made charges for his services in attending wealthy adult daughter against the daughter on his books instead of against the mother, could not recover against the mother in the absence of a written contract under Civ. Code, § 1624, requiring a contract to answer for the debt of another to be in writing, since, having performed services on the credit of the daughter, he could not hold the mother as original promisor.

8. Frauds, statute of ⇨23(4)—Parol promise to pay for services rendered another without consideration moving to promisor void.

Mother's parol agreement to pay for services rendered wealthy adult daughter, being without consideration to the mother, was void under Civ. Code, § 1624, subd. 1, and section 2794, subd. 3.

9. Witnesses ⇨28(2)—Physician held not entitled to extra compensation for testifying in absence of express agreement.

A physician, who voluntarily attended and testified at a hearing, could not recover extra compensation on the theory that he was an expert witness, in the absence of an express agreement to pay him extra compensation therefor.

10. Witnesses ⇨208(2)—Physician could not testify in proceedings for appointment of guardian for patient without patient's consent.

Under Code Civ. Proc. § 1881, subd. 4, a physician, employed by insane person to attend her, could not testify at proceedings for appointment of guardian without the consent of such person.

In Bank.

Appeal from Superior Court, City and County of San Francisco; George A. Sturtevant, Judge.

Action by H. C. McClenahan against Alexander D. Keyes, executor of the last will and testament of Anna Dwight Howard, deceased. Judgment for plaintiff, and defendant appeals. Reversed.

Morse Erskine and Herbert W. Erskine, both of San Francisco, for appellant.

Samuel M. Shortridge, of San Francisco (T. J. Sheridan, of San Francisco, of counsel), for respondent.

WILBUR, J. Plaintiff recovered a judgment in the trial court for services rendered as a physician in connection with the serious illness of Frances S. Howard, a daughter of the decedent, Anna Dwight Howard. The principal question in the case is whether or not the decedent, Anna Dwight Howard, entered into a contract of employment with the plaintiff for such services.

The plaintiff filed a claim against the estate of Anna Dwight Howard—

“for professional services of a medicolegal character rendered to and for the said decedent, at her special instance and request, in relation to Frances S. Howard, daughter of said decedent from January 8, 1915, to April 21, 1915, inclusive, at San Francisco, in San Mateo county, and at Redwood City, Cal., said services consisting of medical advice and services *given and rendered to the said daughter*, consultations with the said decedent and her representatives in respect of said daughter, time, attention, and services rendered in certain proceedings in the superior court in the county of San Mateo, of said state, had and taken to secure the appointment of said decedent guardian of the person and estate of her said daughter, \$1,802.50. For moneys expended in and about the performance of the above services \$18.50. Total \$1,821.00.” (Italics ours.)

[1] The complaint substantially followed the language of the claim except that the words “in respect” are inserted before the words “to said daughter,” so that while the complaint alleges the rendition of medical services to the daughter, the complaint refers to said medical services as rendered “with respect to said daughter.” The rendition of the services sued for is not questioned. The question is whether or not the decedent was liable at all for the services so rendered. The facts in the main are undisputed. Frances S. Howard was thought to be so insane as to be dangerous, and on January 7, 1915, Leon Morris, an attorney at law, representing a brother of Frances S. Howard, Teddy Howard, who was at that time fatally injured, and to protect the brother, swore to a complaint charging Frances S. Howard with being an insane person. She was arrested on that charge, and while awaiting trial placed in a sanitarium conducted by Dr. Bering. The next day, January 8th, owing to the critical condition of Frances S. Howard, who was unconscious, Dr. Bering telephoned the plaintiff, an alienist, to attend her. Her mother, who was then in the East,

arrived in San Francisco January 18, 1915. The plaintiff charges \$379.50 for the services rendered by him to the daughter before the mother arrived in San Francisco. He bases his claim against the mother upon a conversation he held with her immediately upon her arrival while she was ill in bed in the Fairmont Hotel. As he was the sole witness who testified to this conversation we will first dispose of the appellant's objection to the competency of the plaintiff to testify against the defendant executor. The appellant objected to the deposition of the plaintiff on the ground that plaintiff was incompetent as a witness. Under the provisions of section 1880, subdivision 3, of the Code of Civil Procedure, the plaintiff was an incompetent witness against the executor. This objection to the incompetency of the doctor could be waived (Kinley v. Largent [Cal. Sup.] 200 Pac. 937), and the plaintiff relies solely upon such a waiver. The administrator took the testimony of the plaintiff by a deposition, but upon the trial declined to introduce the deposition and objected to the respondent introducing it on his own behalf. The District Court of Appeal held that by taking the deposition of the respondent, the administrator made him a witness, and thereby waived the objection of incompetency. The petition to transfer the case to this court was granted because of a doubt as to the correctness of this ruling, for the reason that section 2032 of the Code of Civil Procedure, under which the deposition was taken, expressly provided that, although the deposition might be used by either party and thus become the evidence of the party introducing it, its introduction in evidence is “subject to all legal exceptions.” If the phrase “all legal exceptions” is broad enough to include the question of the competency of the witness, it is evident that upon the tender of the deposition in evidence the objection might be successfully interposed by the executor. Cudlip v. N. Y. Evening Journal Pub. Co., 180 N. Y. 85, 72 N. E. 925; Bambauer v. Schleider, 176 App. Div. 562, 163 N. Y. Supp. 186.

[2] After an investigation of the authorities we are satisfied that the ruling of the District Court of Appeal was correct. The phrase “subject to all legal exceptions” is one contained in the Practice Act with relation to the admissibility of depositions. Sections 430, 431, Practice Act, Stats. 1851, p. 119. It was held in Turner v. McIlhane, 8 Cal. 575, that by taking the deposition of a witness otherwise incompetent because of interest the objection was waived, and that the other party could introduce that deposition on his own behalf. The court in that connection said:

“We think the intention of this section is that which its language plainly expresses. The defendant had the right to read the deposition. If it were otherwise, and a party should be

allowed to take the deposition of any one or more of the adverse parties, and read, if it suited him—and if it did not, then to exclude it from the other side—the result would be, that a party, plaintiff or defendant, could always be fishing for evidence from adverse parties, without incurring any responsibility or danger on his part. The party who calls upon an adverse party to testify, makes him a witness. By making him a witness, he waives his incompetency to be heard for himself, or for his codefendant, or coplaintiff."

Similarly, in *Jones v. Love*, 9 Cal. 68, it was held that the objections to the competency of a witness based upon interest must be taken at the time of the taking of the deposition or otherwise waived. The same rule was followed in *Brooks v. Crosby*, 22 Cal. 42. It follows that the language of section 2032, Code of Civil Procedure, by which the deposition is admissible subject to "all legal exceptions," does not authorize the competency of the witness to be questioned, where he has been examined by deposition by the party opposing the introduction of the deposition. The Supreme Court of the state of New York has held that the objection to the competency of the witness as against an estate was not waived by taking the deposition (*Cudlip v. N. Y. Evening Journal Pub. Co.*, supra), but this was because of the statute of New York, which expressly reserves the objection of competency to the time of trial. In *Missouri, Tennessee, and Oklahoma* it is held that the taking of the deposition waives the objection to the competency of the witness to testify against the estate. *Ess v. Griffith*, 139 Mo. 322, 40 S. W. 930; *Borgess Inv. Co. v. Vette*, 142 Mo. 560, 44 S. W. 754, 64 Am. St. Rep. 567; *Rice v. Waddill*, 168 Mo. 99, 67 S. W. 605; *Thomas v. Irvin*, 90 Tenn. 512, 16 S. W. 1045; *Percy v. Miller* (Wash.) 197 Pac. 638. The deposition was properly admitted in evidence.

The plaintiff testified in this action after the mother's death as follows concerning the conversation held with her:

"* * * Mrs. Howard had me explain the condition of her daughter, the situation, what had been done, what was necessary to be done. This conference was quite prolonged, a couple of hours I saw her, and, in expressing her appreciation and approval of my efforts and my advice and my opinion of my daughter's case, *she assured me in words and in manner to go right ahead and give all of the services*, be unsparing in my time in looking out for the daughter; that it was very necessary for her to be in the hands of some one competent to understand the condition; *that I would be adequately compensated for my services.*"

Plaintiff relies upon this statement of the mother to establish his right to recover for the services already rendered by him in caring for the daughter, and those subsequently rendered in caring for her, and also as establishing a contract for the medical testimony of plaintiff as an expert given in the

guardianship and in the insanity proceedings, for which he charges about \$899.50 as a reasonable fee.

Notwithstanding this alleged contract of employment, the plaintiff continued to make the charges upon his books against the daughter, and subsequently brought suit against the daughter for the full amount of the claim, alleging in that action that the services were performed *at the special instance and request of the daughter*. The respondent failed to recover in his suit against the daughter, except for the services rendered when she was unconscious, and thereafter filed his claim against the estate of the mother, and brought this action.

As supplementing the statement of the mother the plaintiff relies upon certain transactions had with others to establish her liability, and we will consider these matters before further considering the effect of the mother's statement. During the pendency of the guardianship and insanity proceedings, the former having been instituted by relatives of the daughter in accordance with the advice of the plaintiff, the mother was represented in said proceedings by an attorney, and the plaintiff relies somewhat upon his dealings with this attorney to support his contention that there was a contract of employment between himself and the mother. The plaintiff also testified and relies upon the fact that before the mother arrived in California a telegram was received from her and read to him by the daughter's attorney. The plaintiff's testimony in that regard is as follows:

That after he had rendered emergency services to the unconscious daughter he met Mr. Halsey Rixford, representing himself as the personal attorney of Miss Frances Howard who said "that the mother of the patient was ill in the East, that he had a telegram—no, had telegraphed—and had instructions from the relatives, and to employ the services in the interest and for Miss Frances Howard. Later on I saw a telegram, the contents of which I cannot recall, *signed either by the mother or the brother-in-law*, Mr. Whitell, stating that they were on the way out, and to arrange the matters in regard to the daughter—the only other relative here was her injured brother, a patient at the Adler Sanitarium, Mr. Teddy Howard, hurt in an elevator falling. * * *

Again he said:

"[It [the telegram] stated that the mother and son-in-law were on the way out, and to go ahead and take care of the daughter until their arrival."

The evidence was objected to on the ground that it was incompetent, irrelevant, and immaterial and hearsay. The court ruled as follows:

"Oh, no, it is not, but until it is connected that cannot be brought out. * * * The objection is overruled. However, the question has got to be connected before it can be used against your client."

[3] A telegram from Mr. Whitell would clearly be immaterial and incompetent unless it was shown that he was acting for the mother, and evidence that a telegram was exhibited to the plaintiff by the attorney of the daughter, without some evidence that the telegram was sent by the mother or by her authority, would be immaterial.

A brother, William D. N. Howard, employed Dr. Teass to look after the daughter. Teddy Howard, the injured brother, employed Dr. Chidester. With reference to various relatives with whom he conferred, plaintiff testified:

"I was assured to go ahead *by all concerned*, and I was to be adequately remunerated; no definite statement as to who should do that or as to how or what it should be."

Plaintiff testified that he was in daily attendance upon the daughter up to the 30th of January.

[4, 5] The daughter was a wealthy woman, and able to pay for the services rendered to her. The mother was not liable for such services in the absence of a contract on her part to pay therefor. Appellant claims that the evidence is altogether insufficient to establish either an express or an implied contract on the part of the mother to pay for the services rendered to the daughter. The general rule is that one who calls upon a physician to render services to another is not liable for those services in the absence of an express agreement to pay therefor. 40 Cyc. 2808, 2809. This applies where the physician is called by a parent to render services to an adult son or daughter (*Crowell v. Donoho*, 168 Mo. App. 305, 153 S. W. 1082; *Crane v. Baudouine*, 55 N. Y. 256; *McQuire v. Hughes*, 207 N. Y. 516, 101 N. E. 460, 46 L. R. A. [N. S.] 577, Ann. Cas. 1914C, 585; *Boyd v. Sappington* [Pa.] 4 Watts, 247, and to services rendered to a daughter-in-law (*Dorion v. Jacobson*, 113 Ill. App. 563), or to a wife's relative (*Curry v. Shelby*, 90 Ala. 277, 7 South, 922).

In the case of *McQuire v. Hughes*, *supra*, the rule is thus stated:

"The general rule that, where a person requests of another the performance of services, which are performed, the law implies a promise by the former to pay their reasonable value, has no application in the case of a physician, rendering professional services to a third person, if the relation to the patient of the person, who requests them, be not such as imports the legal obligation to provide them."

[6] It is clear therefore that the mere request of the mother that the plaintiff render services to the daughter would not be sufficient to imply a contract to pay for such services. In determining whether or not the mother agreed to pay for the services rendered to the daughter, it is important to bear in mind that the plaintiff advised the mother that the daughter was incompetent, and for

that reason should be placed under guardianship. Her statement that the plaintiff would be adequately compensated for services rendered, and requesting him to render such services, must be construed in the light of that situation. The amount of the compensation to be allowed to the plaintiff would be passed upon by the mother as guardian in the event that she was appointed, or, if not, by such other relative as was appointed, and it was therefore important that plaintiff should know that the relatives of the patient, including the mother, desired that he should render services, and were willing that he be compensated therefor. If it had been the intention either of the plaintiff or of the mother, that she should become personally responsible for the payment of such services, it would have been very simple for him to have secured from her a direct statement to that effect. The fact that the respondent carried the account on his books in the name of the daughter, and subsequently brought suit against the daughter to recover the full amount claimed for all services rendered, would seem clearly to indicate that he did not enter into an agreement with the mother that he would accept her as the primary debtor, and there was nothing said by the mother as testified to by him which would indicate that the mother intended to assume that obligation in the place and stead of her daughter. On the contrary, it would seem that the mother studiously avoided stating that she would be personally responsible for the plaintiff's services.

[7] If, however, it be assumed that the mother in fact promised to pay for the plaintiff's services, another consideration would lead to the conclusion that there was no liability on the part of the mother for these services rendered to the daughter. Plaintiff was already performing services for the daughter, presumably under a contract for that purpose. The agreement of the mother to pay for such services so being rendered was a contract to answer for the debt of another. If the services of the plaintiff were performed upon the credit of the daughter or if she was in any degree liable for the indebtedness, then the mother would be a mere guarantor, and the contract of guaranty, not being in writing, would be void under the statute of fraud. *Harris v. Frank*, 81 Cal. 280, 286, 22 Pac. 856; Civ. Code, § 1624. The respondent made the charges for his services against the daughter upon his books instead of against the mother, and thereafter brought suit against the daughter alone to recover for such compensation. The law is clear that if any credit was in fact given to the daughter the mother cannot be held as the original promisor, but at most as a mere guarantor. 20 Cyc. 182, 183; *Harris v. Frank*, *supra*; *Edelman v. McDonell*, 126 Cal. 210, 58 Pac. 528; *Johnson v. Bank*, 60 W. Va. 320, 55 S. E. 395, 9 Ann. Cas. 893. In

cases of doubt the question as to which party is primarily liable is a question of fact (Johnson v. Bank, supra), but the conduct of the plaintiff establishes beyond doubt that he extended credit to the daughter, and the fact that he was unsuccessful in establishing his claim against the daughter cannot change the situation.

[8] What has been said is even more emphatically true with reference to the antecedent obligation incurred by or on behalf of the daughter. In such a case, in order that the promise of the mother to answer for the antecedent obligation of the daughter should be considered an original obligation, and therefore not required to be in writing, the statute provides that the promise is deemed original only when made upon a consideration beneficial to the promisor, whether moving from either party to the antecedent obligation or from another person. There was nothing in the arrangement between the plaintiff and the mother to indicate that liability for the continued services of the plaintiff was to be assumed by the mother as a condition for the continued performance of services by the plaintiff in connection with her daughter. Assuming that the conversation between the plaintiff and the mother is susceptible of the construction that she was to pay for plaintiff's services, there was therefore no consideration for the agreement to pay for past services, and therefore such agreement, not being in writing, would be void. Section 2794, subd. 3, and section 1624, subd. 1, Civ. Code. So far here as plaintiff's claim is based upon medical services, past or future, rendered to the daughter, it is clear from the undisputed evidence that the mother was not liable therefor.

Plaintiff was defeated in his suit against the daughter largely for the reason that his services were claimed by her to be hostile to her rather than for her benefit, as appears by the report of that decision. McClenahan v. Howard (Cal. App.) 195 Pac. 68. The plaintiff's claim against the mother includes a large sum (\$789.50) for his services as an expert witness in the insanity and guardianship cases. Plaintiff charged \$20 per hour for his detention as a witness in the superior court of San Mateo county at the time of the hearing of the guardianship proceedings. For one day his claim was \$180. The authorities are not in accord as to the circumstances under which an expert who is called as a witness may receive compensation. Some courts even hold that a contract to pay extra compensation is void. The authorities, however, all agree that, in the absence of an express contract to pay a physician for his testimony as an expert, he is only entitled to the statutory fee. The uniform rule seems to be that a physician who has acquired knowledge of a patient or of specific facts in connection with the patient may be called upon to testify to those

facts without any compensation other than the ordinary witness receives for attendance upon court. In those states recognizing the right to extra compensation for a physician who testifies as an expert it is uniformly held that, where such testimony is sought to be elicited without requiring any particular investigation on the part of the physician, he is required to testify without extra compensation. *People v. Conte*, 17 Cal. App. 771, 784, 122 Pac. 450, 451. For general discussion of the subject, see 5 Ann. Cas. 994; 17 Ann. Cas. 715; 31 Ann. Cas. 490, 491; 40 Cyc. 2186; 37 L. R. A. 671; 30 L. R. A. (N. S.) 281; 2 A. L. R. 1577, 1578.

[9] We do not need to determine the exact limits of the rule in this state for the reason that there is absolutely no showing of any agreement to pay the physician for his services as an expert witness, as distinguished from his services as a physician in the case. There is no suggestion or intimation in the conversation between the respondent and the mother than he was being employed to testify as an expert and the lawyer who represented the mother in the insanity proceedings testified that absolutely no agreement was made by him to secure the testimony of the respondent as an expert witness. It is clear that under these circumstances, the witness having attended voluntarily and testified, cannot recover extra compensation on the theory that he was an expert witness, and that his expert knowledge was involved in his testimony. There is no implied contract for the payment of extra compensation due to the fact that the respondent was used as a witness. The law fixes the fees of a witness, and the only obligation incurred in the summoning of a witness is the obligation to pay the fees which the law fixes for the attendance of a witness. If there is any further or additional obligation, it must arise from an express contract relating to the particular subject of the testimony, and based upon the fact that the witness is required to use his expert knowledge in testifying.

[10] There was no contract to pay the plaintiff any additional compensation for his services as an expert, or in preparation for testifying as such, hence he cannot recover for such expert testimony. In this connection it should be observed that the employment of the plaintiff as the physician for the daughter was inconsistent with the idea that he would be an expert witness, for by such employment he became incompetent as a witness without the daughter's consent. Code Civ. Proc., § 1881, subd. 4.

The evidence is insufficient to support the findings of the trial court in favor of the plaintiff.

Judgment reversed.

We concur: SHAW, C. J.; SHURTLEFF, J.; LAWLOR, J.; SLOANE, J.

188 Cal. 641

(206 P.)

HALL v. CITY AND COUNTY OF SAN FRANCISCO.**COOK v. SAME.**

(S. F. 9911.)

(Supreme Court of California. April 17, 1922.
Rehearing Denied May 15, 1922.)**1. Negligence $\Leftrightarrow$ 117—Contributory negligence must be pleaded.**

Contributory negligence is an affirmative defense, which must be pleaded and proved.

2. Trial $\Leftrightarrow$ 251(8) — Instruction on contributory negligence not pleaded properly refused.

In an action for injuries to passengers in an automobile which collided with a street car, where the defense of contributory negligence was not interposed, the court properly refused an instruction that it was the driver's duty to give way to the car if necessary, and to find for defendant if he negligently attempted to cross in front of it.

In Bank.

Appeal from Superior Court, City and County of San Francisco; Daniel C. Deasy, Judge.

Consolidated actions by Fay M. Hall and Grace Cook against the City and County of San Francisco. Judgment for plaintiffs, and defendant appeals. Affirmed.

George Lull, City Atty., and Charles S. Peery and R. T. Ainsworth, Asst. City Attys., all of San Francisco, for appellant.

Sapiro and Levy and Boyd Oliver, all of San Francisco, for respondents.

SHAW, C. J. These two cases were consolidated and tried together in the superior court. They were transferred to the District Court of Appeal, and an opinion was rendered by that court affirming the judgment. The facts and the question in issue were correctly stated in that opinion as follows:

"The plaintiffs were injured in a collision between the automobile in which they were riding and a street car which was being operated by an agent of the defendant, and they sued the defendant to recover damages. The judgment went for the plaintiffs, and the defendant has appealed. In its briefs the defendant earnestly contends that the trial court committed a reversible error in refusing to give an instruction tendered by the defendant. It appears, without contradiction, that the accident occurred about 8:30 p. m. on the evening of the 31st day of May, 1920. The plaintiffs were riding in an automobile which was in the act of passing from south to north over Octavia street in San Francisco. The automobile was being driven by a young man who was one of the escorts of the plaintiffs. At the same time one of the defendant's street cars was in the act of passing from east to west over Geary street. In the intersecting space covered by both Octavia and Geary streets the collision occurred. As addressed to these facts the defendant tendered,

and asked the trial court to give, an instruction worded as follows:

"You are instructed that, as a street car cannot go upon the street except upon its rails, it has the better right to that space to which others must yield when necessary. It was the duty of the driver of the automobile mentioned in the complaint upon approaching the crossing of Geary street to give way to the car of the defendant, which was about to pass at the same time, if necessary in order to avoid a collision. In other words, the defendant's street car has the prior right of way at the intersection of Geary and Octavia streets, and if the said defendant's car was about to cross Octavia street and was seen by the driver of said automobile to be about to cross Octavia street, it was the duty of the driver of said automobile to yield the right of way to the car of the said defendant, and if a collision occurred between the said street car and said automobile by reason of the driver of the said automobile attempting to negligently and carelessly cross in front of said street car, and the said defendant, its agents and servants, are not guilty of any negligence in the operation of said street car, then your verdict must be for the defendant."

At the trial the defense of contributory negligence was waived; and the sole point submitted to the jury, aside from the amount of damages, was the question whether or not the injuries were caused by the negligence of the defendant's servants operating the street car.

[1, 2] The defense of contributory negligence is an affirmative defense which the defendant must plead and prove in order to obtain the benefit thereof. There was evidence to the effect that the street car had the usual lighted headlight and was plainly visible for a distance of 200 feet before it reached the crossing. The jury might well have believed that the driver of the automobile did not look in that direction, or that, seeing the car, he did not heed the danger of attempting to cross in front of it. The instruction deals almost entirely with the question of the negligence of the driver of the automobile. It had a direct tendency to lead the jury to believe that if the driver was guilty of contributory negligence the plaintiffs could not recover. To so instruct the jury would have been erroneous, in view of the fact that the defense of contributory negligence was not interposed. Without passing on the correctness of this instruction, we think that for this reason it was properly refused by the court. The other instructions of the court fully covered the subject of negligence on the part of the persons operating the street car.

The instruction is an illustration of the dangers of attempting to frame a charge to the jury upon isolated extracts from opinions of this court. It is claimed that it was taken from the opinion in *Arnold v. S. F., etc., Co.*, 175 Cal. 1, 164 Pac. 798. In that case the court was discussing the question of con-

tributory negligence on the part of the injured person as related to the alleged negligence of the driver of the street car. Contributory negligence was there presented as a defense, and the passages from which the instruction was taken treated of both subjects upon the correct theory that, although the motorman of the train was negligent, the plaintiff could not recover if the negligence of the injured party contributed to his injury. The language could not be applied to a case in which contributory negligence was not pleaded without having a tendency to mislead the jury into believing that it was in issue.

No other ruling is presented in support of the appeal, and we think no error appears in the ruling complained of.

The judgments are affirmed.

We concur: **LAWLOR, J.**; **WILBUR, J.**; **LENNON, J.**; **RICHARDS**, Justice pro tem.

56 Cal. App. 687

CRESTA v. OCEAN SHORE R. CO. et al.
(Civ. 4128.)

(District Court of Appeal, First District, Division 2, California. March 2, 1922. Hearing Denied by Supreme Court May 1, 1922.)

1. Appeal and error — 1024(5)—**Finding on contradictory affidavits binding on appeal in absence of abuse.**

Determination of a motion under Code Civ. Proc. § 473, to vacate findings, conclusions of law, and decree for excusable neglect, mistake, and inadvertence, supported by affidavits and assailed by counter affidavits presenting a wide conflict, was binding on appeal, in the absence of a clear abuse of discretion.

2. Judgment — 355—**Party held not entitled to vacation of erroneous judgment.**

Court was not required as a matter of right to grant a motion to set aside a decree under Code Civ. Proc. § 473, on the ground that it was void on its face, in that it awarded a fee-simple title to a railroad as to land condemned for railroad purposes under which condemnation only an easement could be acquired, since it was no more than erroneous; the decree itself not disclosing a want of jurisdiction.

3. Judgment — 392—**Matters occurring year after decree not material on motion to vacate decree.**

Evidence relating to abandonment of operation of railroad a year after a decree awarding the railroad a fee-simple title was wholly immaterial to questions raised by a motion to vacate the decree under Code Civ. Proc. § 473.

Appeal from Superior Court, City and County of San Francisco; **John J. Van Nostrand**, Judge.

Action by **Frank Cresta** individually and as executor of the will of **Mary Agnes Cresta**,

deceased, against the **Ocean Shore Railroad Company** and others. From an order denying motion to vacate findings, conclusions of law, and decree, plaintiffs appeal. Affirmed.

T. Z. Blakeman, of San Francisco, for appellants.

McCutchen, **Olney**, **Willard**, **Mannon** & **Greene** and **F. F. Thomas, Jr.**, all of San Francisco, for respondent.

NOURSE, J. This is an appeal from an order denying plaintiffs' motion to vacate the findings, conclusions of law and decree in favor of defendant in an action to quiet title under the McEnerney Act. Judgment was entered on October 28, 1919, in favor of plaintiffs as to a portion of the property involved in the action and in favor of defendant as to a strip of land running through the property and used by defendant as a right of way for its railroad. A fee-simple title was decreed to the defendant, and plaintiffs claim that the court was without jurisdiction to award more than an easement as to an undivided one-half thereof because title thereto was obtained by a suit in condemnation for railroad purposes. Upon the hearing of the motion evidence was offered that some time after the entry of judgment the defendant, with the consent of the state railroad commission, ceased to operate its road over the property in controversy.

The motion was made under section 473, Code of Civil Procedure, and was based upon the grounds of plaintiffs' excusable neglect, surprise, mistake and inadvertence, and also upon the grounds that the findings of fact were erroneous, inconsistent, contradictory and unintelligible. No appeal was taken from the judgment and no motion for a new trial was made.

[1] The "excusable neglect" of plaintiffs was based on the fact that their counsel was ill when the findings of fact and conclusions of law were signed and filed, and for some days thereafter. The motion was supported by affidavits and assailed by counter affidavits, presenting a wide conflict which the trial court was required to determine. This determination was adverse to plaintiffs, and is binding on this appeal, unless a clear abuse of discretion is shown. An examination of the record convinces us that the trial court did not abuse that discretion.

[2] It is argued that the motion should have been granted as a matter of right, because the judgment was void on its face. The point here is that as defendant acquired part of its title through a decree in condemnation for railroad purposes, and that for such purposes an easement only can be acquired, the court was without jurisdiction to award a fee-simple title. But this was one of the questions at issue in the trial, and one which the trial court was required to determine.

If it decided wrongly, plaintiffs had their remedy by appeal. If error at all, it is error committed within the jurisdiction of the court. Respondent disputes the claim, and argues that the evidence was sufficient to show fee-simple title. Whether this is so is of no consequence, so long as the decree itself does not disclose a want of jurisdiction.

[3] The evidence relating to the subsequent abandonment of the operation of the railroad was wholly immaterial to the questions raised by the motion for relief from the judgment under section 473, Code of Civil Procedure. It was something that occurred nearly a year after the decree, and could not be cited as evidence of surprise, neglect, mistake, or inadvertence on the part of plaintiffs in connection with the entry of the decree.

Judgment affirmed.

We concur: LANGDON, P. J.; STURTEVANT, J.

57 Cal. App. 43

BARNGROVER v. BARNGROVER.
(Civ. 4108.)

(District Court of Appeal, First District, Division 2, California. March 13, 1922.)

1. Divorce — 27(7)—Continuous nagging held extreme cruelty justifying divorce.

Although a wife's motives were good, her nagging for over ten years, growing out of her ultrapuristic character, held sufficient to support a finding of extreme mental cruelty justifying the granting of a divorce.

2. Divorce — 184(10)—Trial Judge's finding based on conflicting evidence not disturbed on appeal.

On appeal from a judgment granting a divorce, the court is bound by trial judge's finding of fact based on conflicting evidence.

Appeal from Superior Court, Santa Clara County; P. F. Gosbey, Judge.

Proceedings by Harvey M. Barngrover against Lucile L. Barngrover. Decree for plaintiff, and defendant appeals. Affirmed.

S. G. Tompkins, of San Jose, for appellant.
L. E. Petree and D. T. Jenkins, both of San Jose, for respondent.

STURTEVANT, J. [1] This is an appeal from a decree granting to the plaintiff a divorce from the defendant. The decree was based upon the extreme cruelty of the defendant, and the cruelty complained of was mental cruelty, as distinguished from physical cruelty. The appellant makes one point, and that is that the evidence does not sustain the findings, and in this behalf the appellant argues that the probative elements adduced by the plaintiff at the trial were altogether trivial. The testimony and

proceedings are all before us. The testimony alone takes up more than 1,000 folios. We have read the record from cover to cover. The trial court found among other things, and the record abundantly supports, a most peculiar case of nagging. As the story of the case was unfolded, it was disclosed that the same tendency of character on the part of the defendant was displayed, not only toward her husband, but toward her child, and toward her tradespeople, and toward her friends and acquaintances. Neither the law nor the interests of the parties require that we should restate the testimony in this opinion. In addition to the feature which we have specially pointed out, there are other matters contained in the record which counsel claim to be immaterial. Conceding, without deciding, that counsel's contention is correct, there still remains within the record the element which we have specially adverted to. The nagging grew out of the ultrapuristic character of the defendant. The appellant says that "she is an earnest Christian woman." It may be added that the whole record sustains that claim. It may be added that apparently the plaintiff is an earnest Christian man. Nevertheless it is a sound legal proposition that nagging by a spouse of such character may have, and probably would have, the same effect on the other spouse as any other kind of nagging. The appellant also argues that "her motives have always been good." Conceding such to be the fact, it still remains that nagging from good motives may be just as hurtful as nagging from any other kind of motives. The case was most thoroughly and completely presented to the trial court by able counsel who tried the case behind closed doors. The testimony covered a period of 10 years and over. The case for the plaintiff was presented by calling to the witness stand 16 of the neighbors and friends of both of the litigants. Two of those witnesses were ministers of the gospel. One of them was at one time the pastor in the Protestant Church of which both the plaintiff and defendant were members. One cannot read the record without admiration for the apparent truthfulness of each and all of the witnesses and the absence of bias and prejudice on the part of the witnesses. The appellant says that, if the facts contained in the record before us "establish grounds for divorce, then it is certain that any husband can divorce his wife, and any wife can divorce her husband, at will, since the peccadilloes complained of are not as serious as those of which 9 out of 10 husbands and wives are guilty." This is not a sound statement, because a most cursory reading of the record discloses a set of facts seldom or never heard of.

[2] In behalf of the appellant the utmost that can be said is that there were some con-

flits in the testimony; however, those matters were addressed to the trial judge, and this court is bound by the findings made by the trial judge on such conflicting evidence.

The judgment is affirmed.

We concur: LANGDON, P. J.; NOURSE, J.

(57 Cal. App. 82)

PACIFIC COAST CONE CO. v. NATIONAL ICE CREAM CO. et al. (Civ. 4110.)

(District Court of Appeal, First District, Division 2, California. March 15, 1922.)

Appeal and error — 1011(1)—Court's finding based on conflicting evidence not disturbed, especially where court tasted evidence.

In an action to recover the price of certain ice cream cones, where defendant set up that they were not sweetened, and hence were below the grade warranted, the trial court's finding on conflicting evidence that the cones came up to the warranted standard will not be disturbed, especially as the trial court tasted every variety of cones in evidence.

Appeal from Superior Court, City and County of San Francisco; E. P. Mogan, Judge.

Action by the Pacific Coast Cone Company against the National Ice Cream Company and another. Judgment for plaintiff, and defendants appeal. Affirmed.

Sloss, Ackerman & Bradley, of San Francisco, for appellants.

Samuel M. Samter, of San Francisco, for respondent.

STURTEVANT, J. The plaintiff sued the defendants to recover judgment for the purchase price of a quantity of ice cream cones. Judgment went for the plaintiff, and the defendants have appealed. On the trial the defendants relied principally on a defense based on certain warranties being breached. The defendants strenuously contended that they had bought "cake cones"; that "cake cones," as that expression is known to the trade, refers to cones that are sweetened. To this the plaintiff replied that the purchase was made by and through certain correspondence, and those papers said nothing about "cake." Going further, the defendants contended that the cones delivered by the plaintiff were not sweetened. To this the plaintiff replied that they were sweetened, but stated that from July to October, 1918, the plaintiff's products were not sweetened as much as they were both before and after that period of time, and, the plaintiffs set forth that the reduction in the quantity of sugar used was because of, and in compliance with, the war regulations applicable to the business of the plaintiff and to its products. However, the

defendants replied that, making all due allowance for the war regulations, the goods in question were still below the grade warranted. As to this element of the case the plaintiff called two witnesses and the defendants called seven. The trial court found the fact as contended for by the plaintiff. The defendants claim on this appeal that there was not a substantial conflict in the evidence, and that this court should hold that the finding in question is not supported by the evidence. We think, however, that the case is one in which this court has no right to substitute its opinion for the finding made by the trial court. We reach this conclusion with less hesitancy because of another element of the trial procedure. That element is this: The trial courtroom seems to have been well stocked with cones; the judge of the trial court, of his own motion, and on requests of counsel, witnesses, and parties, tasted every variety of cone that was offered to him, and retasted the same. He thus became particularly informed on the question of fact on which he made his finding. Furthermore the plaintiff contended that the right to examine and inspect the goods was, under the facts, waived by the defendant. The trial court so found. That finding was well within the proofs as tendered.

We find no error in the record.

The judgment is affirmed.

We concur: LANGDON, P. J.; NOURSE, J.

(57 Cal. App. 88)

ROSS v. CROWDER et al. (Civ. 2396.)

(District Court of Appeal, Third District, California. March 16, 1922.)

1. Sales — 355(1)—Answer held to admit sale and part payment.

Where the complaint alleged that plaintiff sold defendants an engine for \$1,350, that \$800 had been paid, and that \$550 was still unpaid, due, and owing, an answer denying that defendants were indebted to plaintiff in the sum of \$550 or any other sum on account of anything alleged in the complaint, or that such sum or any sum was unpaid, due, or owing, admitted the sale and payment of \$800, and raised only the issue whether the balance of \$550 was due and unpaid.

2. Sales — 359(1)—Facts shown by evidence held to entitle seller to judgment.

Evidence that plaintiff offered to sell defendants' agent an engine for \$1,350, that the engine was taken and used, and a check sent plaintiff by the agent for \$800 in part payment of the price, sustained a judgment for plaintiff for the balance of the price.

Appeal from Superior Court, Butte County; H. D. Gregory, Judge.

Action by A. W. Ross against C. L. Crowder and another in claim and delivery. From a judgment for plaintiff, the defendant named appeals. Affirmed.

Frank Freeman, of Willows, for appellant.
C. D. McComish, of Colusa, for respondent.

FINCH, P. J. The defendant Crowder appeals from a judgment in favor of plaintiff for the sum of \$550.

The complaint alleges:

"That on or about May 15, 1920, plaintiff sold and delivered to defendants at their special instance and request, one 40 H. P. Fairbanks-Morse type N gas engine, for the sum of \$1,350, to be paid for upon delivery of said engine."

"That on or about May 17, 1920, defendants paid \$800 on the purchase price of said engine, but the balance of \$550 is still unpaid, due, and owing."

The defendants answered as follows:

"They deny that on or about May 15, 1920, or at any time alleged in the complaint, or at all, they were indebted to plaintiff in the sum of \$550, or any other sum of money whatever, on account of anything alleged in said complaint, or that said sum, or any sum, was, when the action was begun, or is now, unpaid, or due, or owing."

[1] The answer raises no issue except as to the payment of the \$550 alleged in the complaint to be due and unpaid. The evidence shows without contradiction that no part of the \$550 had been paid.

[2] Notwithstanding the admissions of the answer by failure to deny, plaintiff introduced evidence to prove the first paragraph of his complaint. The evidence shows that W. S. Gauze was in charge of certain land of Crowder as manager; that he had charge of the drilling of wells thereon, and was "attending to the farming" of the land; that plaintiff, in a telephone conversation with Crowder, offered to sell him the engine in question for \$1,350; that Crowder replied that he would arrange to inspect it; that the engine was thereafter taken by "the Crowder people" and was used on such land in operating a pump; and that Gauze sent plaintiff a check for \$800 signed by C. L. Crowder & Co., in part payment of the purchase price. The defendants offered no testimony, and the foregoing evidence is wholly uncontradicted. The undisputed evidence is sufficient to sustain the judgment. Even if this were not so, the answer admits the sale of the engine to defendants at the price alleged and the payment of \$800 thereof. The evidence shows that \$550 of the purchase price remained unpaid, and the court so found. Nothing further was required to entitle plaintiff to judgment.

The judgment is affirmed.

We concur: HART, J.; BURNETT, J.

56 Cal. App. 697

ANDERSON v. ANDERSON. (Civ. 4124.)

(District Court of Appeal, First District, Division 2, California. March 4, 1922. Hearing Denied by Supreme Court May 1, 1922.)

1. Appeal and error ⇐1024(1)—Finding of trial court upon contradictory affidavits binding on appeal.

Where the trial court makes a determination upon issues of fact raised by affidavits, it is binding upon the appellate court, just as in any other case of conflicting evidence.

2. Divorce ⇐182—Denial of alimony pending appeal held not abuse of discretion.

In an action for divorce from wife on ground of extreme cruelty, where some allowances had already been made, *held* that trial court did not abuse its discretion in denying a motion by wife for alimony pending appeal.

3. Divorce ⇐182—Bad faith of applicant to be considered in exercise of discretion upon motion for alimony pending appeal.

That wife was not asking for alimony pending appeal in good faith and was not prosecuting her appeal in good faith were matters that entered into the exercise of discretion of the trial court upon motion for alimony pending appeal.

4. Divorce ⇐182—Alimony pending appeal discretionary.

Whether or not alimony pending appeal shall be granted is a matter resting in the sound discretion of the trial court.

Appeal from Superior Court, City and County of San Francisco; Edmund P. Morgan, Judge.

Action by Andrew H. Anderson against Lenna Mae Anderson. From an order denying motion for alimony pending appeal, defendant appeals. Affirmed.

J. J. Dunne, of San Francisco, for appellant.

J. M. Thomas, of San Francisco, for respondent.

LANGDON, P. J. This is an appeal from an order denying appellant's motion for an allowance to her of alimony during the pendency of her appeal from a judgment against her in an action for divorce instituted by her husband, the respondent herein. She also asks for the allowance of \$274.75 in repay money, alleged to have been borrowed by her to pay for the transcript on appeal from the judgment in the divorce action, \$10 for filing said transcript on appeal, and also for funds to pay for printing of briefs, on said appeal, and for \$300, which she declares she requires for a surgical operation to remove a growth from her back. The action from which this motion was an outgrowth was commenced by the respondent here upon the ground of extreme cruelty; findings were made in his favor, and a decree entered ac-

cordingly. The appellant here, upon motion in the trial court, was allowed \$50 a month alimony, pendente lite, until the interlocutory decree was entered, and was also allowed counsel fees, costs, etc., upon the trial in the superior court. She is now complaining that the action of the trial court in refusing her motion for an allowance during the pendency of the appeal and for the other amounts she asks for is an abuse of the discretion vested in the trial court. The interlocutory decree was filed on April 17, 1919, and the motion resulting in the order appealed from her was not made until about six months later. At that time appellant asked an allowance of a minimum of \$50 a month from the time of the filing of the decree until the determination of the appeal. The evidence, taken at the hearing of this motion, consists almost entirely of affidavits which are before us in the record.

[1] Counsel for appellant devotes many pages of his brief to a criticism of the statement of acts in the brief filed on behalf of respondent. This is because respondent has stated only the facts appearing in said affidavits which are in support of the action of the trial court in denying appellant's motion, and has omitted the contradictory statements contained in appellant's affidavits. Under the record presented to us, such an enumeration of facts was proper for the reason that where the trial court makes a determination upon issues of fact raised by affidavits, that determination is binding upon this court, just as in any other case of conflicting evidence. Almost every material matter set forth in the affidavits of either party is contradicted by statements in the affidavits of the other party. This is not an unusual situation, but upon such a record, the facts supporting the action of the trial court must be taken as true.

Our inquiry here is whether or not the trial court abused its discretion in denying the appellant's motion. *Bohnert v. Bohnert*, 91 Cal. 428, 27 Pac. 732; *Gay v. Gay*, 146 Cal. 237, 79 Pac. 885. The trial court resolved all conflicts in the affidavits in favor of the respondent. It was, assuredly, in a better position to judge between conflicting statements than is this court, for the trial court had observed the parties and their witnesses during a stubbornly contested action, in which the trial extended over a number of days. Our inquiry must be, then, as in a case where a finding is attacked as being unsupported by the evidence: Is there in the affidavits any statements of fact which, taken as true, would justify the trial court in refusing to allow the appellant any further sums of money? An examination of the facts disclosed by the affidavits, with this idea in mind, shows no abuse of discretion.

Respondent's affidavit denied appellant's assertion that she is financially unable to meet the costs of her appeal; denies that she is physically unable to earn money; asserts that she has been working doing "de-

fective work"; denies that his income is as alleged by appellant, and asserts and sets out the figures to substantiate such statement; that the income from the real estate business in which he is engaged, after deducting the expenses thereof, amounted to only \$384.82 from January 1, 1920, to October 1, 1920, and that he has no other source of income whatsoever; that he is financially unable to respond to any further orders which the court might make for payment of money to appellant; that he has paid, upon order of the trial court, approximately \$200 for the reporter's transcript to be used by appellant in her appeal; that he was forced to borrow this sum to make such payment. He also sets out that the allowance of money for the surgical treatment alleged to be necessary for appellant was refused by the trial court upon the first motion made for alimony pendente lite, and that the growth which appellant states she desires to have removed was one with which she was afflicted prior to her marriage with the respondent. We must assume that the refusal of the trial court, upon the first motion of appellant, to allow money for this purpose was for good cause, and that upon the hearing on this second motion the court has found against the appellant upon the conflicting allegations of fact with relation thereto. Respondent also alleges that appellant is in no way physically incapacitated from earning her living, but, on the contrary, that she is sufficiently robust to harass and annoy him and follow him about on his business trips and physically assault him, all of which he charges her with since the filing of the interlocutory decree of divorce. In detail, he alleges that on May 30, 1920, she followed him to Novato, Cal., whither he had gone on business, and assaulted him on the street, and used vile language to him in the presence of his son and his friends; that she was arrested for disturbing the peace as a result of this outrage. The affidavits of several other persons substantiate these charges, including the affidavits of the deputy sheriff and the justice of the peace before whom the matter was heard. The facts disclosed by those affidavits show a most inexcusable course of conduct, violent scenes on the street, threats and blows, and that after respondent had retired to his mother's house, appellant pounded upon the door, and when unable to gain admittance, went around the house, shouting, "The stove you are cooking on is not yours; it is not paid for," and similar remarks. Upon her arrest she pleaded guilty to the charge of disturbing the peace, and paid a fine of \$5. The charges upon which the divorce was granted to the respondent were of a character similar to this last incident. Respondent also filed the affidavit of John Alpi to the effect that the appellant had told him that before she would permit the respondent to get a divorce she would make him pay well for it; that she would "break him" and "torture him."

We are not concerned here with appellant's contradictions of these matters, because the trial court has resolved the conflict against her, and, as stated before, we are rectifying the evidence which appears in the record as a basis for the order made by the trial court, accepting it as true.

It further appears, by the affidavits of the deputy constable of Novato township and of the justice of the peace who heard the charge of disturbing the peace made against appellant, that after a fine had been imposed upon appellant she made the remark in court that—

"Anderson is a dirty dog. I will get even with him; I am going to get some one to beat him. I will go up one side of the street and down the other in this town and tell the inhabitants of Novato about him."

[2, 3] These matters, and other similar ones in the affidavits filed by respondent, in connection with the intimate knowledge of the trial judge of the facts of the case, obtained in the trial of the divorce action, assuredly warranted him in concluding that the appellant was not asking for this money in good faith, and that she was not prosecuting her appeal in good faith, and that it was without merit. It has been recognized that such matters enter into the exercise of the discretion of the trial court upon such a motion as we are here considering. In *Gay v. Gay*, supra, it was said:

"The fact that the judge of the lower court before whom the case was tried, and who was therefore fully advised of all the proceedings therein, awarded her the alimony, is some evidence that he believed there was merit in her appeal, and that it was being taken in good faith. If he believed otherwise, he would have denied the motion."

[4] Whether or not alimony pending an appeal shall be granted is a matter resting in the sound discretion of the court, and its action relative to an application therefor will not be disturbed by this court, save when it appears that such discretion has been abused. The order appealed from is affirmed.

We concur: **NOURSE, J.; STURTEVANT, J.**

(56 Cal. App. 590)

CITY OF REDDING v. DOZIER. (Civ. 2424.)

(District Court of Appeal, Third District, California. Feb. 23, 1922. Hearing Denied by Supreme Court April 24, 1922.)

1. Licenses $\S$ 6(1)—Cities have power to license businesses for revenue purposes.

Since the amendment to Municipal Corporation Act, $\S$ 862, subd. 10, adopted in 1903 (St. 1903, p. 93), repealed by implication the

provision of Pol. Code, $\S$ 3366, enacted in 1901 (St. 1901, p. 635), limiting the powers of cities and towns to license business to the purpose of regulation, and subsequent amendments of section 3366 passed in 1915 (St. 1915, p. 723) and 1917 (St. 1917, p. 279) have both provided that this act should not be deemed to repeal the power to license for revenue purposes, while amendments of the Municipal Corporation Act in the same years retained section 862, subd. 10, in the same form, a municipal corporation has authority to license businesses for revenue purposes only.

2. Licenses $\S$ 6(2)—Power to license business includes licensing physician.

The authority given municipal corporations to license business for revenue purposes authorized a revenue license upon a physician carrying on the business of practicing medicine at a fixed place.

3. Pleading $\S$ 406(9)—Evidence held to cure omission from complaint of allegation defendant had fixed place of business.

In an action to collect from a physician a city license, testimony by defendant that he received patients at his residence, performed operations there, and kept them there for treatment when they required close observation, conclusively shows that he had a fixed place of business and cures a claimed defect in the complaint which alleged defendant was practicing medicine and had his principal place of business within the city, but did not allege that he had a fixed place of business.

Appeal from Superior Court, Shasta County; H. D. Gregory, Judge.

Action by the City of Redding, a municipal corporation, against Earnest Dozier, to recover a license tax. Judgment for plaintiff, and defendant appeals. Affirmed.

C. F. Kimball and Roscoe J. Anderson, both of Redding, for appellant.

W. D. Tillotson, of Redding, for respondent.

FINCH, P. J. Plaintiff was given judgment for \$10 alleged to be due as a license tax imposed under an ordinance adopted by plaintiff city. The principal question raised is whether the city has authority to impose the tax.

The defendant is a physician and surgeon residing and practicing in the city of Redding and having his office at his place of residence. Redding is a city of the sixth class, incorporated as such in 1887 under the Municipal Corporations Act of 1883 (St. 1883, p. 93).

The ordinance is entitled:

"An ordinance to license various classes of business, shows, exhibitions and games within the city of Redding for the purpose of revenue and regulation, and fixing the rates of license tax upon the same and providing for the collection of the same by suit or otherwise."

Section 1 provides:

"Every person, firm, association, copartnership or corporation, who has a fixed place of business, and engages in, carries on, or conducts any business, exhibitions or games, described in this ordinance, within the city of Redding, shall pay a license therefor in the amount hereinafter specified. * * *

Section 2 provides:

"Licenses to be paid as provided in the preceding section and the persons who shall be required to pay the same and the business upon which the same is to be paid respectively are the following, to wit: * * * (29) Lawyers, doctors and dentists, \$5 per quarter."

[1] Since the question raised seems to have been definitely settled in this state, it is deemed sufficient to call attention to the statutes and decisions on the subject. The ordinance in question was adopted March 1, 1920.

Section 862, subd. 10, of the Municipal Corporations Act, as originally enacted, empowered the trustees of cities of the sixth class "to license, for purposes of regulation and revenue, all and every kind of business authorized by law and transacted or carried on in such city or town; * * * to fix the rates of license tax upon the same, and to provide for the collection of the same by suit or otherwise."

In 1901 (St. 1901, p. 635) section 3366 of the Political Code was adopted, providing as follows:

"Boards of supervisors of the counties of the state, and the legislative bodies of the incorporated cities and towns therein, shall, in the exercise of their police powers, and for the purpose of regulation, as herein provided, and not otherwise, have power to license all and every kind of business not prohibited by law. * * *

In *City of Sonora v. Curtin*, 137 Cal. 583, 70 Pac. 674, it was held that subdivision 10 of section 862 of the Municipal Corporations Act, "giving to the board of town trustees power to license for purposes of revenue, is repealed * * * by section 3366 of the Political Code."

In 1903 (St. 1903, p. 93) subdivision 10 of section 862 of the Municipal Corporations Act was amended by substituting the words "for the purpose of revenue and regulation" for the words "for the purposes of regulation and revenue" in the original enactment. In *Ex parte Jackson*, 143 Cal. 564, 77 Pac. 457, it was held that the amendment of 1903 repealed by implication the inconsistent provision of section 3366 of the Political

Code "so far as the application of such section to cities of the sixth class is concerned."

Section 3366 was amended in 1915 (St. 1915, p. 723), and again in 1917 (St. 1917, p. 279) both amendments containing the following provision:

"This act shall not be deemed to repeal any act vesting municipal corporations with power to license for revenue purposes."

In 1915 (St. 1915, p. 828) and also in 1917 (St. 1917, p. 1528), section 862 of the Municipal Corporations Act was amended; the amendment in each instance being approved at a later date than the approval of the amendment in the same year of section 3366. Both amendments of section 862 retained subdivision 10 thereof in the form adopted in 1903. It thus appears that the power of the trustees of a city of the sixth class to impose a license tax for the purpose of revenue has not been changed since the decision in *Ex parte Jackson*, supra, and that case is controlling here. Counsel for appellant contend that the decision in that case is based on an erroneous interpretation of the law, but no sufficient reason is advanced to support the contention.

[2] In *Ex parte Johnson* (Cal. App.) 190 Pac. 852, it was held that a city may impose a license tax for carrying on the business of a lawyer at a fixed place of business. In *Ex parte Galusha*, 184 Cal. 697, 195 Pac. 406, the Supreme Court reached the same conclusion. It must be held that the same rule applies to a physician and surgeon.

[3] The complaint alleges that the "defendant was and now is a doctor practicing medicine and having his office and principal place of business in the city of Redding." Appellant argues that the allegation as to place of business is not the equivalent of a "fixed place of business." The criticism is hypercritical. The defendant testified that he has a large practice; that he receives patients at his residence and performs operations there; that he regularly keeps patients at his residence for treatment when they require close observation; that there is no room in his residence designated as an office, but that he treats his patients in the living room; that he treats most of his patients at their homes. The foregoing evidence, coming from the defendant, conclusively shows that he has a fixed place of business and that the alleged defect in the complaint, if conceded to be a defect, could not have prejudiced the defendant's rights.

The judgment is affirmed.

We concur: BURNETT, J.; HART, J.

56 Cal. App. 718

UHL et ux. v. FERTIG. (Civ. 3616.)(District Court of Appeal, Second District,
Division 1, California. March 6,
1922.)

1. Highways ⇐184(3)—In suit for injury in a collision, held that there was evidence of defendant exceeding speed limit which the court had a right to consider.

In an action for injuries to an automobile in a collision, *held* there was evidence which the court had a right to consider as substantially tending to show defendant was exceeding the statutory speed limit immediately before the collision.

2. Highways ⇐184(3)—Swerving to left to avoid collision not negligence as a matter of law.

Where defendant, to avoid collision with plaintiff's automobile entering the road from private grounds, swerved to his left beyond the center of the highway, he was not guilty of negligence as a matter of law.

3. Highways ⇐176—Motor vehicle going along main artery of travel has right prior to one emerging from private grounds.

As between a motor vehicle moving along a main artery of travel and another vehicle emerging from private grounds, the former has the first right to pass.

4. Highways ⇐184(2)—Evidence held to show contributory negligence in failing to signal was the proximate cause of a collision.

In an action for injury to an automobile in a collision with another, evidence *held* to show that contributory negligence in failing to sound a signal as required by the Motor Vehicle Act of 1919 was the proximate cause of the collision.

Appeal from Superior Court, Los Angeles County; Frederick W. Houser, Judge.

Action by Mel Uhl and wife against H. C. Fertig. From a judgment for plaintiffs, defendant appeals. Reversed.

O'Melveny, Millikin & Tuller and J. N. Owen, all of Los Angeles, for appellant.

James E. Kelby, of Los Angeles, and Floyd S. Sisk, of Venice, for respondents.

JAMES, J. Plaintiffs were awarded judgment for damages. They alleged in their complaint that defendant operated in a negligent manner an automobile upon the public highway, with the result that it collided with a similar vehicle owned by the plaintiffs and damaged the latter. It was particularly alleged that the defendant's car was being driven at a speed in excess of 35 miles per hour. The amount of the recovery allowed was the sum of \$650, from which judgment the defendant has appealed.

San Fernando boulevard, in the county of Los Angeles, is a paved thoroughfare 24 feet

in width. It is one of the main highways carrying traffic to and from points northward in the state, and along its course stage lines and other passenger vehicles are accustomed to travel at a high rate of speed. It is admitted that at the place where the accident hereinafter referred to occurred conditions were such as to authorize a driver of a motor vehicle upon that highway to maintain the maximum speed permitted by the Vehicle Act (St. 1915, p. 397, as amended by St. 1917, p. 382, and St. 1919, p. 191), to wit, 35 miles per hour. The highway from the point mentioned extends in a generally northerly and southerly direction and for a great distance it is straight. On the day in question, at about 4 o'clock in the afternoon, defendant was driving a touring car, weighing approximately 5,000 pounds, southerly along the highway and in the direction of the city of Los Angeles. He was driving on the right-hand side of the roadway. Plaintiff's son, a boy 18 years of age, operating a motor roadster which weighed approximately 2,950 pounds, emerged from a driveway leading from private property and from the westerly side of the highway. It was the intention of the boy to go to a point northerly on the main boulevard, and to do this it was necessary for him to cross the boulevard at right angles and turn to the left. This operation would take him directly across the path of the approaching machine which was, as we have stated, operated by the defendant. There was a distance from the property line from which the private driveway proceeded, to the edge of the paved portion of the highway, of 18 feet. To the northward of the driveway and at about the center of this 18-foot strip was a row of large pepper trees which at that time of the day cast their shadows over considerable of the width of the paved highway. There was a rose hedge on the property line 5 or 6 feet high commencing immediately at the driveway and extending northward for some feet, probably 25 or 30, and several palm trees were set outside the rose hedge and immediately adjacent to the driveway on the north and between the hedge and the line of pepper trees. The inner space back of the property line and to the north of the driveway was set with lemon trees which were about 5 feet in height. As to the facts now stated there was no dispute. At this point we will narrate the substance of the testimony introduced on behalf of the plaintiff. George Uhl, the young man who was driving plaintiff's machine, testified that he was proceeding out of the driveway at the rate of 8 or 10 miles per hour, and decreased his speed somewhat (how much does not appear) as he approached the gateway. His further narrative was as follows:

"When the front end of my machine arrived at the point practically coterminous with the property line there are rose bushes obstructing the view of the highway toward the north. Back of the rose bushes about 25 or 30 feet and toward the house I could see in a northerly direction along the highway about 500 feet. The rose bushes referred to obstructed the view of the highway north from the gate along the major part of the fence. As soon as I was even with the property line I could see northerly about 2,000 feet. The road was straight, with a slight decline. As I approached the highway I looked in a northerly direction for the approach of a machine. My speed then was about 8 miles an hour, and I approached the highway at a right angle. As I approached this pavement I again looked north. My machine, which was an Oldsmobile roadster, at the time it was struck by the other machine, was on the easterly side of the road with the exception of the rear wheel and portion of the outer wheel which was about one foot westerly of the center line of the highway, and I was headed a slight degree toward the north when struck, having begun to turn the machine when the collision occurred. When the collision occurred I had crossed the center of the road. The machine which struck me was proceeding southerly. As I started on the pavement I increased my speed as much as the car would pick up. The pavement slightly raises upwards there. When I first saw the machine which collided with me it was about 1,000 feet northerly, and I was just on or without the property line when I saw it, my front wheel just approaching the paved portion of the highway. I did not keep my eye on it all the time. Upon seeing the machine 1,000 feet away, at the usual rate of speed, I knew I had time—that the other car would be coming, I knew I had time to get across, which I did, and my whole machine, except just about one foot of it, was on my side of the road when I was struck by Mr. Fertig's machine. * * * I should judge the Pierce-Arrow was driven at a speed of 40 miles an hour or over. After striking me the other machine driven by Mr. Fertig, went about twice the distance I did. I didn't see Mr. Fertig make any effort to retard his machine. * * * Seated in a car, one can't see over the hedge along the driveway. I did not stop my car before proceeding on the boulevard. My front wheels were just about at the edge of the pavement when I started to pick up speed. From the time I first observed Mr. Fertig until I was struck I had traveled about 15 or 16 feet. I was going about 10 miles an hour, I should judge, when I was struck. Mr. Fertig was going about 40 miles an hour. * * * As I came out of the driveway I looked in both directions to see if machines were approaching. None were approaching from the south, going toward San Fernando, and I saw none toward the north except Mr. Fertig's machine. * * * One can't see in a northerly direction until he is beyond the property line. Just so you are beyond the property line you can see out both directions along the highway. There are no intersecting highways in the vicinity of the accident, the first junction being about 4 or 5 miles to the south. I paid no attention to Mr. Fertig's car from the time I first saw it until I glanced and saw him swerve towards me."

Defendant's machine struck the plaintiff's car on the left side thereof and about midway between the front and the rear wheels. The force of the impact carried plaintiff's machine for a distance of 40 feet, and defendant's car, after losing its contact, went on for a distance of 21 feet before it came to a standstill. There was testimony of one witness showing that, when he arrived shortly after the accident and made certain measurements, he found the distance between the car of the plaintiff and that of the defendant to be greater than we have stated it to be, but there was no evidence showing that the machines were in the same position at the time these measurements were made as they were immediately after the collision.

[1] We have stated in its most favorable light in general substance the testimony for the plaintiffs. We have in addition referred to the fact as to the movement of the two cars after the collision, as shown by their position when they were stopped. We take occasion here to point out that conditions last referred to were not pertinent at all to be considered in estimating the speed at which the defendant was traveling, because the court was not enlightened by the testimony of any witness informed upon that subject as to what might be the movement of machines, after colliding as these machines were shown to have collided. That is, judging from these conditions alone, the court would not have been authorized to conclude that the defendant's speed at the time of the accident was in excess of any particular number of miles per hour. We refer especially to that matter because it is the contention of appellant that there was no substantial evidence conflicting with that given by the defendant and his witnesses as to the rate of speed at which the car driven by the former was being operated at the time. Defendant testified that he was traveling immediately prior to the accident at from 28 to 30 miles per hour. The passenger who was riding with him testified that the speed of defendant's car was 25 or 30 miles per hour at the time of the accident. The statement was made by one witness who arrived on the scene after the accident occurred, in which he expressed to the defendant the opinion that defendant's car must have been going 50 or 60 miles per hour. This testimony was of no evidentiary value whatsoever, notwithstanding that it was further stated that defendant made no response to the estimate given by that witness. It was shown that the defendant did immediately after the collision state that he (defendant) had the right of way and was going at less than 30 miles an hour. It is appellant's claim that there was no substantial evidence showing that defendant was traveling at more than the legal speed of 35 miles per hour. The case for the plaintiff as to this issue rests upon the as-

sertion of George Uhl. That witness stated in one part of his testimony that defendant was traveling at a speed of "40 miles an hour or over," and again that "Mr. Fertig was going at about 40 miles an hour." No objection was made that this witness was not qualified to estimate that speed. This testimony, standing alone, would afford some evidence from which the court might properly find that the speed of the defendant's car was 40 miles per hour. Appellant contrasts the statements which we have quoted with another portion of the boy's testimony, wherein he stated that when he first observed the defendant's car northward on the boulevard it was about 1,000 feet away. As the witness testified that he had traveled 15 or 16 feet going at a rate of 8 or 10 miles an hour when his car was collided with by that of defendant, appellant proceeds to show by a simple mathematical calculation that the boy's statement of 1,000 feet distance was farfetched and utterly unreliable. And indeed it was so. As appellant argues, if the defendant traveled 1,000 feet while the boy's machine, going at the rate of 10 miles per hour, traveled 15 or 16 feet, then it must have been that the defendant's car was moving at the impossible rate of over 500 miles per hour. If we were authorized to assume that George Uhl's capacity for estimating speed at which a motorcar might be traveling was no better than his capacity for estimating distance, then the argument of counsel would be altogether sound, and it would follow, as a necessary conclusion, that all of the testimony given by George Uhl on the question of the speed of defendant's car was unreliable and should be given no consideration in the case. We cannot so assume, and it must be said that the record exhibits some testimony which the court had the right to consider as substantial tending to establish the fact that the defendant, immediately before the collision, was traveling at a speed in excess of that allowed by law. "If facts are doubtful, as the result of uncertain evidence or conflict of testimony, the question should be submitted to the jury." *Davis v. California St. R. Co.*, 105 Cal. 131, 38 Pac. 647. So also whenever upon the evidence "the conclusion [of fact] is open to debate, it is for the jury." *Stephenson v. Southern Pacific Co.*, 102 Cal. 143, 34 Pac. 618, 36 Pac. 407. The evidence given by George Uhl was more definite than where a plaintiff's witness described by the speed of a defendant's automobile as "very fast," as was the case in *Diamond v. Weyerhaeuser*, 178 Cal. 540, 174 Pac. 38. See, also, *Finkle v. Tait* (Cal. App.) 203 Pac. 1031.

[2] And we think that the finding as to defendant's negligence can be sustained only because of the evidence of defendant's failure to observe the requirement not to exceed

the maximum of 35 miles per hour while traveling on the highway. As a matter of law, his act in swerving toward the left when it appeared to him that a collision was imminent, instead of continuing on the right-hand side of the road, was not in itself negligence. Defendant's testimony is entitled to be taken as representing the conditions which caused him to guide his machine to the left, for it stands uncontradicted. He testified that when he saw the plaintiff's car it was 60 or 75 feet away and approaching within 2 or 3 feet of the paved boulevard, going 8 or 10 miles an hour. He then testified as follows:

"When I first saw his car I turned to the center of the road to try and avoid an accident with him, thinking that I had plenty of time to go around him and avoid the accident. Just when I applied the brakes I do not know. I had but a fraction of a second within which to act."

There are many cases, several of which are cited by appellant in his brief, which declare the familiar rule that, where a person discovers himself in sudden peril, without sufficient time to weigh all of the surrounding circumstances, that the act which he may then do is not a negligent one, even though it may appear, upon reasoned consideration, that his choice was unwise.

"The rule, judicially stated, is that one who in a sudden emergency acts according to his best judgment, or who, because of want of time in which to form a judgment, omits to act in the most judicious manner, is not chargeable with negligence." 20 Ruling Case Law, p. 29.

[3] Appellant insists that the evidence shows without conflict that the driver of plaintiff's car was guilty of contributory negligence. He prefaces the argument to this point with the assertion that, as between a motor vehicle moving along a main artery of travel and another vehicle emerging from private ground abutting the highway, the former must be conceded the first right to pass. To that proposition we are disposed to give ready assent. It would seem to be a rule founded upon the reasonable necessities of the situation assumed. The conditions which surrounded the parties at the time and place where the accident herein referred to occurred well illustrate the need for declaring the rule to be as indicated. Over that thoroughfare a great deal of vehicular traffic constantly passed, and high rates of speed were maintained. The casual machine that might emerge upon the highway from private property aligning the same could better suffer the small delay by allowing precedence to the highway traffic and so not only avoid obstructing the latter, but decrease the danger of injury by collision.

[4] Once it is determined that the right of

way was in the defendant, it follows that the latter was not required to watch with the same vigilance all abutting private property for the coming of possible obstructions to his progress as he would be required to watch along the surface of the highway ahead of him and at intersecting public ways. Traveling at a high rate of speed—35 miles an hour being permitted—the duty was imperative that such driver should keep his eyes on the road. He was not required to anticipate the unexpected event that a motor vehicle would suddenly issue forth from private grounds and cross the highway in front of him. He had not the duty to look across hedges or through shrubbery, nor yet to scan the ground within the line where shade trees bounded the footway outside the property line. We apply here the conclusions just drawn only for the purpose of showing that a situation existed which made it the duty of the driver of plaintiff's car to give ample warning by audible signal of his approach to the main thoroughfare. The Motor Vehicle Act (Statutes of 1915, p. 397), provides that—

"Every person operating a motor vehicle shall sound said bell, gong, horn, whistle or other device whenever necessary as a warning of danger."

In the answer of defendant it was expressly alleged that plaintiff's car was "propelled along said private driveway and upon and across said highway at an excessive and negligent rate of speed and without any warning being given by the person in charge of said car of the presence of the same upon or the movement thereof along said private driveway." It was further alleged that said driver did not use ordinary diligence and care to discover the presence of approaching cars on the boulevard. The trial judge found that plaintiff's driver was not negligent and that plaintiff's car was not driven onto the highway "at an excessive speed, or without giving drivers upon said highway any warning of the movements of said car." It was sufficiently established and without contradiction that George Uhl, the driver of plaintiff's car, sounded no horn or other signal giving warning of his approach from the driveway. In his own testimony he makes no mention of having given any such signal. The defendant testified that he heard no signal or horn sounded by any one. A witness who was riding with defendant testified that he "heard no signal of any kind prior to the accident." One witness for plaintiff testified that he heard the crash of the automobiles in collision, that he had seen plaintiff's son drive the automobile away from the home toward San Fernando, and that he heard the sound of a horn. He did not tell

from what direction that sound came, nor did he by any language indicate whether that sound came from the plaintiff's automobile or from some passing machine upon the highway. Plaintiff's machine at no time was stopped in its progress from the driveway across the highway to the point where it was struck. Traveling at from 8 to 10 miles per hour, as George Uhl said it was, the time occupied by its movement from the property line onto the paved portion of the highway would be a matter of about two seconds. We have already pointed out that the estimate of George Uhl as to the distance (1,000 feet) that defendant's car was away from the line of the driveway at the time he first saw it was utterly unreliable. It was so at variance with other facts and circumstances as to furnish no conflict whatsoever with the testimony of the defendant and his witnesses regarding the situation which immediately preceded the collision. The defendant testified that he had been driving on the right-hand side of the road immediately prior to the accident and was looking straight ahead along the road; that there were no street intersections ahead for a distance of 400 or 600 feet, and the country was sparsely built up, there being an occasional ranch. A witness called on behalf of the defendant testified that in his opinion a car of the weight of that of the defendant's, on level asphalt pavement, with three passengers, going at the speed of 30 miles an hour, would require from 80 to 100 feet within which to be brought to a stop. That the car of the defendant must have been approximately at the place and distance where the defendant's testimony stated it to be may be demonstrated by taking into account the speed of 40 miles per hour at which George Uhl said defendant's car was traveling, together with the distances and rate of speed given by the witness George Uhl as referring to the machine which he himself was operating. Regardless of whether George Uhl was negligent in miscalculating the distance between his car and that of the defendant, and was therefore negligent in not conceding the right of way to the approaching machine, it very clearly appears that, had he obeyed the law as well as observed the rule of common prudence, he would have given notice of his approach to the highway by some signal audible to those who might take warning from the sound. Under the evidence we are satisfied that it clearly appeared that the negligence of the driver of the plaintiff's car contributed proximately to the cause of the collision. The findings of the trial court in that particular are not sustained by the evidence.

The judgment is reversed.

We concur: CONREY, P. J.; SHAW, J.

56 Cal. App. 740

(206 P.)

COLTHURST v. FITZGERALD, Justice of the Peace. (Civ. 2456.)

(District Court of Appeal, Third District, California. March 7, 1922.)

1. Justices of the peace ⚡64—Time to answer after demurrer should not be extended beyond two-day period.

Under Code Civ. Proc. §§ 872, 874, a justice of the peace was without authority to extend defendant's time to answer after his demurrer was overruled, beyond the two-day limitation fixed by section 874, the amendment (St. 1921, p. 122) of section 872, authorizing an extension not to exceed five days, not applying to orders entered prior thereto.

2. Justices of the peace ⚡95—Time to answer cannot be extended after defendant was in default.

Even if the justice of the peace had authority to extend the time within which defendant might answer after his demurrer was overruled, he could not grant such extension by an order entered after the defendant was in default.

3. Mandamus ⚡177, 190—Damages cannot be recovered unless pleaded and proved; costs recoverable by petitioner.

The petitioner for mandamus to compel a justice of the peace to enter judgment cannot recover damages without pleading and proving them, though he may recover his costs incurred in the mandamus proceedings, under Code Civ. Proc. § 1095.

Original application by J. E. Colthurst for a writ of mandate to be directed to J. A. Fitzgerald, as Justice of the Peace for Vallejo Township, to require him to enter judgment in favor of the petitioner in an action by the petitioner against Mary V. Smylie and husband. Peremptory writ issued.

J. E. Colthurst, of Vallejo, for petitioner.

FINCH, P. J. This is an original proceeding in mandamus to compel respondent to enter judgment in favor of petitioner in an action, pending in the justice court of Vallejo township, Solano county, in which petitioner is plaintiff, and Mary V. Smylie and Charles Frank Smylie, her husband, are defendants.

On the filing of the petition herein, this court caused an alternative writ of mandate to issue requiring respondent to enter judgment as prayed for or, in default thereof, to show cause before this court at 10 o'clock a. m. on February 20, 1922, why he had not done so. The alternative writ, together with a copy of the petition and of petitioner's points and authorities, was duly served on respondent ten days prior to the time set for the hearing. Copies were likewise served on said Charles Frank Smylie and on Joe Lawrence, Jr., attorney for the defendants in the action in the justice court. Neither the

respondent nor said defendants appeared at the hearing, and the matter was heard at the time appointed on the verified petition on file, and was argued and submitted by the petitioner.

From the facts presented at the hearing, it appears that the action in the justice court was brought to recover from the defendants therein the sum of \$168, alleged to be due the plaintiff for counsel fees and costs advanced by him. The defendants interposed their demurrer to the complaint in that action. The demurrer came on regularly to be heard May 7, 1920, and the same was on that day overruled by the respondent. Respondent attempted to grant the defendants ten days to answer after the overruling of the demurrer. On May 18, 1920, petitioner demanded the entry of judgment by default against the defendants. The respondent refused on the ground that he had granted defendants an additional ten days to answer. May 28, 1920, the petitioner again made demand upon respondent to enter judgment but was again refused. Thereafter the defendants filed separate answers, denying the alleged indebtedness to the plaintiff therein.

[1, 2] It appears clear that the respondent was without authority to extend defendants' time to answer to the extent attempted. Sections 872 and 874, Code Civ. Proc.; Hall v. Kerrigan, 135 Cal. 4, 66 Pac. 868. The amendment of section 872 (Stats. 1921, p. 122), authorizing the court to allow a defendant not to exceed five days to answer, after his demurrer to the complaint is overruled, can have no application, of course, to prior orders. Even if it be conceded that the respondent had authority to extend the time to answer beyond the two-day limitation fixed by section 874, he could not so extend the time after the defendants were in default. Freese v. Freese, 134 Cal. 48, 66 Pac. 43; Union Collection Co. v. Oliver, 162 Cal. 758, 124 Pac. 435.

[3] Petitioner prays for his costs incurred in this proceeding, and, in his argument, he claimed the right to recover damages sustained. He neither alleged nor proved any damage and consequently can recover none. He is entitled to his costs herein incurred. Code Civ. Proc. § 1095; Gould v. Moss, 158 Cal. 548, 111 Pac. 925.

It is ordered that a peremptory writ of mandate be issued by the clerk of this court, directed to respondent, J. A. Fitzgerald, justice of the peace in and for Vallejo township, Solano county, Cal., requiring him, as such justice of the peace, to enter judgment in favor of the plaintiff and against the defendants, for the sum of \$168 and costs of suit, in that certain action, pending in said justice court and described in the petition herein, wherein said J. E. Colthurst is plaintiff and said Mary V. Smylie and Charles Frank Smylie are defendants. It is further ordered

that petitioner have judgment against the respondent for petitioner's costs herein incurred.

We concur: HART, J.; BURNETT, J.

56 Cal. App. 771

RUCKER v. HUBLER. (Civ. 3679.)

(District Court of Appeal, Second District, Division 2, California. March 8, 1922.)

1. Brokers — 88(14)—Finding of ownership of property held sufficient.

In an action by a real estate agent for a commission for negotiating an agreement to exchange property, the finding of a written agreement whereby defendant agreed to exchange his property for the property "owned by" another party named was a sufficient finding that the latter owned the property.

2. Brokers — 61(1)—Commission held earned when agreement for exchange made, and not to be dependent on its being carried out.

A real estate agent, contracting to secure an agreement for the transfer of property in exchange, earns his commission when the agreement to exchange is made, and the commission does not depend on its being carried out.

3. Brokers — 89—Money judgment for commission held proper.

In an action by a broker against a client for damages for refusing to pay a commission for negotiating a contract of exchange of property between the client and another, where the commission was to be paid by conveying to the broker a lot worth \$500 and paying him \$100, a judgment for \$600 was proper.

Appeal from Superior Court, Los Angeles County; Waldo M. York, Judge pro tem.

Action by M. S. Rucker against S. M. Hubler. From judgment for plaintiff, defendant appeals. Affirmed.

Victor T. Watkins, of Los Angeles, for appellant.

Ralph H. Clock and C. C. McWhinney, both of Long Beach, for respondent.

CRAIG, J. [1, 2] By this action plaintiff, Rucker, sued to recover \$600 as commission for having represented defendant, Hubler, as agent, and having secured the execution of an agreement of exchange of real estate. Concerning this agreement the court found as follows:

"That on or about the 11th day of January, 1919, in the city of Long Beach, Cal., the defendant, S. M. Hubler, employed the plaintiff, M. S. Rucker, as a real estate broker to secure an agreement for the transfer of the southeast quarter (S. E. $\frac{1}{4}$) of section twenty-two (22), township five south (5 S.), range six (6), Riverside county, California, for certain real prop-

erty owned by one Samuel Brown described as lot twenty-three (23), Potter's Woodlawn subdivision, city and county of Los Angeles, for which services the defendant agreed to pay the plaintiff as hereinafter found."

The court further found that plaintiff secured the execution of a written agreement by which one Samuel Brown agreed to exchange his property for defendant's and defendant agreed to accept the same in exchange for that described in the agency agreement. The defense interposed was that Brown did not own the property which he offered to exchange, and also refused to carry out the contract which he signed. Appellant contends that the court made no finding upon either of the supposed issues thus presented. In addition to that contained in the finding above quoted, the court in its second finding states:

"And on that date the defendant and one Samuel Brown entered into a written agreement of exchange wherein and whereby the defendant agreed to exchange his property above described for the property owned by Samuel Brown above described."

As to the ownership of the property by Brown, it is true that the finding might have been more direct. However, if a finding on that matter were necessary, the one made is sufficient.

But Rucker earned his commission when the agreement to exchange was signed by Hubler and Brown. The evidence is not contained in the transcript before us, and the findings must therefore be taken to correctly set forth the import of the agreement entered into between plaintiff and defendant. The principal, having accepted the customer by entering into an agreement, will not be permitted to question the ability or the willingness of the customer to carry out the exchange. 9 C. J. 631, 632; 4 R. C. L. 309. This contract only required Rucker "as a real estate broker to secure an agreement for the transfer" of the defendant's property in exchange. Under such an agreement the agent's commission is not dependent upon the exchange being carried out. *Jennings v. Jordan*, 31 Cal. App. 335, 160 Pac. 576. Appellant cites *Connor v. Riggins*, 21 Cal. App. 756, 132 Pac. 849. That decision has no application to the instant case for the contract expressly provided that the transaction should be "consummated." Neither of the alleged defenses constituted legal defenses, and no findings upon them were necessary.

[3] Appellant further complains that the court should not have given judgment for \$600, but, if at all, the decree should have been that defendant convey a certain lot agreed to be given Rucker as a part of his commission and \$100. Such a decree would

conform to the agency agreement, but the court found that defendant had broken this agreement, and refused to convey the lot. The action is not one for specific performance, but for damages. The court found the reasonable value of the lot to be \$500. This, plus the \$100 stipulated in the contract of agency, makes \$600, for which amount judgment was properly entered.

Judgment affirmed.

We concur: FINLAYSON, P. J.; WORKS, J.

57 Cal. App. 84

PEOPLE v. OWENS. (Cr. 598.)

(District Court of Appeal, Third District, California. March 15, 1922.)

1. False pretenses —39—Burden of proof as to lack of funds or credit of one passing a check is on prosecution.

In a prosecution under Pen. Code, § 476a, for making and uttering a check on a bank without having funds or credit in the bank to meet the check, the burden is on the prosecution to show that defendant had neither funds nor credit to meet the check.

2. Criminal law —800(1)—Instruction defining "credit" should be given in prosecution for passing check on a bank in which defendant had no funds nor credit.

In a prosecution under Pen. Code, § 476a, for making and uttering a check upon a bank without having funds in, or credit with, the bank to meet the check, an instruction defining "credit" as used in the statute should have been given.

Appeal from Superior Court, Mendocino County; H. L. Preston, Judge.

George Owens was convicted of making and uttering a check on a bank without having funds or credit to meet it, and he appeals. Reversed.

W. D. L. Held, of Ukiah, for appellant.

U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

FINCH, P. J. The defendant appeals from a judgment of conviction of the crime of making and uttering a check upon a bank without having funds in or credit with such bank to meet such check, and from the order denying his motion for a new trial. The charge is based on section 476a, Penal Code.

[1] The evidence shows that the defendant made the check, delivered it to the prosecuting witness, and received the face value thereof in money, and that the records of the bank did not contain the name of the defendant as a depositor. The evidence further shows that the prosecuting witness took the check to the bank on which it was drawn

but did not cash it there. He testified that the bank refused payment, but such testimony was stricken out by the court. The record is silent as to whether the defendant had credit with the bank to meet the check. If he had such credit, then no crime was committed. The burden was on the prosecution to show that the defendant had neither funds nor credit with the bank to meet the check.

Respondent urges that the question whether the defendant had funds in or credit with the bank was peculiarly within his own knowledge, and that the burden of proof on that issue was on him. The Supreme Court has held to the contrary. *People v. Frey*, 165 Cal. 140, 145, 131 Pac. 127.

[2] The court refused to give an instruction defining the word "credit" as used in the statute. The instruction should have been given. The other instructions refused were contained in other parts of the charge to the jury.

The judgment and order are reversed.

We concur: BURNETT, J.; HART, J.

56 Cal. App. 702

In re HAHN. (Civ. 3834.)

(District Court of Appeal, Second District, Division 1, California. March 4, 1922.)

Attorney and client —61—Disbarred attorney held entitled to reinstatement.

Evidence considered, and held to show that an attorney disbarred for unprofessional conduct had reformed and was entitled to be reinstated.

In the matter of S. S. Hahn. Application for an order reinstating petitioner as attorney and counselor at law. Order granted.

Grant Jackson, Joseph Scott, and W. H. Anderson, all of Los Angeles, for petitioner. Loeb, Walker & Loeb and John W. Hart, all of Los Angeles, for Los Angeles County Bar Ass'n.

PER CURIAM. Petitioner herein on the 26th day of July, 1915, was, after examination duly made, admitted to practice law in all the courts of the state. In November, 1917, the Bar Association of Los Angeles County filed in the superior court an accusation wherein there was set forth a description of certain acts done by this petitioner while practicing his profession. The accusation contained three counts. The first set forth language used by petitioner in the argument of a criminal case in the superior court, which language was offensive and vituperative in character and wholly unjustifiable from every standpoint of professional

ethics. In a second count it was charged that petitioner, by way of advice to several persons and in the presence of the officer named, said:

"The next time Officer Whaples comes into this house I advise you to stab, injure him in any way, or even kill him, and I will defend you."

The third count contained the charge that petitioner had procured a complaint to be verified containing a statement which he knew to be untrue. After hearing the evidence in support of the accusation, and petitioner's defense thereto, the superior court on March 5, 1918, made its judgment depriving petitioner of any further right to practice law. On March 8, 1918, petitioner enlisted as a private soldier in the army of the United States and on July 2, 1918, was sent with the Expeditionary Forces to France, where he saw active service on the battle front, attaining the rank of sergeant. In May, 1919, he was returned to the United States and received honorable discharge from the service. In July, 1919, he presented to the superior court his petition that he be reinstated as an attorney and counselor at law. After due consideration of the matter, and assuming that jurisdiction was reposed in that court so to act, the superior court made its order setting aside the judgment of disbarment and reinstating petitioner according to his prayer, whereupon he resumed the practice of his profession and continued thereat until January, 1921. At this time the district attorney filed an affidavit in the superior court alleging that this petitioner had never been legally reinstated in the right to practice and that his appearance in court as an attorney amounted to a contempt. The action of the district attorney was taken under the view that the superior court was without jurisdiction to make the order of reinstatement. The decisions *In re Mash*, 39 Cal. App. 548, 179 Pac. 897, and *In re Danford* (Cal. App.) 193 Pac. 272, affirmed this view and the superior court held that judgment of disbarment was still effective. Petitioner thereupon and on the 15th of February, 1921, filed in this court his petition asking for his reinstatement. The Bar Association filed written opposition to the petition and alleged further acts of petitioner, committed subsequent to his dis-

barment and during the time that he had re-engaged in practice of the law, as evidence of his unfitness. This court denied the application for reinstatement, and petitioner has now, after the lapse of nearly another year, renewed it, offering all of the evidence which was submitted at the prior hearing and additional evidence, by way of showing that he has earned the right to his reinstatement. Part of that evidence consists of written testimonials made by a number of the superior judges of Los Angeles county and lawyers practicing at the bar. Other of the documentary evidence consists of statements from various reputable persons with whom petitioner has been associated during the past year. Petitioner on his own behalf asserts that, whatever may have been his derelictions, they were due to inexperience and youth, and that, by reason of his various experiences in the war and in his business concerns subsequent thereto, he has acquired greater breadth of mind and more thorough appreciation of a proper standard of conduct to guide him in the future. He asserts and promises that, if reinstated, he will not again transcend the bounds of professional ethics in any manner whatsoever. In view of the showing made, we are convinced that petitioner has profited by his experiences and believe that he possesses the foundation of sufficient moral integrity of mind to fulfill his duty to his clients and to the profession. In addition to other recommendations submitted, the fact that three lawyers of long experience at the bar and of unquestioned standing have appeared as counsel and personally urged that favorable action be taken upon the application is entitled to be given weight in resolving the question. Their appearance in this behalf carries with it the guaranty that they act not alone for the best interest of the applicant, but also in the interest of the bar at large. And so we are impelled to the conclusion that petitioner should be given his chance to prove that he can from henceforth discharge the duties of an attorney at law with dignity and integrity, and render that high character of service which is ever demanded of the legal profession.

It is ordered that S. S. Hahn be, and he hereby is, restored all the rights and privileges of an attorney and counselor at law, and is authorized to practice his profession in all the courts of this state.

57 Cal. App. 46

ALLEN v. LAUGHLIN FRUIT REFINERS, Inc. (Civ. 3651.)

(District Court of Appeal, Second District, Division 1, California. March 13, 1922. Hearing Denied by Supreme Court May 11, 1922.)

1. Appeal and error — 434—Obtaining extension of time to file brief held an appearance.

Where counsel for respondent while an appeal was pending obtained extensions of time for filing a brief, based on stipulations with appellant's counsel, it constituted an appearance and an acknowledgment of the pendency of the appeal.

2. Contracts — 217—Contract construed as subject to cancellation only as to services to be rendered after cancellation.

Where plaintiff, a reporter for a commission, wrote to defendant, agreeing to accept an order for a report of certain investigations subject to cancellation at any time as to reports of subsequent hearings, to which defendant replied, placing an order for the report "subject to cancellation at any time," the contract was for services to be rendered, and, on plaintiff's furnishing a copy of the report, he was entitled to compensation, since the right of cancellation reserved was to cut off the service without being required to accept a further service concerning transcript to be made after cancellation of the order.

3. Contracts — 23—Acceptance held to be an unqualified acceptance of offer of services.

Where an offer to make a report of certain investigations before a committee was to "accept your order subject to cancellation at any time as to the reports of subsequent hearings, * * *" a reply, "We hereby place an order for the report subject to cancellation at any time," was an unqualified acceptance.

Appeal from Superior Court, Los Angeles County; Charles Wellborn, Judge.

Action by Franklin W. Allen, doing business under the name and style of Hulse & Allen, against the Laughlin Fruit Refiners, Inc. From judgment for defendant, plaintiff appeals. Reversed.

Adams, Adams & Binford, of Los Angeles, for appellant.

Dana Ong, of Los Angeles, for respondent.

CONREY, P. J. At all times mentioned in the complaint the plaintiff was the official reporter for the Interstate Commerce Commission. Commencing on July 7, 1919, the Commission conducted hearings in several cities of the United States relating to increases in charges and changes in rules and regulations proposed in perishable protective tariff No. 1, compiled by the United States Railroad Administration. On July 3, 1919, the plaintiff at New York wrote a letter to the defendant at Los Angeles, stating that these hearings were to be held, and then making the following offer:

"As these increases and changes are of the utmost importance and shippers of perishable freight must follow the hearings carefully in order to protect their interests, we should be advised at once if you want copies of the official reports, which will be furnished at 12½ cents per page, the charge authorized and approved by the Commission, so that we may make enough copies to supply you."

On July 12th the defendant replied as follows:

"In answer to your letter of July 3 regarding Perishable Protective Tariff No. 1, we desire to place our order for same at 12½c per page, provided there are not too many pages. Will you kindly advise us about how many pages are contained in the article?"

On July 17th the plaintiff replied:

"Replying to your letter of July 12, 1919, we cannot tell how long each hearing in docket No. 10664, perishable freight investigation, will last, or how many pages there will be in the report, but we will gladly accept your order subject to cancellation at any time as to reports of subsequent hearings, so that you can control your expenditure, if the length of the hearings makes the cost of the complete report more than your interest warrants."

On July 23d the defendant replied:

"Yours of the 17th at hand. Regarding perishable freight investigation, docket No. 10664, we hereby place an order for the report subject to cancellation at any time."

On July 28th the plaintiff replied:

"Please accept our thanks for your order of July 23, for the reports of the hearings in docket No. 10664, perishable freight investigation, which will have our careful attention."

On the 27th day of August the plaintiff shipped to the defendant a package containing an installment of the report of the evidence received by the Commission in said matter. This was received by the defendant on the 9th day of September. Thereupon, on the same day, the defendant, by its manager, opened the package to see what it was, and immediately closed it up, and sent it back to the plaintiff. At the same time he sent a letter on behalf of the defendant to the plaintiff as follows:

"Referring to your letter of July 7th, we are to-day returning docket No. 10664, perishable freight investigation, as the cost of the report is more than our interest warrants. The writer expected to hear from you before shipping the report stating the number of pages it contained, the subject of our letter of July 12th."

On September 15th the plaintiff replied to the letter of September 9th as follows:

"Replying to your letter of September 9, we regret that we cannot accept the return for credit of the copy of the official report in docket No. 10664, which was furnished on your order,

because our charge to you is for the services of our employees in making the copy for you and, as we cannot return that labor to them and get credit for it, we cannot comply with your request. We note the cancellation of your order effective at the end of the hearing of September 13, a copy of the report having been completed for you up to that date."

This is an action to recover compensation at the agreed rate for that part of the report which was delivered or tendered for delivery, up to and including September 13, 1919. Judgment was entered in favor of the defendant, and the plaintiff appeals therefrom.

[1] Preliminary to his argument on the merits, counsel for respondent claims that the appeal should be dismissed on the ground that the purported notice of appeal contained certain defects which rendered it ineffective as a notice of appeal. We deem it unnecessary to discuss these objections to the notice of appeal. After the notice had been given, and after the transcript had been filed, respondent obtained two successive orders, extending his time for filing a brief in response to the brief for appellant. These orders were based upon stipulations obtained by counsel for respondent from counsel for appellant. The obtaining of these stipulations and orders, unaccompanied by any reservation, constituted a complete appearance and acknowledgment of the pendency of the appeal. Thereafter, upon due notice, a formal motion to dismiss the appeal was presented to the court (in Division 2, where the case was then pending), and denied. The renewal of the motion is made by leave of court, but in our opinion it is without merit.

[2] The court in its findings, without referring at all to the letters preceding July 23, all of which were set out in the complaint, found the facts to be as follows:

"That on the 23d day of July, 1919, the defendant placed an order with plaintiff for a copy of the perishable freight investigation report, docket No. 10664, subject to cancellation; that plaintiff accepted this order and its terms and conditions; that on the 9th day of September, 1919, defendant canceled the said order."

It appears, therefore, that the contract was held to have been made completely by defendant's letter of July 23d and plaintiff's acceptance thereof, without regard to the preceding correspondence, and was construed to be an order subject to cancellation at the time and in the manner hereinbefore stated. In this we think that the court erred. The contract was for a service to be rendered. The right of cancellation as reserved in the letter of July 23d was a right reserved, entitling the defendant to cut off the service at any time without being required to accept a further service concerning transcript to be made at any time after cancellation of the

order. Viewed in this light, we perceive no conflict between the terms of plaintiff's letter of July 17th and defendant's letter of July 23d. Therefore both of these letters together constitute the contract, under the terms of which the plaintiff is entitled to compensation at the agreed rate for such service as had been rendered prior to the receipt in due course of the order of cancellation. Plaintiff, having tendered the copy in accordance with its agreement, is entitled to payment therefor.

[3] Of course, we agree with the rule contended for by counsel for respondent and supported by the authorities, to which he refers, that an acceptance of an offer on terms varying from those proposed is a rejection of the offer, and that a qualified acceptance is a new proposal. But we hold that respondent's acceptance of the offer made by appellant was an unqualified acceptance.

The judgment is reversed.

We concur: SHAW, J.; JAMES, J.

57 Cal. App. 74

SATHER v. SATHER. (Civ. 4134.)

(District Court of Appeal, First District, Division 1, California. March 14, 1922. Hearing Denied by Supreme Court May 11, 1922.)

1. Divorce ☞161—Affidavit on application to open default held insufficient.

Affidavit by a wife to open a default decree for divorce entered against her in behalf of the husband, alleging that "at the time of the service of said process defendant was so sorely disheartened by the past conduct of plaintiff that she failed to defend said action fearing that, if she did so, the plaintiff might cause her further arrest on some pretext or another," and that she has suffered illness "brought about by the unwarranted attacks of plaintiff by his either having her arrested or causing her to be arrested on one pretext or another and causing detectives to follow and annoy her," held insufficient under Code Civ. Proc. § 473, to justify setting aside the default.

2. Divorce ☞161—Opening default decree held within discretion of court.

On conflicting affidavits on application by a wife to open default decree of divorce, whether the decree should be opened on the ground that defendant's failure to answer resulted from her fear of plaintiff arising from his misconduct held to rest within the discretion of the trial court.

3. Appeal and error ☞957(1)—Discretion as to opening default judgment not disturbed unless abused.

The granting or denial of a motion to set aside a default is largely a matter of discretion, and the action of the trial court will not be re-

versed unless there is a clear showing of abuse of discretion.

Appeal from Superior Court, Alameda County; A. F. St. Sure, Judge.

Action by John P. Sather against Emma Rosie Sather. Judgment for plaintiff, and defendant appeals. Affirmed.

W. E. Lady, of Los Angeles, for appellant.
George Gelder, of Oakland, for respondent.

KNIGHT, Justice pro tem. This is an appeal by defendant from an order denying her motion to set aside an interlocutory judgment of divorce and disallowing her application to file an answer. The complaint for divorce was upon the ground of desertion. Personal service of the summons was had upon the defendant, and, failing to answer, her default was entered. On April 14, 1921, an interlocutory judgment of divorce was granted and entered in favor of plaintiff. On June 23, 1921, about six weeks subsequent to the entry of said interlocutory judgment, defendant filed two motions, one to set aside the interlocutory decree, and the other for an allowance of counsel fees and alimony. The motions were noticed for hearing on July 1, 1921, and were heard by the court and denied on August 5, 1921. Defendant's application for relief from the default is based upon her own affidavit, and the proposed verified answer, and the sole reason stated by appellant for failing to answer the complaint, within the statutory period is that—

"At the time of the service of said process defendant was so sorely disheartened by the past conduct of plaintiff that she failed to defend said action, fearing that if she did so the plaintiff might cause her further arrest on some pretext or another."

In said affidavit it is further stated that ever since the service of the summons plaintiff has been ill and under the care of a physician; that her physical condition "has been brought about by the unwarranted attacks of plaintiff by his either having her arrested or causing her to be arrested on one pretext or another and causing detectives to follow and annoy her." Plaintiff, in a counter affidavit, denies the statements contained in defendant's affidavit, and, besides challenging the good faith of defendant's position, sets forth facts, which stand uncontradicted, so far as the record before us discloses, showing that these parties have been engaged in much previous legal controversy concerning their marital and property rights. In said counter affidavit plaintiff states that three previous actions between himself and wife have been brought and disposed of by the superior court of Alameda county. One was an action for divorce commenced by the appellant upon the ground of extreme cruelty. Although the court on September 29,

1920, denied a divorce to either party, it nevertheless found, on the issues raised by respondent's cross-complaint that appellant had on February 20, 1920, deserted and abandoned respondent. The second action was apparently an action in replevin brought by the respondent to recover the possession of certain personal property, presumably furniture. The court, on September 29, 1920, decided in favor of respondent, and again found that the appellant had on February 20, 1920, deserted and abandoned the respondent. The nature of the third action is not revealed by the counter affidavit, but it is shown that it was brought by the respondent, and was afterwards dismissed on stipulation. Subsequent to the disposal of these various actions, to wit, on October 14, 1920, a property settlement was effected between the parties, through appellant's attorney, whereby appellant was given certain household furniture and \$200 in cash, in consideration for which appellant waived any and all further claim against the respondent, or his property, or his estate, including future alimony, maintenance, and counsel fees.

It is further stated in said counter affidavit that subsequent to said property settlement the appellant, without respondent's knowledge, purchased on credit certain furniture from a furniture company in San Francisco, upon the representation that she was a married woman and was then living with her husband; that before said furniture was paid for appellant sold it to other parties, which resulted in her being arrested at the instance of said furniture company, and the bringing of an action by said furniture company against the respondent and the appellant for the recovery of the value of the furniture, which action was, at the time of the hearing of these motions, pending in the superior court of the city and county of San Francisco.

At the expiration of one year from the date on which the court in the other action found that respondent had been abandoned by appellant, respondent filed this action for divorce.

[1, 2] The state of the record before us demonstrates two things: First, that the grounds stated in appellant's affidavit are clearly insufficient as a matter of law to justify the granting of any relief under the provisions of section 473 of the Code of Civil Procedure; and, secondly, that from the facts stated in both affidavits it was a matter resting entirely with the trial court to say which of the parties should be believed.

[3] It has been repeatedly held that the granting or denial of a motion to set aside a default is largely a matter of discretion to be exercised by the trial court, and that its action either in granting or refusing the application will only be reversed where a clear abuse of discretion is shown. Morton v.

Shannon, 26 Cal. App. 689, 147 Pac. 1179; Kearney v. Palmer, 18 Cal. App. 517, 123 Pac. 611; Garner v. Erlanger, 86 Cal. 60, 24 Pac. 805; Williamson v. Cummings, 95 Cal. 652, 30 Pac. 762; Cass v. Hutton, 155 Cal. 103, 99 Pac. 493; Ingram v. Epperson, 137 Cal. 370, 70 Pac. 165.

In view of the facts shown by the record here, it is obvious that the court did not abuse its discretion.

The order appealed from is affirmed.

We concur: TYLER, P. J.; KERRIGAN, J.

56 Cal. App. 638

BORLAND v. BORLAND et al. (Civ. 4102.)

(District Court of Appeal, First District, Division 2, California, Feb. 25, 1922. Hearing Denied by Supreme Court April 24, 1922.)

1. Justices of the peace §130—Res judicata when same defense set up in action for subsequent installments under same contract.

A judgment, in an action brought in justice court and tried de novo in the superior court against one guaranteeing the payment of alimony for installments then due, was res judicata, when the same defenses of want of consideration and invalidity were set up in a subsequent action for installments subsequently accruing.

2. Justices of the peace §130—Defense that contract contrary to public policy, etc., held sufficiently set up to be res judicata.

In an action commenced in justice court on a guaranty of payment of alimony, an answer alleging that the agreement was invalid, though not setting up the facts constituting the invalidity, was sufficient to make the question res judicata in a subsequent action in which defendant pleaded that the agreement was part and parcel of a collusive agreement for a divorce, and as such contrary to public policy, etc.

3. Justices of the peace §130—Failure to offer proof in support of defense pleaded does not affect conclusiveness.

Where defendant, sued in justice's court on her guaranty of payment of alimony, pleaded the invalidity of the contract, a judgment rendered against her was conclusive, though she failed to make proof of all the facts bearing on the question of invalidity.

4. Estoppel §78(2) — Recitals in contract cannot be contradicted as between parties.

Under Code Civ. Proc. § 1962, subd. 2, recitals of a guaranty of payment of alimony regarding the divorce proceedings, the filing of the decree, etc., could not be contradicted as between the parties.

5. Costs §80—Properly granted to defendant in cross-action against whom there was no cause of action.

Where a guarantor, sued on her guaranty, made her principal a party by cross-complaint to enable the court to pass on her claimed right

to a cancellation of the contract, but asked no relief against him and there was no cause of action against him, judgment in his favor against defendant for costs was proper.

6. Justices of the peace §130—Conclusive between parties though another party joined in subsequent suit.

A judgment against defendant in an action in a justice's court on her guaranty of payment of alimony was res judicata as between the parties in a subsequent suit for installments subsequently accruing, though defendant's principal was made a party to the subsequent suit by cross-complaint.

Appeal from Superior Court, City and County of San Francisco; E. P. Shortall, Judge.

Action by Flora Borland against E. A. Borland, in which John H. Borland was made a party by cross-complaint. From a judgment for plaintiff, defendant appeals. Affirmed.

W. H. Morrissey, P. L. Keller, and Chas. H. Brennan, all of San Francisco, for appellant.

Walter Christie, of San Francisco, for respondent.

LANGDON, P. J. This is an appeal by the defendant from a judgment against her for \$450 upon a contract by which, for a valuable consideration, she guaranteed the payment of \$50 a month alimony to plaintiff, which sum, said contract recited, had been allowed to plaintiff by a decree of divorce duly entered in her favor dissolving the marriage between her and John H. Borland, the son of the present defendant.

In the present action the defendant filed an answer admitting the execution of the contract set out in the complaint and the fact that \$450 past due thereunder had not been paid by her son nor by herself as the guarantor, but alleged that said agreement was invalid and void for several reasons, to wit: That no consideration for the same had actually been paid, despite the recital therein contained; that it was part and parcel of a collusive agreement for divorce, and as such was contrary to public policy; that the recital therein contained to the effect that the decree in the divorce action had previously been entered was false, the fact being that the contract of guaranty was, in reality, entered into before the actual signing and filing of the decree which it recites, and similar matters. A cross-complaint was also filed, containing substantially the same allegations and asking that said contract of guaranty be declared null and void and be surrendered for cancellation. Plaintiff's answer to this cross-complaint denied all these allegations and alleged that these matters

were res adjudicata as between plaintiff and defendant because in a prior action in the justice's court plaintiff had recovered judgment against this defendant for the sum of \$150, the amount then due under the contract of guaranty involved here, and that all matters of defense against said contract herein set up were decided adversely to said defendant in that action; that, later, upon an appeal from said judgment of the justice's court, a trial de novo was had in the superior court, in which action the same issues were determined adversely to defendant. The court found these allegations of the answer to the cross-complaint to be true, and its finding is based upon the judgment roll in the action in the justice's court and in the action in the superior court, which was introduced in evidence by the plaintiff herein.

[1] The trial court, in harmony with its conclusion that such matters were res adjudicata between the parties, refused to receive evidence offered by the defendant in support of these allegations of her cross-complaint. The one question presented on this appeal is as to whether or not these matters were conclusively settled as between these parties by the prior judgments upon this same contract. We are of the opinion that they were. We find that the case of *Koehler v. Holt Mfg. Co.*, 146 Cal. 335, 80 Pac. 73, is peculiarly in point. In that case, as in the present one, a suit had been brought to recover certain installments due under a contract between the parties. The defense was that there had been a valid revocation of the same on the part of the defendant. This matter was decided in favor of defendant in the justices' court and, upon appeal, by the superior court. Later, suit was brought for other installments then due. The trial court held that the former judgments were a bar and our Supreme Court affirmed the judgment, saying:

"We are of the opinion that the plaintiff is estopped by the former judgment. It is true it was not rendered in a suit to recover the same installments that are involved in this action, and, consequently, it is not technically a bar to the present action. But it appears by the record in the former action that it was a suit to recover the amounts due under the terms of the same accepted order for the four months previous to the time here involved; that in defense the defendant relied upon the same revocation of January 25, 1902, upon which he relies in the case at bar; that the validity and effect of that revocation was litigated and submitted to the court in that action, and that the court decided that it was valid; that its effect was to abrogate and annul the defendant's acceptance of the order and put an end to its liability thereon, and rendered judgment accordingly. The case comes clearly within the principle that a judgment operates as an estoppel to preclude the parties and privies from contending to the contrary of that point or matter of fact, which, having been once distinctly

put in issue by them, has been, on such issue joined, solemnly found against them."

[2] Appellant contends that the answer of the defendant in the former action did not put in issue the matters of fact sought to be litigated in the present action. It is true, of course, that the pleadings in the justice's court were more informal and less carefully drawn than the pleadings in the present action. But in the former action defendant alleged that the agreement sued upon had been entered into by her without any consideration or without any valid consideration, and also alleged that said agreement was "invalid." True, the facts constituting the invalidity were not set up, but in the justice's court defendant would have been permitted to show such facts as she alleges in the present case, in support of her contention that the agreement was invalid. The difference in form between the pleadings in the two actions is not material, and upon this question the case of *Koehler v. Holt Mfg. Co.*, supra, is again directly in point, for it is therein said:

"The objection that the validity of the revocation was not put in issue in the former suit is not tenable. There was, it is true, no formal answer setting up the revocation such as might be considered necessary in a suit begun in the superior court. But the pleadings in justices' courts are not required to be in any particular form, and when the case comes before the superior court on appeal their effect and sufficiency are to be judged by the same standards as when it is before the justice of the peace. In construing them, when they come under consideration collaterally as in the present case, the rule excluding conclusions of law as no proper part of a pleading does not apply."

[3] If defendant failed in the first action to offer proof as to each and every one of her contentions regarding the invalidity of this contract, the judgment therein rendered against her, upon the question of its invalidity, is, nevertheless, conclusive. In the case of *Matter of Viola Frazier* (Cal. App.) 194 Pac. 510 the court said:

"The principle of res adjudicata applied as well to matters which might have been proven as to those actually offered in evidence. Were this not the law, the doctrine would not be efficacious, for a party could withhold evidence in one case and defeat the plea of res adjudicata by introducing it at a later trial of the same issues. The fact of the divorce existed, and was known at the time of the former hearing, and petitioner cannot now take advantage of her failure to produce the evidence."

So in the present case. The defendant set up the alleged invalidity of the contract as a defense in the justice's court. She knew at that time all the facts in relation to the alleged invalidity. If she failed to make proof of all the facts bearing upon that matter, that failure will not warrant a reopening of the question from time to time to per-

mit her to introduce her evidence piecemeal. The fact of the validity of the contract involved here was a question which the court was compelled to determine before it could pronounce judgment in the prior actions between these parties. It was a fact directly in issue and the prior determination is conclusive as between the plaintiff and defendant. *Garwood v. Garwood*, 29 Cal. 514, 521; *Rucker v. Langford*, 138 Cal. 611, 613, 71 Pac. 1123; *Southern Pacific Co. v. Edmunds*, 168 Cal. 415, 418, 143 Pac. 597; *Estate of Bell*, 153 Cal. 331, 339, 95 Pac. 372; *Suisun Lumber Co. v. Fairfield School District*, 19 Cal. App. 587, 596, 597, 127 Pac. 349; *Williams v. Hawkins*, 34 Cal. App. 146, 149, 166 Pac. 869; *Jones, Commentaries on Evidence*, vol. 3, p. 855.

Our conclusion that the validity of the contract between these parties was conclusively settled as between them in the former action disposes of the only real question on this appeal, for it follows that the trial court properly refused to hear evidence offered by defendant bearing upon the alleged invalidity of the contract.

[4] Furthermore, although it is unnecessary for the determination of this appeal, we might add that the offer of proof by defendant was also open to the objection that it was inadmissible under the provisions of section 1962, subd. 2, Code of Civil Procedure, which provides that recitals contained in a written instrument (except recitals of consideration) are conclusively presumed to be true as between the parties. Here defendant was endeavoring to contradict the recitals of this contract regarding the divorce proceedings, the filing of the decrees therein, etc. It is settled in this state that this cannot be done. *Moore v. Earl*, 91 Cal. 632, 635, 27 Pac. 1087; *Elizalde v. Murphy*, 163 Cal. 681, 687, 126 Pac. 978.

[5, 6] The only other point which it is necessary to mention is the contention of appellant based upon the fact that upon her motion John H. Borland was made a party to the action. This motion was made, according to appellant, upon the theory that it was necessary to have said John Borland before the court to enable it to pass upon defendant's right to a cancellation of the contract between herself and the plaintiff. John Borland was the former husband of the plaintiff, and it was his payments of alimony which were guaranteed by his mother, the defendant. He entered his appearance, after the motion of the defendant that he be brought into the action as a party defend-

ant had been granted, and then failed to answer the cross-complaint. As there was no cause of action against him and as no relief of any kind was asked against him, the court, necessarily, gave judgment in his favor against the defendant for his costs. This was proper, because the defendant in no way made out any case against him. She seeks to gain an advantage, however, by the fact of his entrance into the case, by contending that, as he was a party to this action and was not a party to the former action before the justices' court and the superior court, the parties to the actions are different and the rule of res adjudicata does not apply. This contention is without merit. We do not see that John H. Borland was a necessary party to this action; but, if he were, his joinder does not change the rule with reference to the plaintiff and defendant; the reason of the rule remains the same. Of course, the question of the validity of this contract was not res adjudicata as to John H. Borland, but he did not contend in the present case that it was invalid and presented no pleadings or proof upon any matter. But the plaintiff and defendant E. A. Borland are the same parties who have litigated before the question of the validity of this contract, and that question is settled conclusively between them.

The judgment is affirmed.

We concur: STURTEVANT, J.; NOURSE, J.

On Petition for Rehearing.

PER CURIAM. We withhold approval from the statement in the opinion of the District Court of Appeal to the effect that proof that the contract sought to be enforced by the plaintiff was part and parcel of a collusive agreement for divorce, and as such contrary to public policy, was inadmissible to show the invalidity of the contract sued on, because it contradicted the recitals of the contract. We are not prepared to say that, where the question is whether or not a contract is contrary to public policy, proof of facts contradictory to its recitals may not be given to impeach it, if they show the illegal intent and purpose of the contract, and we prefer to leave the question open.

The petition for a rehearing is denied.

SHAW, C. J., and SHURTLEFF, SLOANE, WILBUR, LAWLOR, and LENNON, JJ., and RICHARDS, Justice pro tem., concur.

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(206 P.)

SCHOOLEY v. FRESNO TRACTION CO.
(Civ. 4099.)

(District Court of Appeal, First District, Division 2, California. March 6, 1922. Hearing Denied by Supreme Court May 4, 1922.)

1. Street railroads ⇨114(14)—Evidence held to show pedestrian's negligence in stepping on track.

In an action for death of a pedestrian, evidence given on behalf of the plaintiff which showed that decedent was struck before he reached the middle of the street car track, and probably just as he stepped over the first rail, *held* to show that he stepped onto the track immediately in front of the approaching car when it was too late for the motorman to stop.

2. Street railroads ⇨101—Gross negligence in stepping on track bars recovery.

The gross negligence on the part of a pedestrian in stepping onto a street car track immediately in front of an approaching car is gross negligence contributing to his injury which bars recovery for his death.

3. Street railroads ⇨98(6)—Pedestrian not on regular crossing must exercise more care.

A pedestrian undertaking to cross street car tracks by a diagonal route at a place other than a regular crossing must exercise greater care than if he were attempting to cross directly over the street upon a regular sidewalk crossing.

4. Street railroads ⇨98(6)—Pedestrian on crowded thoroughfare must exercise more care.

The fact that the place of crossing is on a busy thoroughfare in the business district of a city requires a pedestrian attempting to cross a street car track to exercise especial care.

5. Negligence ⇨80—Contributory negligence affirmatively appearing bars recovery.

Where it affirmatively appears from plaintiff's own evidence that want of due care on the part of deceased was the proximate cause of his injury, plaintiff cannot recover, and it was error to refuse instructions requested by defendant to that effect.

6. Negligence ⇨65—Contributory negligence determined without regard to defendant's negligence.

The question of contributory negligence must be determined without regard to any negligence on the part of defendant.

7. Street railroads ⇨93(2)—Speed within legal limit held not unreasonable.

Even though a speed within the legal limit may not be reasonable under all the circumstances, the fact that a street car struck a pedestrian who suddenly stepped on the track immediately in front of it does not establish that the speed was unreasonable.

8. Street railroads ⇨114(7)—Evidence held not to show negligent outlook or stop.

Where there was no direct evidence that the motorman failed to keep an outlook or failed to use the brakes promptly to stop the car,

negligence in those respects is not established by the striking of a pedestrian who stepped onto the street car track immediately in front of the approaching car.

9. Street railroads ⇨102(1)—Ineffective fenders held not proximate cause of death of negligent pedestrian.

Where a pedestrian was contributorily negligent in stepping upon the track immediately in front of approaching car, the negligence, if any, of the street car company in failing to equip the car with effective fenders was not the proximate cause of the pedestrian's death and it was error to instruct the jury that, even if deceased was negligent, defendant was liable if they further found that, if the car at that time had been equipped with a suitable fender, deceased would not have been killed.

10. Street railroads ⇨103(2)—Doctrine of "last clear chance" held inapplicable.

The doctrine of "last clear chance" only applies where the defendant or its servant was actually aware of the danger of the injured person in time to have avoided the accident and is not applicable where pedestrian stepped upon a street car track immediately in front of an approaching car.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Last Clear Chance.]

Appeal from Superior Court, Fresno County; D. A. Cashin, Judge.

Action by Erie G. Schooley, as administratrix of the estate of C. P. Schooley, deceased, against the Fresno Traction Company, to recover damages for death of plaintiff's intestate. Judgment for plaintiff, and defendant appeals. Reversed.

Everts, Ewing & Wild and T. M. Stuart, all of Fresno, for appellant.

Harris & Hayhurst and Henry Hawson, all of Fresno, for respondent.

LANGDON, P. J. This is an appeal by the defendant from a judgment against it for \$30,000. The plaintiff is the administratrix of the estate of C. P. Schooley, deceased, and sues to recover for the death of her intestate caused by the alleged negligence of the defendant in the operation of its street railway.

The complaint charged that deceased was run over and killed by one of defendant's street cars at a point near the westerly intersection of M and Tulare streets, in the city of Fresno, and alleged that his death was caused by defendant's negligence. The alleged negligent acts were specified in six different subparagraphs, substantially as follows: (1) Excessive rate of speed of the street car. (2) Motorman failed to keep a lookout, and hence failed to discover the deceased upon the track in time to avoid running over him, and failed to use proper care in stopping the car after discovering deceas-

ed's peril. (3) The brakes and other safety appliances upon the car used for stopping same were worn and defective. (4) Car was equipped with an old, defective, out-of-date, insufficient and inadequate front fender, on account whereof the deceased was not protected, but instead was run over by the wheels of the car. (5) Car was not equipped with an automatic fender such as was in general use, by reason whereof the deceased was run over by the front wheels of the car. (6) Car was not equipped with up-to-date automatic air brakes such as ordinarily used, on account whereof the motor-man was unable to stop the car.

The defendant denied each specification of negligence, and alleged that the collision and resulting death of the deceased were brought about by his own contributory negligence.

The place of the collision is in the business district of the city of Fresno, and the point where Schooley was attempting to walk across the track was not upon a regular crossing, nor at a place provided for or used by pedestrians in crossing the street car tracks. Tulare street is one of the principal business streets of Fresno, running generally east and west. It is crossed at right angles by K street, L street, and M street, in the order named, from west to east. The deceased resided on the easterly side of M street, and at the time of the collision was on an errand from his home to a grocery store located on the southerly side of Tulare street near the center of the block between L and M streets, and was pursuing a diagonal shortcut in a southwesterly direction from his home to the store.

The defendant operates two street car tracks on Tulare street, east-bound cars running over the southerly track or "toward the Santa Fé depot" and west-bound cars over the northerly track or "toward the Southern Pacific depot." The deceased, while attempting to cross Tulare street in a diagonal direction at some point between the crossing on M street and an alley between L and M streets, was struck in the back, a little to the left side, by a west-bound car which came from his rear. At the time he was struck he was upon the first track that he attempted to cross. The evidence is that he was struck by this car immediately after he stepped upon the track. True, one witness stated that deceased was approximately in the middle of this first track; the others stated that he was just over the first rail; but this variance is of slight importance, because, the approximate width of a street car track being a matter of common knowledge, it is plain that, whether deceased was in about the middle of the track or just over the edge of the first rail when he was struck, he must have stepped over the first rail he reached immediately in front of the approaching street car. In other words, he stepped from a place of safety into imminent

danger. Traffic was heavy on the street at the time and place of the collision. The deceased was a man of the age of 44 years, and had been employed as a boiler maker for 20 years. The plaintiff, who was his wife, testified, upon being examined as to his hearing, that it was better than the average boiler maker's. He had, however, sustained an injury to his left eye. This was caused by particles of steel getting into his eye in the course of his work, which had seriously impaired the sight of this eye. This eye was the one nearest the street car which struck him. As deceased stepped over the rail, his head and face were away from the car, and the car struck him in the back, slightly to the left side. These facts are agreed upon by all the witnesses who testified regarding them.

We shall now discuss in some detail the proof made by plaintiff in support of her action. The witness Longuevan testified:

That he was riding on "the front platform of the east-bound car, and noticed the car coming from the east, going west, with a man walking diagonally toward the street car track—that is, the track on which the west-bound car was running. After taking, I should judge, 6 or 8 steps, possibly more and may have been a few less, he got approximately in the middle of the car track, and was struck in the back by the street car, knocking him forward on his face, and apparently rolled him up like a ball, until he got underneath the front fender, and it appeared to me that he had also gotten partly under the wheel guard. * * * In the meantime, the car had been brought to a halt and likewise our car had been brought to a halt and I got off."

In response to further questions, this witness testified that he judged the car which struck deceased was going about 15 miles an hour; that he thought the car ran between 20 and 30 feet after striking deceased; that, when witness first saw deceased, deceased was from 6 to 8 feet from the track on which he was struck, and was walking diagonally; that he saw him go under the front fender, and apparently he went under the wheel guard, but as to this latter fact the witness was clearly unable to give any satisfactory information, as he did not go near the scene of the accident after the car stopped, but left the car on which he was riding and went home, not desiring to see more of this ghastly occurrence. This witness admitted that he had stated at the coroner's inquest, on the day after the accident, that he was unable to judge the speed at which the car was going, and on cross-examination, he admitted that deceased had just gotten over the first rail when he was struck.

The next witness was J. P. Langston, who testified that his business was "air brakeman and safety appliance," and that he was employed by the Santa Fé. His testimony was confined entirely to measurements regarding the fenders on the car and descriptions of

these appliances which we shall not consider here, for the reasons which will later appear.

Frank Digioia was next produced on behalf of plaintiff. He was the conductor on the car which struck Schooley. He stated the car was going at about six or seven miles an hour; that the car came to a sudden stop; that he got off the car and found Mr. Schooley lying flat on his back; that he was in between the slat fender and the pilot board. It might be stated here that the car was equipped with two safety appliances or fenders, one a so-called "slat apron" in front, and wheel guards to prevent bodies from being mangled by the wheels of the car. A detailed description of these appliances is unnecessary here under our view of the law governing this case. This last witness stated that the body had gotten under the slat apron, but had not passed the wheel guard.

The witness Peterson testified that he was on the front platform of the car which struck Schooley; that he saw the man when he was just stepping on the car tracks; that the car was going about 12 or 15 miles an hour; that the man was crossing the track diagonally and was struck in the side; that he was walking at an ordinary gait. This witness did state that when he saw deceased after the accident the body was partly under the car, but he admitted that at the coroner's inquest, the day after the accident, he had testified that the body was not under the car. It also appears that immediately after the accident this witness made a statement in his own handwriting to the defendant company. He admitted on the stand that in that statement he had written that the accident was due to the "carelessness of the victim" and that the deceased was entirely at fault.

The physician who examined the body of deceased at the coroner's office testified for plaintiff, and stated that he had found "lacerations on the face, a broken jaw and several ribs broken; that his chest was crushed in and the jugular vein in the neck punctured by one of the ribs. That the punctured jugular vein caused deceased to bleed to death." The balance of the testimony for plaintiff was that of expert witnesses, and had to do solely with the different kinds of fenders in use upon street cars. The substance of this testimony was that "Eclipse" and "Worcester" fenders are projecting fenders, and are the ones in common use in Los Angeles and San Francisco. These were described in detail, and photographs introduced. Upon cross-examination it was admitted that wheel guard fenders, which was the type used upon the cars of the defendant, were in use to some extent in Venice, Pomona, Long Beach, San Bernardino, Santa Monica, Riverside, Redlands, Pasadena, San Francisco, and other places.

[1] The foregoing is the substance of the testimony offered on behalf of plaintiff. That

testimony shows beyond question that the deceased was negligent in stepping upon the tracks of the defendant company, directly in front of an on-coming car, which was plainly in view at the time he stepped upon the track if deceased had chosen to glance in its direction. We think that the negligence of deceased is not only overwhelmingly established by a perusal of the entire record, but it is sufficiently established upon an examination of plaintiff's own evidence. Taking the highest estimate of the speed of the car—15 miles an hour—it is plain that, even if deceased was not struck until about the time he reached the middle of the track (although the testimony strongly leads to the conclusion that he was struck immediately upon stepping over the first rail), he must have stepped over the rail into a place of danger when the car was practically upon him, and at a time when it was too late for the motor-man to have stopped the car or for any appliance to have saved a dangerous collision. Surely, under the language of the cases hereafter cited, and under any rational system of law, defendant could not be charged with a duty to anticipate that any one would suddenly step from a place of safety onto the car tracks in the middle of a block, directly in front of an approaching street car.

[2] We think such gross negligence on the part of a pedestrian will bar all right of recovery for any injuries which he may sustain. It is said in 25 R. C. L. 1285:

"However, where a foot passenger walks or steps directly in front of an approaching car and is struck the instant he sets his foot between the rails there is but one inference that can reasonably be drawn from that fact; that is, the inference of contributory negligence."

Cited in support of this doctrine, among other cases, is the case of Driscoll v. Cable Railway Co., 97 Cal. 553, 32 Pac. 591, 33 Am. St. Rep. 203. In that case it was said:

"While, therefore, the owners of these railroads [street railroads] are to be held to due care in the management of their lines, they, when exercising such care, are not responsible in damages to a person who, in a careless, or reckless, or absentminded way, walks suddenly in front of a moving car, and is injured before there is time to stop it. The person in charge of a car, with a clear track before him, has a right to assume that people will not suddenly undertake to cross in front of it; otherwise he could not make any headway, and no street car line could be successfully operated, either for the profit of the owner or the convenience of the public. And the general rule is, that where the negligence of the injured party is a contributing proximate cause of the accident, he cannot recover damages."

In the Driscoll Case it is pointed out that the question of whether or not the negligence of the pedestrian did contribute to his injury is generally one upon which there is conflicting evidence, which makes it difficult

for a railroad company which was itself guilty of negligence at the time of the accident to relieve itself from an unfavorable verdict. We recognize this rule, and so we have discussed herein only the plaintiff's evidence upon this question of deceased's negligence. Quite apart from the testimony offered by defendant, some of it from disinterested witnesses, we think it must appear without conflict, from plaintiff's own evidence that her intestate was negligent, and that such negligence was the proximate cause of his death. Under such circumstances there can be no recovery. Section 1714, Civ. Code; *Flemming v. Western Pacific R. R. Co.*, 49 Cal. 253; *Studer v. Southern Pac. Co.*, 121 Cal. 400, 53 Pac. 942, 66 Am. St. Rep. 39; *Nagle v. Cal. S. R. R. Co.*, 88 Cal. 86, 25 Pac. 1106; *Rudd v. Eyrnes*, 156 Cal. 640, 105 Pac. 957, 26 L. R. A. (N. S.) 134, 20 Ann. Cas. 124; *Esrey v. So. Pac. Co.*, 88 Cal. 399, 26 Pac. 211.

In the case of *Lee v. Market Street Railway Co.*, 135 Cal. 293, 67 Pac. 765, it is said:

"That a man under these circumstances should thus heedlessly cross a public street in the middle of the block and know nothing of the approach of a street car until the moment when it struck him is a demonstration of carelessness and negligence so complete as to require no comment."

[3] It is also well settled in this state that a pedestrian undertaking to cross street car tracks by a diagonal route at a place other than regular crossing must exercise greater care than if he were attempting to cross directly over the street upon a regular sidewalk crossing. *Sheldon v. James*, 175 Cal. 474, 166 Pac. 8, 2 A. L. R. 1493; *Scott v. San Bernardino, etc., Co.*, 152 Cal. 604, 93 Pac. 677; *Moss v. Boynton Co.* (Cal. App.) 186 Pac. 631, 632.

[4] The fact that the place of crossing was on a busy thoroughfare in the heart of a business district required plaintiff's intestate to exercise especial care. *Davis v. Breuner Co.*, 167 Cal. 683, 140 Pac. 586. Giving to plaintiff's evidence and to the undisputed facts all the value to which they are legally entitled, the inevitable conclusion must be that the deceased did not exercise ordinary care in crossing at a place and under conditions which required of him a greater degree of care than would have been required had he crossed at a regular crossing in a section of the city less subject to travel.

[5, 6] In an action for the death of plaintiff's intestate, alleged to have been caused by defendant's negligence, it is incumbent upon plaintiff to make out a prima facie case in his own favor showing that the damages claimed resulted from the defendant's negligence, and, where it affirmatively appears from his own evidence that deceased's want of due prudence was the proximate cause of the injury, plaintiff cannot recover. *Dufour v. Central Pac. R. R. Co.*, 67 Cal. 319, 7 Pac. 769. The question of contributory

negligence must be determined without regard to any negligence on the part of the defendant. *Moss v. Boynton* (Cal. App.) 186 Pac. 631, and cases cited therein.

Under these facts, the refusal of the trial court to give, upon the request of the defendant, two instructions stating that the deceased was negligent as a matter of law, and could not recover, was prejudicial error.

[7] Under our view with reference to the negligence of deceased, the question of defendant's negligence becomes immaterial, because the law of comparative negligence which obtains in some states is not recognized by the courts of this state. *Sego v. Southern Pac.*, 137 Cal. 405, 70 Pac. 279; *Straten v. Spencer* (Cal. App.) 197 Pac. 540. But, in justice to the defendant, it may not be amiss to say that we do not think the record establishes any of the allegations of the complaint respecting negligence on its part. Let us revert for a moment to such allegations. With reference to the speed of the car, it is admitted that the speed limit allowed by law for street cars at the place in question was 16 miles an hour. Defendant was well within this limit, according to even the highest estimate placed by plaintiff's witnesses upon the speed of its car. True, as stated by respondent, this legal limit may not be a measure of what was a reasonable speed under all the circumstances. But there is nothing to indicate that the speed at which the car was traveling was not a reasonable rate of speed under the conditions then existing. Its unreasonableness is not established, as contended by respondent, by the fact that the car struck a man stepping suddenly directly in its path. And, if this were not true, the matter would then fall within the rule announced in the case of *Davis v. Breuner Co.*, 167 Cal. 683, 140 Pac. 586, which held that, where the negligence of the plaintiff in not looking both ways before starting to cross a street in a busy thoroughfare in the business district of a city is established, it will bar his recovery notwithstanding the defendant was driving an automobile at a speed in excess of the speed allowed by ordinance. A fortiori, there can be no recovery in the present case where the street car was being operated at a legal rate of speed.

[8] There is no proof that the motorman failed to keep an outlook or that he failed to use proper care in stopping the car after discovering deceased's peril. Indeed, it is plain that, if the deceased stepped over the rail, and was almost instantly struck, as appears in the present case, then no outlook which the motorman could possibly have kept would have enabled him to stop the car in time to avoid the accident. Deceased was not in a position of peril until he stepped upon the rail, and he could not have taken more than a step or two, going at an ordinary gait, before he was struck. Until almost the moment he was struck, then no outlook

would have disclosed him in a position of danger, for he was not in such a position. This negatives any possibility that any failure to keep an outlook, if such there was (and on that matter the evidence is to the contrary), could have contributed to the accident. There is not the slightest evidence that the motorman failed to use proper care in stopping the car after discovering deceased's peril, or that the brakes or other appliances for stopping the car were worn and defective. There is no evidence that the car could have been stopped in a shorter distance, nor that any other car otherwise equipped could have been stopped more quickly. Furthermore, there is no proof that the deceased was run over by the wheels of the car. The nearest approach to such proof is in the testimony of a witness who at the time of the accident was on a car going in the other direction, who stated that it appeared to him from a distance of about 75 feet that the deceased had gotten under the car; but this witness admitted that he did not go nearer to the scene of the accident after the car stopped, but hurried away so as not to see the injured man. His testimony, then, as to what his impression was at that distance is without weight in view of the evidence of several eyewitnesses who saw the position of the body when the car stopped, and who testified that the body was not under the wheels nor under the car. It is apparent, then, that the only possible theory for the judgment is that the jury believed the fenders upon the car were improperly constructed, and that this condition was the proximate cause of the injury.

[9] Now, if by any course of reasoning, in the light of defendant's evidence on this subject, the jury had been justified in concluding that the fenders and safety appliances on defendant's car were not reasonably well suited for the purpose for which they were intended, nevertheless we think it cannot be successfully contended, under the facts of this case, that this matter was the proximate cause of the injury and death, for it conclusively appears from all the evidence that the negligence of deceased was the proximate cause of his death. *Craven v. Central Pac. R. R. Co.*, 72 Cal. 345, 13 Pac. 878. If a person, while crossing the track of a railroad on a public highway, is injured by a passing train, his negligence, if it contributed at all to the injuries, contributed directly and proximately. *Hearne v. Southern Pac. R. R. Co.*, 50 Cal. 482.

Under such a state of facts, we are unconcerned with the contradictory opinions of numerous witnesses produced by both sides as to the relative merits of different types of fenders or safety appliances. It is admitted that the defendant was under no duty statutory or under the common law, to equip its cars with any particular kind of fenders. But we may go a step further,

and point out that even if defendant had been violating a statute by the use of the fenders attached to this car, the presumption of negligence raised by such unlawful conduct would only furnish ground for a recovery where it was the proximate cause of the injury. *McKune v. Santa Clara V. M. & L. Co.*, 110 Cal. 480, 486, 42 Pac. 980; *Fenn v. Clark*, 11 Cal. App. 79, 81, 103 Pac. 944. We apprehend it would not be contended that, if a pedestrian, with murderous intent, pushed another directly in front of a moving car, the injured person could recover regardless of the fact that the car was unequipped with any safety devices, in direct violation of a statute, or that if one, with suicidal intent, hurled himself in front of a moving car, his representatives could recover regardless of the type of fender the car carried, and the question of the violation by defendant of an ordinance regulating fenders would not change the rule of law. The present case furnishes but a difference in degree, and not in kind.

Because of the conclusions we have reached regarding the matters herein discussed, it is unnecessary for us to discuss all of appellant's specifications of error. We shall mention merely an error in an instruction, which, together with the other matters herein discussed, compels a reversal of the judgment. The jury was instructed:

"That if they find from the evidence in this case that the deceased at the time of the accident and at the time he met his death was guilty of negligence in going upon the track of the street car, but should they further find that said car at the time was not provided with a suitable fender or appliance placed in front or attached to the trucks of such car or dummy for the purpose of removing and clearing obstructions from the track and preventing any obstacles, obstructions or persons on the track from getting under such dummy or car, and removing the same out of danger or out of the way of such dummy or car, and that it was negligence on the part of the company to so operate said car without such suitable fender or appliance; and if they further find that, if said car had at said time been provided with such suitable fender or appliance, the deceased, notwithstanding his negligence, if any, in getting upon said track, would not have been killed, then the defendant is liable to the plaintiff for the damage occasioned by his death, and it is the duty of the jury to find a verdict in favor of the plaintiff."

The foregoing instruction is in conflict with the cases hereinbefore cited, and is also in direct conflict with the case of *Waterman v. Visalia Electric R. R. Co.*, 23 Cal. App. 350, 357, 137 Pac. 1096, 1099, where it is said:

"They would then apply said instruction to that contingency and necessarily reach the conclusion that though the child's mother was guilty of negligence that contributed directly to the injury, yet, since defendant, if it had furnished suitable brakes, might have avoided

the accident, plaintiff was entitled to recover. This would be, of course, to set at naught and completely nullify the doctrine of contributory negligence. It would be in effect that the prior negligence of defendant, if contributing to the accident, would render defendant liable notwithstanding the succeeding negligence of plaintiff which contributed directly and proximately to the injury. In other words, contributory negligence would be entirely eliminated from the case."

[10] There is no theory of the instant case under which the above-quoted instruction would have been proper. Appellant suggests that it was given under the doctrine of "last clear chance," but, as pointed out by appellant and admitted by respondent, that doctrine has no application here, because, as clearly stated in the case of *Waterman v. Valsalia Co.*, supra, 23 Cal. App. at page 356, 137 Pac. at page 1096, that doctrine could only apply where the defendant or its servant was actually aware of the danger of the injured person in time to have avoided the accident and, as demonstrated by the evidence in the present case, deceased was not in a position of danger until he stepped upon the track, which was just an instant before he was struck, and the defendant was afforded no opportunity by the exercise of the greatest possible diligence to avoid the accident. This instruction was therefore erroneous, and greatly prejudicial to defendant.

The judgment is reversed.

We concur: NOURSE, J.; STURTEVANT, J.

(56 Cal. App. 774)

MILLS v. RICHMOND CO., Inc. (Civ. 4129.)

(District Court of Appeal, First District, Division 2, California, March 9, 1922. Hearing Denied by Supreme Court May 8, 1922.)

1. Deeds ¶94—**Evidence** ¶441(8)—**Collateral matters in sale contract, such as grading streets, placing curbs, etc., are not merged in deed.**

A deed made in execution of a contract for the sale of land merges the provisions thereof as to the quantity or identity of the land, but collateral matters, such as grading streets, placing sidewalks and curbs, etc., may be inquired into.

2. Cancellation of Instruments ¶37(1) — **Plaintiff need not plead materiality of defendant's payment of costs of grading, etc., as part of consideration for sale.**

In a suit to rescind a contract of sale for grantor's failure to grade the street and place sidewalks and curbs in front of the lot sold as agreed, plaintiff need not plead facts showing that the cost thereof was a material element of the consideration.

3. Vendor and purchaser ¶110 — **Seller's agreement to grade street, etc., held not an independent covenant, breach of which would not be ground for rescission.**

A clause in a contract of sale whereby the seller agreed to grade the street and place sidewalks and curbs in front of the lot sold held not an independent covenant, a breach of which would not be ground for rescission, in the absence of express language to such effect.

Appeal from Superior Court, Contra Costa County; A. B. McKenzie, Judge.

Action by Mrs. L. Mills against The Richmond Company, Incorporated. Judgment for defendant, and plaintiff appeals. Reversed.

Lovett K. Fraser, of San Francisco, for appellant.

Forrest A. Cobb, of San Francisco, for respondent.

STURTEVANT, J. The plaintiff commenced an action against the defendant to obtain a rescission of a contract to purchase two lots in the town of Richmond, Contra Costa county, Cal. The trial court sustained a demurrer to the plaintiff's amended complaint, and, she declining to amend, judgment went for the defendant, and the plaintiff has appealed.

In her amended complaint the plaintiff sets forth that on the 1st day of February, 1913, she agreed to buy of the defendant's assignor two lots at \$500 each, and to pay thereon \$10 down and \$10 per month until the full purchase price had been paid, and that in consideration therefor the said Herbert F. Brown agreed that he would, when all payments had been made, execute and deliver to plaintiff a good and sufficient deed to said premises, and also that "the seller agrees to grade the street and place concrete sidewalks and redwood curbs in front of the within mentioned lot"; that the said Herbert F. Brown transferred said contract to the defendant, which accepted the same, and agreed to fulfill all of its terms. The plaintiff made all payments, and the defendant did, on the 19th day of December, 1919, make and deliver to plaintiff its deed.

It is further averred that, when said contract was made, February 1, 1913, the plaintiff was a widow of 80 years of age, living on a farm near Kelseyville, Lake county, Cal., and that plaintiff has been unable to leave Lake county since the year 1915 because of her extreme old age and the condition of her health, and that she has never seen said lots; that on the 1st day of March, 1921, the plaintiff received the information that the defendant had never done the grading and other improvements above referred to; that plaintiff relied on defendant's agreement and would not have purchased the lots except by reason of each and all of the re-

itals in her contract. The plaintiff pleads in appropriate averments a notice of rescission, an offer to reconvey, and a demand for the return of her money.

[1] The demurrer which was interposed and sustained pleaded, among other things, that the amended complaint did not state facts sufficient. In support of its demurrer the defendant makes two points. It contends that a deed made in execution of a contract for the sale of land merges the provisions of the contract therein. As to the quantity of land described or the identical body of land to be conveyed, it may be conceded that respondent's point is good. *Riley v. North Star Mining Co.*, 152 Cal. 549, 556, 93 Pac. 194. But there is no such dispute involved in this case. As to the matter of a clear title, the payment of taxes, the grading of streets, the placing of sidewalks, and curbs, one would not expect to see anything on those subjects in a deed. If such matters existed between the parties they were collateral to the deed and may be inquired into. *Blahnik v. Small Farms Improvement Co.*, 181 Cal. 379, 383, 184 Pac. 661.

[2] The respondent's second point is that, even if appellant had not accepted performance, she has not pleaded facts sufficient to entitle her to rescind; that the facts pleaded, at most, entitle her only to damages for breach of a contract. In making this point the respondent argues that it is not as to every contract concerning the sale and purchase of a lot that the cost of the grading, sidewalks, and curbs constitute a material element of the consideration, and that one who would rescind must plead facts showing that such an element is material. There are two answers to that argument. No one, we take it, would have the temerity to claim, as a matter of law, that the cost of the street work fronting a city lot could be treated as de minimis. Again, so far as the item may be said to be trivial, the question seems to be settled in California against the contention of the respondent. *Walker v. Harbor Business Blocks Co.*, 181 Cal. 773, 186 Pac. 356. If, as argued by the respondent, the construction of the improvements in question was a matter of no great cost, the fact may be developed at the time of the trial (*Fountain v. Semi-Tropic L. & W. Co.*, 99 Cal. 677, 34 Pac. 497), but no duty rested upon the plaintiff to add any additional allegations than those contained in her pleadings.

[3] We understand the respondent to contend that the clause, "The seller agrees to grade the street and place concrete sidewalks and redwood curbs in front of the within mentioned lot," is an independent covenant, and therefore that a breach thereof is not a ground for rescission. This is a strained interpretation of the contract. There is no

express language showing it to be an independent covenant. In *Brennan v. Ford*, 46 Cal. 7, 16, the court said:

"No time was stipulated for the performance of these acts, nor is there any provision from which it can be inferred that one was to precede the other. In such cases the law implies that they are to be performed concurrently. In the *Bank of Columbia v. Hagner*, 1 Pet. 455, it is said that 'in contracts of this description the undertakings of the respective parties are always considered dependent unless a contrary intention clearly appears. A different construction would, in many cases, lead to the greatest injustice, and a purchaser might have payment of the purchase money enforced upon him and yet be disabled from procuring the property for which he paid it.'"

For the foregoing reasons we think the demurrer should have been overruled, and that the trial court erred in sustaining the same.

The judgment is reversed.

We concur: LANGDON, P. J.;
NOURSE, J.

57 Cal. App. 110

PEOPLE v. APPLE. (Cr. 605.)

(District Court of Appeal, Third District, California. March 18, 1922.)

1. Criminal law — 1069(6)—Time of taking appeal is jurisdictional.

The limit of time fixed by the Code within which an appeal may be taken is jurisdictional, and no jurisdiction is conferred on the court to hear and determine an appeal attempted to be taken after the expiration of the time fixed.

2. Criminal law — 1024(3)—Appeal by people must be taken from judgment on demurrer and not from order sustaining demurrer.

Under Pen. Code, § 1238, authorizing an appeal by the people from a judgment on demurrer, and section 1008, authorizing amendment of indictment or information and providing for judgment, if the district attorney does not amend after a demurrer is sustained, a judgment should be entered on the demurrer, and the appeal must be taken from such judgment, and not from the order sustaining the demurrer.

Appeal from Superior Court, Tehama County; John F. Ellison, Judge.

Criminal prosecution by the People against S. N. Apple. From an order sustaining a demurrer to the indictment, the People appeal. On motion to dismiss the appeal. Motion granted, and appeal dismissed.

U. S. Webb, Atty. Gen., for the People.
James T. Matlock, of Red Bluff, and E. L. Randall, of Corning, for respondent.

HART, J. The defendant was indicted by the grand jury of Tehama county for the

crime of felony embezzlement. The defendant demurred to the indictment on the ground, among others, that the facts therein stated do not show the crime of embezzlement or the commission of any offense, and the court sustained the demurrer.

The district attorney appeals from the order sustaining the demurrer.

The defendant has moved to dismiss the appeal on the ground that the same was not taken within the time prescribed by law.

Section 1240 of the Penal Code provides:

"An appeal may be taken by the people by announcing in open court at the time the order is made that the people appeal from the same."

The record discloses that the order sustaining the demurrer was made and entered in the minutes of the court on the 29th day of November, 1921, and that the district attorney, on the 5th day of December, 1921, appeared in court and thus attempted to take an appeal from the order sustaining the demurrer, as follows:

"District Attorney, M. J. Cheatham, now announces that this being the first law day and the first time when he was present in court since the making of the order sustaining the demurrer to the indictment in the above-entitled action, which order was made in his absence, that the plaintiff now appeals to the District Court of Appeal, Third Appellate District, of the State of California, from the order sustaining the demurrer to the indictment in the above-entitled action."

[1] Assuming that the order sustaining the demurrer is itself tantamount to a judgment on said demurrer, it is clear that under section 1240 of the Penal Code, above herein quoted, the appeal was not taken within due legal time, and for that reason could not be reviewed by this court. It is well settled that the limit of time fixed by the Code within which an appeal may be taken from an order or judgment is jurisdictional, and that therefore, where an appeal has been attempted after the expiration of the time within which the Code provides it shall be taken, jurisdiction to hear and determine the appeal is not conferred upon the court to which the appeal is sought to be taken. Under this view of the situation, as it is presented by the record, the motion to dismiss the appeal would have to be granted.

[2] But a more serious proposition arises upon the question whether there was, in fact, any action by the trial court upon which, as a matter of law, an appeal may be predicated.

Section 1238 of the Penal Code provides, among other things, that an appeal may be taken by the people "from a judgment for the defendant on a demurrer to the indictment, accusation or information." In the case of *People v. Ah Own*, 39 Cal. 604, which was an appeal from an order sustaining a demurrer to an indictment for kidnaping, it

was held, by a divided court, however, that an order sustaining a demurrer to an indictment constituted the final action in the case, and that such order therefore amounted to a final judgment, from which an appeal might be prosecuted and maintained. A similar ruling was made in the case of *People v. Jordan*, 65 Cal. 644, 4 Pac. 683. In the *Ah Own* Case the reason upon which the ruling was founded was that a criminal pleading was not, as was and is true of a pleading in a civil action, amendable. In the *Jordan* Case it was held that—

"The Penal Code does not provide for any entry of judgment on demurrer other than the entry of the order upon the minutes. § 1007. The order in the minutes is the judgment. Although it is better to employ the language of the Code, a judgment that a demurrer be 'sustained' is in effect a judgment that a demurrer be allowed."

When the above decisions were handed down, there was no provision in the Penal Code authorizing the amendment of an information or indictment. Since then, however, section 1008 of the Penal Code has been amended so as to read as follows:

"An indictment or information may be amended by the district attorney without leave of court, at any time before the defendant pleads. Such amendment may be made at any time thereafter, in the discretion of the court where it can be done without prejudice to the substantial rights of the defendant. An indictment cannot be amended so as to change the offense charged, nor an information so as to charge an offense not shown by the evidence taken at the preliminary examination. If a demurrer is sustained and an amendment is not allowed, or, if allowed, is not made, within such reasonable time as the court may fix, the court shall give a judgment of dismissal, which shall be a bar to another prosecution for the same offense. The defendant shall thereupon be discharged, unless the court directs the case to be submitted to the same or another grand jury, or directs a new information to be filed; provided that after such order or resubmission, the defendant may be examined before a magistrate, and discharged or committed by him, as in other cases."

It will be thus noted that under the existing law the district attorney has the right to amend an indictment or information without leave of court at any time before a plea to the charge by the defendant, provided, of course, that the amendment does not change the offense charged or does not involve matters of substance, but only matters of form. *People v. Anthony*, 20 Cal. App. 586, 129 Pac. 968. It will also be observed that, after demurrer sustained to an indictment or information, the district attorney is entitled to a reasonable time, to be fixed by the court, within which to amend the pleading, and if, within such time as the court in its discretion may fix, he does not amend, the court must cause a judgment of

dismissal to be entered. It would seem to be clear, from this provision, that it is contemplated that either a judgment of dismissal or a judgment upon the demurrer itself without a dismissal based upon the order sustaining the demurrer should be entered, and, this being so, it would follow that there can be no appeal except from a judgment so entered. In other words, under section 1008 as amended, whereby amendments of criminal pleadings in matters of form are allowed, the situation with respect to the action of the court in sustaining a demurrer to a criminal pleading is precisely the same as that with respect to the same matter in civil actions. It has often been held, and, indeed, it is clear from the Code provisions themselves, that an order sustaining a demurrer to a complaint in a civil action is not appealable, but that in such case the appeal must be from the judgment entered upon the order sustaining the demurrer. Since section 1008 of the Penal Code was amended, as indicated above, there is no reason why the rule as to appeals in civil cases for the purpose of having the order of the court sustaining a demurrer reviewed should not be applicable in criminal cases, and that the appeal in such instances should be from the judgment entered upon the order sustaining the demurrer and not from the order itself.

Our conclusion is that the attempted appeal here is futile and that this court is without jurisdiction to review the purported record before us.

We may add that the Attorney General did not at the oral argument seriously resist the motion to dismiss the appeal, probably being of the opinion that the attempt to bring the matter before this court was not legally successful. No briefs have been filed herein by either side. We have therefore been guided in our conclusion entirely by the Code sections themselves and what little light is to be gathered from the earlier decisions, cited above, which, as we have shown, were rendered before section 1008 of the Penal Code was revised, as indicated above.

The motion to dismiss the appeal is granted.

We concur: BURNETT, J.; FINCH, P. J.

57 Cal. App. 90

PACIFIC STATES CORPORATION v. GILL
et al. (Civ. 2386.)

(District Court of Appeal, Third District, California. March 16, 1922.)

1. Principal and agent §99—Judgment on theory of ostensible agency not sustainable, where parties dealing with alleged agent did not know of circumstances relied on.

A judgment for defendants on the theory that one from whom they purchased plaintiff's

cattle was his ostensible agent cannot be sustained, where many of the circumstances tending to show an ostensible agency occurred after the first purchase and some of them after a second purchase, and there was no evidence that defendants at the time of the purchases had any knowledge of the circumstances which had already occurred tending to establish an ostensible agency.

2. Principal and agent §103(7)—General authority to sell cattle held not to authorize sale of cattle covered by feeding contract providing for sale by mutual agreement.

Under a contract whereby plaintiff's foreman was to take plaintiff's cattle to his own ranch, and feed, water, and fatten them, and under which the cattle were to be marketed at such times and for such prices as should be mutually agreed on, and the proceeds divided, the foreman had no authority to sell the cattle under any general power he might have had as plaintiff's agent to sell other cattle or live stock, and evidence tending to establish a general authority to sell cattle or other live stock did not tend to show any authority to sell the cattle covered by the contract.

3. Animals §22—Contract for feeding and division held a bailment.

A contract under which plaintiff's foreman was to take plaintiff's cattle to his own ranch and feed, water, and fatten them, and they were to be sold at times and prices mutually agreed on, and the proceeds divided, was a contract of bailment, under which the foreman was a depository of the cattle for hire.

4. Principal and agent §173(1)—No presumption that draft received by principal from agent about time of unauthorized sale represented proceeds of sale.

There was no presumption that a draft sent plaintiff by its agent about the time of his unauthorized sale of cattle to defendant was delivered to plaintiff as payment of its interest in the selling price of such cattle.

5. Principal and agent §173(1)—Inference that check received from agent was in settlement of selling price of cattle sold held overcome.

Any inference that a check sent plaintiff by its agent about the time of his unauthorized sale of cattle to defendant was in payment of plaintiff's interest in the selling price of the cattle was overcome by uncontradicted evidence that it was not given for that purpose.

6. Principal and agent §166(3)—Receipt of check not ratification of unauthorized sale, of which principal did not know.

Though a check sent plaintiff by its agent about the time of his unauthorized sale of cattle to defendants was intended by him as payment of plaintiff's share of the proceeds of the sale, there was no ratification of the sales, where plaintiff and its officers did not know of the sale, or know that the check was sent for such purpose.

7. Principal and agent §173(2)—Letter written by agent or under his direction admissible to show purpose of accompanying check.

Under Code Civ. Proc. § 1854, a letter accompanying a check received by plaintiff from

its agent and explanatory of the purpose for which the check was sent was admissible, if written by the agent himself or by some one under his direction.

Appeal from Superior Court, Tulare County; W. B. Wallace, Judge.

Action by the Pacific States Corporation against Fred Gill and others. From a judgment for defendants, plaintiff appeals. Reversed and remanded.

Pendleton & Lewis, of Los Angeles, Farnsworth, McClure & Burke, of Visalia, and Howard S. Lewis, of Los Angeles, for appellants.

Lamberson & Lamberson, of Visalia, and Karl A. Machetanz, of Exeter, for respondents.

HART, J. This is an action for damages for the alleged conversion of 257 head of steers, property of the plaintiff; it being the contention of the latter that said steers were, without authority or right, sold to the defendants by one George H. Loughery, who at the time of said sale had possession of said animals. The cause was tried before a jury. At the close of plaintiff's case a motion for a nonsuit was granted as to the defendant Western Meat Company. The jury gave the defendants a verdict, and thereafter a motion was made by the plaintiff for a new trial upon all the statutory grounds appropriate to a verdict for a defendant in a civil action for damages. Section 657, Code Civ. Proc. Said motion having been denied, judgment was thereupon entered in favor of the defendants. This appeal, supported by a bill of exceptions, is by the plaintiff from the judgment so entered.

The plaintiff was at the time of the transaction involved herein engaged in the business of raising, buying, and selling beef cattle in Tulare county. The cattle were kept and ranged on lands belonging to the plaintiff in said county, one of said tracts of land being known as the "Tagus ranch." G. H. Loughery was at the times referred to in the complaint also engaged in the stock-raising business on lands owned by him and situated in Tulare county and not far distant from the cattle ranges of the plaintiff. Loughery, it may here be stated, was, during a portion of the year 1915, employed by the plaintiff on the Tagus ranch as one of the foremen having charge of the stock of the plaintiff on said ranch. On the 25th day of September, 1915, the plaintiff and the said G. H. Loughery entered into a written agreement, by the terms of which said plaintiff was to and did turn over to the possession of said Loughery 257 head of beef cattle, weighing in the aggregate 201,560 pounds, "to be fed and marketed upon the terms and conditions herein contained." Said agreement provided that the said cattle were to be taken by Loughery to his ranch in Tulare county, consisting of

1,065 acres and known as the "Ammawage ranch," and there feed, water, and fatten said cattle, "giving them the best of care until marketed and sold as provided in this agreement." The agreement further provided that Loughery at his own expense should "provide all water, feed and help necessary to properly feed and fatten said cattle, so that they shall be ready for slaughter for the California fall and winter trade of 1916 and 1917; it being agreed that no cattle shall be marketed earlier than September 1, 1916, and that all shall have been fattened and marketed by not later than March 1, 1917." The agreement proceeds:

"Said cattle may be sold in whole, or in part at any time between said last-mentioned dates, but said Loughery agrees to notify Pacific States Corporation by written notice mailed to it at the Merritt Building, Los Angeles, Cal., whenever he is ready to have any of said cattle sold, stating the number of head ready to be marketed and giving Pacific States Corporation an opportunity to co-operate with him in obtaining the best price for said cattle. It is agreed that said cattle shall be marketed only at such times and for such price as shall be mutually agreed upon by said Pacific States Corporation and said Loughery: Provided, however, that in the event said parties fail to agree as to said matter, or as to whether said cattle are being properly fattened or as to whether said cattle are in proper condition to be sold as fat beef cattle for killing purposes, then the decision in said matters shall be left to Mr. James C. Drake, president of Los Angeles Trust & Savings Bank, Los Angeles, Cal., as sole arbitrator, and his decision in said matters, and each of them, shall be final. As said cattle are marketed and sold, all the proceeds therefrom shall be paid over to Pacific States Corporation until 201,560 pounds net weight (this being the total number of pounds that the cattle weighed at the time of their delivery to Loughery) of said cattle shall have been sold. Thereafter, as any of said cattle are sold, two-thirds of the selling price shall be paid over to Pacific States Corporation and one-third thereof to said Loughery, until all of said cattle are sold."

The agreement finally provides that, after all said cattle have been marketed and paid for, a final settlement shall be had between the parties to the agreement, whereby the plaintiff shall be allowed credit for 201,560 pounds of cattle weighed in at the commencement of "this feeding agreement at the average price per pound received for all of said cattle, and the balance received for said cattle shall be divided equally between Pacific States Corporation and said G. H. Loughery, taking into account the moneys received by the respective parties prior to said final settlement." In other words, Loughery was to receive 50 per cent. of all increase made in weight by said cattle "by growth and feeding," after the plaintiff had received payment for the cattle as weighed at the time of the execution of the agreement, to wit,

201,560 pounds. The final clause of the agreement provides that said Loughery, by not later than March 1, 1917, "shall cause to be sold under this contract at least 201,560 pounds of fat, marketable, beef cattle."

The complaint alleges that on or about the 15th day of June, 1916, the plaintiff was the owner of and entitled to the immediate possession of the cattle referred to in the above agreement; that the value of said cattle on said day was \$35,924; "that on or about said last-mentioned day, and while the plaintiff was the owner of, and entitled to the immediate possession of, said cattle, as aforesaid, the above-named defendants, and each of them, wrongfully took and carried away said personal property, said 257 head of cattle, and disposed of the same, and converted the same to their own use, to the damage of the plaintiff in the sum of \$35,924."

The answer, after specifically denying the essential or vital averments of the complaint, sets up three special defenses, to wit: (1) That during the year 1915 and a portion of the year of 1916 said George H. Loughery, with other men, were employed by the plaintiff on its said Tagus ranch; that during a portion of said years the said Loughery was held out by the plaintiff to be a manager of the business of said plaintiff at said ranch, "and the said George H. Loughery was, during said time, held out by the plaintiff to be and was actually in control of the buying and selling of cattle at said Tagus ranch; that in the month of December, 1915, the defendants believing from the appearances, as such appearances were presented to them at the time, and from the fact that said George H. Loughery was, during such time, occupying the position as manager of said Tagus ranch, and was and had been for several months prior thereto actually engaged in the business of buying and selling cattle for and on behalf of said Pacific States Corporation, plaintiff herein at said Tagus ranch, and believing that the said George H. Loughery was the manager of said Pacific States Corporation for the purpose of buying and selling cattle, did purchase from said George H. Loughery, as the agent of said Pacific States Corporation, about 246 head of cattle which defendants believe are a portion of the same cattle attempted to be described by the plaintiff in its complaint on file herein, but the said defendants did not purchase or receive from the said George H. Loughery, or from any other person, 257 head of cattle." It is further alleged, in connection with this defense, which, as will be observed, is that of ostensible agency, that said defendants, at the time that they made such purchase, paid to said Loughery "as the agent and manager of said Pacific States Corporation" the full amount and value of said cattle so purchased, "and at said time

believed that the said Loughery had full and complete authority as the agent of said plaintiff to sell said cattle and receive payment therefor"; that said Loughery had possession of said cattle and delivered possession thereof to defendants at the city of Visalia in said county of Tulare, at the time of the purchase of the same by the defendants, who at said time believed said Loughery to be the agent of the plaintiff herein. (2) That the plaintiff is estoppel from denying the agency of Loughery and the full power of the latter to sell the cattle in question as the agent of the plaintiff for the reason that the plaintiff by its own acts and conduct, at the time of the purchase of said cattle by the defendants, led the latter to believe that said Loughery was its manager and agent for the purpose of buying and selling cattle and that by reason of such acts and conduct "the plaintiff caused the defendants to change their position in the premises and to purchase the said cattle from the said George H. Loughery as the manager and agent of the plaintiff at said Tagus ranch," etc. (3) That at the time of the sale of said cattle to the defendants by said Loughery the plaintiff was the owner of an undivided two-thirds interest and the said Loughery the owner of an undivided one-third interest in and to said 246 head of cattle so sold to defendants; that at the time of said sale said Loughery had full power and authority to sell, market and dispose of said cattle or any part thereof, and during all of said time said Loughery had possession of said cattle; that (on information and belief) immediately after the sale and delivery of said cattle by said Loughery to defendants the former delivered and paid to the plaintiff two-thirds of the sum which was then and there paid by defendants to said Loughery as the purchase price of said cattle, to wit, the sum of \$7,583, "and that said sum was the true value of the share and interest of said plaintiff in said cattle at the time of said sale and the delivery thereof."

[1] It is manifest from the special defenses set up in the answer that the theory upon which issue was tendered by the defendants was that Loughery, in the transactions involved in the sale of the cattle to the defendants, was the ostensible agent of the plaintiff with authority to negotiate the sale. The second special defense, which is that of estoppel, really amounts to no more than that of ostensible agency. In the brief of respondents, however, it is claimed that the testimony shows actual agency in Loughery, or, in other language, that Loughery was actually the agent of the plaintiff, with full authority to negotiate the sale of the cattle referred to in the pleadings to the defendants. Counsel for the plaintiff, in their closing brief, state that the defendants, in accordance with the theory upon which their answer was framed, presented the case below

upon the hypothesis of ostensible agency, but that since the appeal has been taken they have abandoned the theory of ostensible agency and adopted that of actual agency. It is upon the theory upon which the defendants present their appeal that the case will be reviewed here. Indeed, it is to be stated that, if the defendants had rested their case upon the theory of ostensible agency, it is clear that a vast amount of the testimony offered in support of that claim would be wholly irrelevant and incompetent, since many of the circumstances which were brought out by the evidence at the trial occurred subsequently to the date of the purchase of the first lot of cattle by the Gill Bros. from Loughery, and some occurred even after the date in February, 1916, when the second lot of cattle was likewise purchased. For this reason alone, upon the theory of ostensible agency, a reversal would be required, for there is no evidence showing or tending to show that at the time the purchases of the cattle were made the defendants had any knowledge of those few circumstances which occurred before the sales and which might otherwise be held to be competent as tending to establish ostensible agency. In fact, Fred Gill, the only one of the two defendants called to the witness stand in their behalf, testified that he negotiated with Loughery for the purchase of the cattle and that he had met Loughery only a few days prior to the 15th day of December, 1915, on which day the first lot of cattle was purchased from Loughery by him. He did not then know what Loughery's contractual or business relations with the plaintiff were or what his authority was, except such information upon the subject as was involved in the statement made by one Townsend when the latter introduced Loughery to said Gill as one of the foreman of the plaintiff's Tagus ranch.

It is first contended by the defendants that there is testimony tending to show that the cattle sold and delivered to the Gill Bros. by Loughery were not the cattle as to which the written contract between the plaintiff and Loughery was made. In other words, it is the claim that the cattle sold to the Gill Bros. were not the cattle described and referred to in the contract between plaintiff and Loughery. This contention, however, is at variance with the admission made by the defendants in their amended answer to the complaint, wherein they allege that the defendants "did purchase from said George H. Loughery, as the agent of said Pacific States Corporation, about 246 head of cattle which defendants believe are a portion of the same cattle attempted to be described by the plaintiff in its complaint on file herein." The second defense of the answer, as we have seen, admits that the plaintiff was the owner of a two-thirds interest in the cattle.

Moreover, the claim of the plaintiff that the cattle described in the complaint were the cattle sold to the Gill Bros. is supported by the testimony of witnesses who knew the cattle and who were present at the time they were sold.

As to the present theory of the defendants, however, that Loughery, in executing the transactions culminating in the sale of the cattle to the defendants, was the actual agent of the plaintiff, authorized as such to negotiate the sale, it will be necessary to review the evidence which it is claimed tends to establish that proposition. It appears that, at some time in the year 1913, one H. C. Merritt, Jr., became vice president and general manager of the plaintiff, and remained in those positions continuously up to and during a portion of the year 1917. Said Loughery, subsequent to the time in 1913 when Merritt became general manager of the corporation, was given employment as a foreman of plaintiff on the Tagus ranch. Besides Loughery there were several other men employed by the plaintiff on said ranch, and acting as foremen and discharging duties similar to those performed by Loughery. The cattle referred to in the complaint were kept at the Tagus ranch down to the time of the execution of the contract between plaintiff and Loughery. Upon the making of the contract between the plaintiff and Loughery the cattle in question (257 head in number according to the plaintiff) were driven to Goshen Junction, in Tulare county, and were there weighed and delivered to Loughery. The weighing of the steers was conducted by Merritt, assisted by Loughery, a man by the name of Charles Sage, one Clark, and several other persons whose names are not mentioned. After the weighing and counting of the cattle Loughery drove them from Goshen Junction to his Ammawage ranch. At some time in the year 1916 Merritt visited the Ammawage ranch for the purpose of inspecting the cattle. He did not see Loughery on that occasion, but saw the steers.

Several months thereafter Merritt again visited the Ammawage ranch and was informed that Loughery had departed for the East. He did not see the cattle at this time, but, inquiring of Davidson, foreman of Loughery, as to the whereabouts of the cattle, was informed by said Davidson that, all the feed on the Ammawage ranch having been exhausted, the cattle had been removed and were then on the mountain pasture of Loughery. Merritt thereupon sent Loughery a wire in the East, asking him about the cattle, and Loughery replied that "he had them on good feed, and as soon as he came back he would show them to me." Shortly thereafter Loughery returned to Tulare county and accompanied Merritt to a place (not in the mountains) where there was a band of cattle

grazing, and pointed out the animals to Merritt as those mentioned in the contract. They were not, however, the cattle so referred to. Merritt became suspicious, and some time later inquired of one of the employees, whom he designated as one of the "riders of our cattle," where the cattle in question were, and the said employee replied that "those cattle had been sold a long time ago to the Gill Bros." At this time, which was in the year 1917, Loughery was at the home of his mother-in-law in Pasadena, and Merritt called him on the telephone, and requested him to come to the Tagus ranch immediately and "straighten out" the matter of the sale of the cattle to the defendants. Loughery did not go to the Tagus ranch in response to said request, and, although Merritt heard of his having been a few days later in the county of Tulare, did not see him, and had not heard from or of him from that time until the time of the trial of this action. In connection with the statement of the facts thus far made, it should be said that Davidson, foreman of Loughery, testified that Loughery instructed him "to say to anybody connected with the Pacific States Corporation" who might make inquiries about the steers, that they were in the mountains, and that, Merritt having subsequently, and after the cattle had been sold to the Gill Bros., asked where the steers were, Davidson, in obedience to Loughery's instruction, told him that "they were in the mountains."

We come now to a consideration of the testimony which it is claimed supports the theory upon which the defendants insist that they are entitled to an affirmance of the judgment, to wit, that Loughery, in disposing of the cattle to the Gill Bros., was vested with full authority so to do by the plaintiff. Said testimony may be briefly stated as follows:

As above shown, Fred Gill, who conducted the negotiations resulting in the sale of the cattle by Loughery to the defendants, admitted that he met the former for the first time a few days only prior to the day in December, 1915, on which the first "bunch" of the steers was purchased; that Loughery was introduced to him by one James H. Townsend as the agent of the plaintiff. Of other previous transactions of Loughery, acting for plaintiff, Fred Gill, at the date of the first purchase, had no knowledge.

Townsend testified that in the summer of 1915 he was employed by Loughery to work on the Tagus ranch for two days; that Loughery gave him his (Loughery's) personal check for the sum due for the services so performed, but that within a brief time thereafter he received a draft from "the Tagus people" in payment for the same services; and that thereupon he returned to Loughery the money he received on the check or draft the latter had given him. This witness testified that a day or two before the

purchase of the first lot of cattle by the Gill Bros. he introduced Loughery to Fred Gill as "the foreman on the ranch out there," and added: "I had always known him as such."

Len Bequette testified that, at some time in the fall of 1915, Merritt, manager of plaintiff, stated to witness that Loughery was one of his foremen.

George E. Waddell stated that he accompanied his son to the Tagus ranch some time in the latter part of 1915 or the first part of 1916, his son having gone to said ranch to buy some cattle; that at that time he did not hear any negotiations between Loughery and his son regarding the purchase of cattle; that, at the time the cattle were selected and weighed, Mr. Merritt, Jr., was present; and that the only part that Loughery took in the transaction, so far as he observed, was to assist in selecting and weighing the cattle.

G. H. Waddell, son of the witness last above named, stated that at the time referred to by his father he purchased some cattle from the Tagus ranch, the transaction being carried on by Loughery. He further stated that, a short time previously to the purchase of the cattle, he met Loughery at the town of Tulare, and that the latter stated to him that he had charge of the cattle at the Tagus ranch and had some there he would like to sell to the witness; that Loughery said that the cattle were not at that time in good form, but that he was feeding them, and that he agreed with Loughery to purchase a number of head; that in the month of January, 1916, he went to the Tagus ranch and selected the cattle, and he and Loughery together weighed them. The witness further testified that he did not remember whether he gave Loughery the check for the cattle at the Tagus ranch at the time of the purchase, or whether Loughery "came to Lindsay for it. I was doing business at Lindsay; had a butcher business at that time." He also testified that he saw Merritt, Jr., at the Tagus ranch at the time that the purchase was made, but that he had no conversation with him about Loughery, and that he had no conversation with Merritt about settling for the cattle; that "Mr. Loughery did that."

H. C. Heizeg testified that he had business transactions with the plaintiff in the years 1913, 1914, and 1915; that in 1915 he sold some mules to Loughery, and that the latter gave him a check for the amount the sale came to, but he could not state whether it was a Tagus ranch check or Loughery's own personal check. He also stated that all he knew of the nature of Loughery's business relations with the plaintiff was what he was told by a Mr. Hollingsworth, who worked on the Tagus ranch, and who said to the witness that Loughery wanted to buy some mules for the ranch.

The foregoing testimony was given by wit-

nesses for the defendants. There were some 12 or more other witnesses who testified for the defendants; but, as the transactions which they testified they had had with Loughery on the Tagus ranch were of the same general character as those testified to by the witnesses last above named, no useful purpose could be subserved by reproducing their testimony herein.

[2, 3] Conceding that the evidence produced by the defendants, and of which the above is a summarized statement, is sufficient to warrant the inference that Loughery was, at the time of the consummation of the transactions involved in this litigation, an agent of the plaintiff having general power to buy and sell stock for the latter, still it is very clear that said evidence falls far short of showing, or even tending to show, that in the transactions concerned herein he was authorized to negotiate and consummate the sale of the cattle described in the written contract between him and the plaintiff. Indeed, it may be conceded that Loughery, while employed as a foreman on the Tagus ranch, was authorized by the plaintiff to buy and sell cattle and other domestic animals for the latter, and yet that fact would not be proof of authority having been vested in him by the plaintiff to sell the cattle described in the written contract to the defendants, or, for that matter, to any other person or persons. The transaction relating to the cattle sold by Loughery to the defendants was a special or particular one between the plaintiff and Loughery, and had no reference to or connection with any other contractual relations existing between the plaintiff and Loughery. In other words, it was an independent transaction, and was the subject of a special contract, reduced to writing, whereby the plaintiff agreed to and did, upon certain specified terms and conditions, turn over to Loughery the possession of said cattle for a specified purpose. In fact, it was, in effect, a contract of bailment, and under it Loughery was a depository of the cattle for hire. It provided, among other things, as we have seen, that—

"Said cattle shall be marketed only at such times and for such price as shall be mutually agreed upon by said Pacific States Corporation and said Loughery."

Thus it will be observed that, even if it be true that Loughery was, at the time of the execution of said contract, an agent of the plaintiff, with general powers with respect to the sale and purchasing of other domestic animals for the former, there is nothing in the evidence which shows or tends to show that Loughery was authorized to sell the cattle described in the contract, in the absence of an agreement upon the part of the plaintiff that he might do so. Indeed, nothing could be clearer than that

Loughery had no authority to sell the cattle referred to in the contract under any general power he might have had as an agent of the plaintiff to sell other cattle or live stock for the latter. And it is equally clear that, as pointed out above, the evidence tending to establish authority in Loughery to sell cattle or other live stock for the plaintiff other than those mentioned in the contract in question does not tend to show that there was, as the written contract referred to provided, an agreement by the plaintiff with Loughery that the latter had authority to sell the steers referred to in said contract. In other words, while the evidence produced by the plaintiff tends to show that Loughery, while acting as foreman on the Tagus ranch, had the authority as such foreman to buy and sell cattle and other stock for the plaintiff, still the proof so adduced does not show nor tend to show that it had been mutually agreed between plaintiff and Loughery that the steers which were made the subject of the special written contract between said parties should be sold or marketed by Loughery at the times and for the prices at which the latter sold the steers to the defendants, or that he had any authority to sell them at the times that he disposed of them to the defendants.

Where, as here, the authority to do a particular act under a written contract between two parties must alone be found in the contract itself, or, in other words, where authority to do an act by one party to a written contract cannot be exercised, except upon the express agreement or consent of the other party thereto, mere evidence of the fact that the party assuming to perform such act was, prior to and at the time of the making of such written contract, the agent of the other, cannot of itself justly be held to be proof of authority given to the agent by the principal to do such act. Indeed, the very fact that as to the cattle in question and the condition upon which they were to be marketed by the parties a special contract was made, and the further fact that the cattle were to be and were removed to Loughery's ranch from the Tagus ranch, themselves constitute convincing evidence that the intention was to take the subject-matter of said contract from within the scope of any authority Loughery might have had prior to and at the time of the making of the contract to buy and sell cattle or other domestic animals for the plaintiff other than those described in the said contract, and therefore to show that Loughery disposed of the cattle in question to the Gill Bros. by and with the consent of the plaintiff, there should have been evidence, either direct or circumstantial, disclosing that such consent had been obtained, or that the sale of the steers to the defendants was by and through the mutual consent and agreement of both plaintiff and Loughery. There was

as we have shown, absolutely no such testimony introduced into the case.

The third defense interposed by the defendants involves the claim that the plaintiff received and accepted from Loughery its share of the purchase price of the cattle and that thus it ratified the sale made by Loughery to the defendants. The defendants offered in evidence a draft issued on the 14th day of February, 1916, by the National Bank of Visalia, upon the First National Bank of Los Angeles, payable to G. H. Loughery, for the sum of \$1,962.24 and indorsed, "Pacific States Corporation, by C. H. Dickinson, Secretary." This draft, having been issued near the time at which the second lot of cattle was sold by Loughery to the defendants, was offered in evidence by the latter upon the theory that it was in payment to plaintiff for its interest in said second lot of cattle so sold. Further than the mere check itself, the defendants presented no evidence showing the particular purpose for which the check was delivered to the plaintiff by Loughery. On the other hand, C. H. Dickinson, secretary, auditor, and assistant treasurer of the plaintiff at the time that said check was received by the latter, testified that the check was in payment for neither of the two lots of cattle sold to the Gill Bros., but was to pay for cattle which Loughery had sold to G. H. Waddell. The testimony of Dickinson as to this matter is as follows:

"I did not receive from George H. Loughery, in any month in 1916, or at any other time, any money on account of the sale of the Gill cattle or of the cattle to Gill. The corporation did not receive any such remittance; if the corporation had received it, I would most certainly have known it. * * * I know for what purpose that check was received by the plaintiff; it was in payment for cattle sold by Loughery to George H. Waddell."

And in this connection it should be stated that the plaintiff offered in evidence a letter which Dickinson said came with the check referred to, the offer having been made on the ground that it explained the purpose for which the check was sent to the plaintiff, and that the court sustained the objection of the defendants to the admission of the evidence on the ground that, the same having been signed by "George H. Loughery, per H," no showing was made that Loughery either dictated the letter or that it was written under his direction or by his authority. Merritt, Jr., general manager of plaintiff, testified, as we have already shown, that neither he nor the corporation learned of the sale of the cattle to Gill Bros. by Loughery until the month of March, 1917, over a year after the last lot of cattle was sold and the check in question was received by the corporation from Loughery. He further stated that the plaintiff received a

check in question, but explained that it was for the sale of cattle by Loughery without plaintiff's consent; that he had learned of the sale of cattle by Loughery to persons other than the Gill Bros., through pressing the persons to whom the cattle were so sold, and that he thereupon forced Loughery to draw his check for the amount and then discharged him from the employment of the company.

[4-6] It is first to be remarked that there is no presumption that the check referred to was delivered to the plaintiff as in payment of the latter's interest in the purchase price of any of the cattle sold by Loughery to the Gill Bros.; but, even if it might be said that the circumstance of the receipt of the check near the time at which the last lot of cattle was sold to Gill afforded such an inference, such inference is clearly overcome by the testimony of Dickinson and Merritt to the effect that the check was not given for said purpose, and which testimony must be accepted as revealing the truth of the matter, since there is absolutely no contradiction thereof. Moreover, Merritt testified (and his testimony as to this is nowhere contradicted) that the corporation first learned of the transactions involving the sales of the cattle to the Gill Bros. in the month of March, 1917, which, as above stated and as is obviously true, was over a year after the last sale to Gill Bros. was made. It follows that, if Loughery intended the said check for \$1,962.24 as in payment of the plaintiff's share of the proceeds derived from the sale of the last lot of cattle to the Gill Bros., neither the plaintiff nor any of its officers knew that such was the purpose of said payment, and certainly it will not be contended that the plaintiff, not having any knowledge of the sale of the cattle to Gill Bros. or that the check was sent by Loughery with the intention that it should go in payment of its share of any moneys received on said sales, had ratified the transactions involving said sales. A party cannot be held to have ratified an act of which he had no knowledge at the time of the alleged act of ratification.

[7] There are numerous exceptions to the rulings of the court on the evidence and certain assignments of error as to certain instructions given and refused. In view of the conclusion at which we have arrived as to the effect of the evidence introduced for the purpose of showing that Loughery was authorized to sell the cattle, these assignments need not be specifically noticed herein. We may assume that, upon a retrial, the trial court will avoid the repetition of any errors, either in the rulings or in the matter of the giving or refusing to give instructions, into which it might have fallen at the trial of which this appeal is the outgrowth. It is hardly necessary to suggest, however, that in the event of a retrial of the

cause, the letter, which was above referred to as having accompanied the check for \$1,962.24 received by the plaintiff from Loughery, should be admitted, provided it be shown that it was either written by Loughery himself or by someone under his direction and that its contents are explanatory of the precise purpose for which Loughery transmitted the check to the plaintiff. Section 1854, Code Civ. Proc.

The judgment is reversed, and the cause remanded.

We concur: FINCH, P. J.; BURNETT, J.

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KOERBER v. SUPERIOR COURT IN AND FOR CITY AND COUNTY OF SAN FRANCISCO et al. (Civ. 3979.)

(District Court of Appeal, First District, Division 1. California. March 10, 1922. Hearing Denied by Supreme Court May 8, 1922.)

1. Courts $\S$ 200 $\frac{1}{2}$ —Probate court cannot adjudicate title to personalty, in proceedings to discover assets of the estate.

The probate court cannot, in the exercise of its jurisdiction, pursuant to Code Civ. Proc. §§ 1459-1461, to discover assets of the estate, adjudicate the disputed title to personal property.

2. Courts $\S$ 200 $\frac{1}{2}$ —Claim of property, in proceedings to discover assets, does not give court jurisdiction to adjudicate ownership.

That the party summoned by the probate court, in proceedings for discovery of assets of the estate, filed an answer claiming ownership of the assets involved, does not give the probate court jurisdiction to adjudicate the title to such property.

3. Prohibition $\S$ 10(2)—Can issue to prevent probate court from entering judgment beyond jurisdiction and enforcing it by contempt.

Prohibition will issue to prevent a judge of the probate court from entering a judgment, without jurisdiction, determining the title to personal property, requiring its delivery to the administrator, and reserving power to enforce the order by contempt proceedings, against which a remedy by appeal was not plain, speedy, or adequate.

Original application for writ of prohibition by Alice L. Koerber against the Superior Court of the State of California, in and for the City and County of San Francisco, and Hon. Frank H. Dunne, as Judge thereof, to restrain the defendant from rendering a decision or judgment adjudicating title to certain personal property. Writ issued as prayed.

Sullivan & Sullivan and Theo. J. Roche, of San Francisco, for petitioner.

C. J. Heggerty and J. E. Barry, both of San Francisco, for respondents.

KNIGHT, Justice pro tem. This is an application for a writ of prohibition to restrain and prohibit department 9 of the superior court of the state of California, in and for the city and county of San Francisco, and the judge thereof, from rendering any decision or entering any judgment adjudicating the title to certain personal property, which it is claimed belongs to the estate of May Ferguson, deceased.

The admitted facts are that May Ferguson, a resident of the city and county of San Francisco, died therein on July 23, 1920, leaving an estate. The heirs at law, surviving her, are her husband, William J. Ferguson, and the petitioner herein, Alice L. Koerber, who is a daughter by a prior marriage. On December 20, 1920, the surviving husband, William J. Ferguson, filed in said court a petition for the probate of a purported will of said decedent, for his appointment as administrator with the will annexed, and for his appointment as special administrator of said estate. On February 7, 1921, pursuant to said petition, he was appointed, and immediately afterwards qualified as such special administrator, but no action has been taken on that part of the petition relating to the probate of the will and for the appointment of an administrator with the will annexed. In said petition, filed December 20, 1920, it was also, among other things, alleged that, during the last illness of said May Ferguson and a few days prior to her death, the said Alice L. Koerber surreptitiously obtained possession of the keys to the safe deposit box of said May Ferguson and wrongfully removed therefrom the will of the said May Ferguson, and also cash in the sum of \$9,995, and jewelry of the value of \$3,250, and that she has converted said cash and said jewelry to her own use.

As part of the relief asked for in said petition, the court was requested to issue a citation pursuant to sections 1459, 1460, and 1461 of the Code of Civil Procedure, directing the said Alice L. Koerber to appear before said superior court and be examined on oath on the matters alleged in said petition. Upon the return day of that citation, and in obedience thereto, the said Alice L. Koerber appeared personally and by counsel and filed a written answer to the said petition. She was afterwards examined orally, under oath, concerning all of the matters alleged in said petition. By her answer and in her testimony she claimed that, acting upon the instructions from and at the direction of her mother, she removed said cash and said jewelry and said will from said safe deposit box and brought them to her mother; that her mother thereupon made her a gift of said money and jewelry and instructed her to destroy the will, which she did. During said hearing a dispute also arose as to the ownership of certain pictures and paintings,

of which said Alice L. Koerber also claimed to be the owner, by virtue of a bill of sale executed by her mother prior to her death.

At the conclusion of the hearing of said citation, counsel for William J. Ferguson moved said court to make its findings and enter its judgment, adjudicating that the disputed property belonged to the estate of May Ferguson, deceased. Thereupon the court filed the following memorandum opinion:

"While there is a grave question as to the power of the court to make the order asked for by petitioner, yet as I am convinced from the evidence adduced at the hearing that the property in question taken from decedent's safe deposit box is the property of decedent's estate and should be returned thereto; and as the respondent, Alice L. Koerber, has by her answer put in issue the title to said property, the order prayed for will be granted. Counsel will file findings accordingly."

Pursuant to the court's opinion, findings and judgment were prepared and were signed by the court and delivered to the clerk for filing and entry.

[1] The main question, presented by this proceeding, is whether or not the court, sitting in probate, in the exercise of its jurisdiction, pursuant to sections 1459, 1460, and 1461 of the Code of Civil Procedure, may try and determine questions of title to personal property. The trial court expressed grave doubts about it, and, in view of the decisions of the Supreme Court of this state, there can be no question that such power does not exist, and that any attempt to exercise such authority is in excess of the probate jurisdiction. *Ex parte Casey*, 71 Cal. 269, 12 Pac. 118; *Ex parte Hollis*, 59 Cal. 406; *Levy v. Superior Court*, 105 Cal. 600, 38 Pac. 965, 29 L. R. A. 811; *Estate of Klumpke*, 167 Cal. 415, 139 Pac. 1062.

It has also been held in other jurisdictions, in construing statutes similar to ours, that the power of the probate court ends with the discovery of the property and the enforcement of the remedial provisions of the statute, and does not extend beyond that, so as to allow the court to adjudicate the title to disputed property. In *re Robert's Estate*, 48 Mont. 40, 135 Pac. 909; *Barto v. Harrison et al.*, 188 Iowa, 413, 116 N. W. 317; In *re Manser's Estate*, 60 Or. 240, 118 Pac. 1024; *Humbarger v. Humbarger*, 72 Kan. 412, 83 Pac. 1095, 115 Am. St. Rep. 204.

Respondents do not seriously dispute the correctness of this rule, but they endeavor to justify the action of the trial court, upon the theory that Alice L. Koerber, by her answer, put in issue the title to said disputed property, and that, in the prayer of her answer, she not only asked that the petition filed against her be denied, but that "she be accorded such other relief to which, under the facts, she is entitled," from which respondents argue that she thereby voluntarily submitted to the jurisdiction of the probate

court, in this proceeding, the question of the title to said property, and that she is consequently bound by any determination the court may make thereof.

[2] We are of the opinion that such contention cannot be sustained. This proceeding was one purely in probate, ancillary and summary in its character, instituted for the purpose of the discovery of property, claimed as the property of the estate. There was no pretense, either at the time the petition was filed, or during the course of the hearing thereof, that it was an action at law or a suit in equity, to determine the title to the property. Alice L. Koerber was charged therein, by a verified petition, with having wrongfully taken and unlawfully embezzled the property of the estate, which admittedly was in her possession prior to her mother's death. Certainly, under those circumstances, she had the right to deny those accusations by written, verified answer, and to assert her own claim of ownership to said property, without forfeiting her right to have the question of the title to said property tried in the regular legal way. If respondents' contention were sustained then, in every proceeding commenced under the provisions of those Code sections, the mere assertion of a claim of ownership to the disputed property, by the person cited to appear, would at once transform the probate jurisdiction of the court, convert the proceeding into an action at law, and thereby deprive the person, claiming the title to the property, of a trial by jury.

The cases relied upon by respondents are not in point, for the reason that, in each of them, the party against whom the proceeding was instituted was cognizant of the character of the proceeding, the purpose for which it was brought, and the result sought to be accomplished by it, and, notwithstanding such knowledge, openly acquiesced in having the questions presented, considered, and adjudicated in that particular proceeding. Furthermore, the judgments rendered in those proceedings were such as the court had the full power, under its jurisdiction, to render.

[3] By the terms of the judgment proposed in this proceeding, it is adjudged that the estate of May Ferguson and the special administrator thereof do have and recover from said Alice L. Koerber, the said sum of \$9,995 and said jewelry, and that, within 10 days after the service upon her of a copy of said findings and judgment, that she return and deliver to said estate and said special administrator the said sum of money and jewelry, and the court reserves—

"the power and authority to enforce this order and judgment, and to enforce and compel compliance therewith by said Alice L. Koerber by such further and other orders, executions, writs, process, and proceedings for contempt in case of the refusal of said Alice L. Koerber to comply with and fully perform the command

and requirement of this order and judgment, as shall be and appear to the court to be proper and necessary to enforce and compel compliance with this order and judgment."

In view of the terms of this judgment, we are of the opinion that the petitioner has no plain, speedy, or adequate remedy by appeal, and that this proceeding in prohibition, which this court, under the Constitution has power to entertain, is the proper remedy. *Primm v. Superior Court*, 3 Cal. App. 209, 84 Pac. 786; *White v. Superior Court*, 126 Cal. 247, 58 Pac. 450; *Elliott v. Superior Court*, 168 Cal. 727, 145 Pac. 101; *Havemeyer v. Superior Court*, 84 Cal. 397, 24 Pac. 121, 10 L. R. A. 627, 18 Am. St. Rep. 192.

Let the writ issue as prayed.

We concur: TYLER, P. J.; KERRIGAN, J.

86 Cal. App. 742

SOLOMON v. RED RIVER LUMBER CO.
(Civ. 2420.)

(District Court of Appeal, Third District, California. March 7, 1922.)

1. Negligence — 23(1) — Attractive nuisance doctrine inapplicable to swing constructed for children.

Though one who constructed a swing to be used by school children for play is liable for failure to use ordinary care in constructing it, the doctrine of attractive nuisance does not apply in such a case, since that doctrine requires one maintaining a dangerous mechanism to use proper care to prevent a child from playing on it; whereas the swing, if properly constructed, was not a dangerous mechanism, and was intended to be used by the children.

2. Negligence — 139(1) — Modification of instruction as to fitness of swing by including attractive nuisance doctrine held misleading.

In an action for the negligent construction of a swing for school children to play on, the modification of an instruction requested by defendant that if the swing was properly made for the purpose for which it was intended to be used, and that no injury would result while it was being so used, defendant was not liable, by adding thereto, "unless you find such appliance constituted" an attractive nuisance, made the instruction confusing and misleading.

3. Negligence — 27 — Person properly constructing swing for children not liable for injuries from inherent danger.

A person who properly constructed a swing intended to be used by school children for play thereon is not liable if the swing was properly constructed for that purpose, though it was made attractive to children and though there was inherent danger in their playing with it.

4. Negligence — 140 — Instruction held erroneous as holding maker of swing liable notwithstanding intervening cause of injury.

The modification of a charge requested by defendant that if, after the swing was made by defendant, its character and use was materially changed without the knowledge or consent of defendant, after which the accident occurred, the defendant was not liable, by adding a proviso requiring the jury to find that the swing as first constructed was not an attractive nuisance, was erroneous as giving the impression that, though the accident was due to the act of third persons who changed the character and use of the swing without the knowledge of defendant, they must find for the plaintiff if the swing was originally an attractive nuisance.

5. Negligence — 140 — Instruction excusing defendant from liability for changed condition of swing held correct.

Where there was evidence that a swing constructed by defendant on school grounds was used for some time without accident, and that plaintiff's son was killed by the breaking of the swing immediately after its character and use had been changed by others so as to impose a greater strain upon its parts, a requested instruction that if the change imposed an additional burden on the swing, and was made without the knowledge or consent of defendant, the verdict must be for defendant, was proper and supported by the evidence.

6. Negligence — 121(1) — Plaintiff held to have burden of proving swing was defective when constructed.

In an action against the maker of a swing for the use of school children, the plaintiff has the burden of proving that the swing was defective when constructed by defendant, which is not met by proof that on the day of the accident the wood appeared rotten, without proof as to the length of time the swing had been in use.

7. Negligence — 27 — Schools and school districts — 89 — Maker of swing for school playground is not charged with its maintenance.

One who constructed on school grounds a swing for the use of school children is not charged with the duty of maintaining the swing after it was constructed, which devolves upon the school district.

8. Negligence — 62(3) — Change in condition of swing after construction held to relieve maker of liability.

Where a swing was originally constructed by pivoting a wheel on the stump of a sawed-off tree and suspending six ropes therefrom on which the children could swing, a change, without the maker's knowledge, in the swing by suspending from the ropes three long planks lashed together at their ends so as to form a triangle on which a large number of children could ride at the same time, was a change imposing an additional strain upon the swing so as to relieve the maker of the swing from liability for death resulting from the breaking of the tree, the first morning the swing was used after it was changed.

9. Negligence ⚡62(3)—**Maker of swing for school could not anticipate dangerous change therein would be made by teacher.**

Even if the maker of a swing for use by school children should have anticipated that the children would attempt to make changes in its construction and use which added to the danger of its breaking, the maker could not have anticipated that such changes would be made by a teacher in the school, and is not liable for death resulting from the breaking of the swing after such changes were made by the teacher.

10. Pleading ⚡237(6)—**Defendant held entitled to amend to conform to proof.**

In an action for injuries resulting from a swing constructed by defendant for a school, where the answer alleged the swing had been changed from its condition as constructed by defendant, by some of the children, and testimony at the trial that the change was made by the teacher was excluded because it varied from the answer, defendant was entitled, on statement it had not discovered until two days before that the change was made by the teacher, to amend his answer to conform to the proof.

Appeal from Superior Court, Lassen County; George H. Thompson, Judge.

Action by John Solomon against the Red River Lumber Company to recover damages for the death of plaintiff's minor child. Judgment for plaintiff, and defendant appeals. Reversed.

Pardee & Pardee, of Susanville, and A. E. Bolton and Arthur W. Bolton, both of San Francisco, for appellant.

Dodge & Barry, of Reno, Nev., for respondent.

BURNETT, J. The appeal is from a judgment based upon the verdict of a jury for \$5,000 against the defendant, in an action for damages for the death of plaintiff's minor son, Joseph Solomon, aged 9, who, with 25 or 30 other boys, was playing with a playground apparatus in the school yard of the Westwood public school in the county of Lassen. The apparatus broke, a portion thereof striking him and causing his death. This apparatus was a swing constructed as follows: A white fir tree about 12 inches in diameter, standing in the school yard, was sawed off about 12 or 14 feet from the ground. An iron pin or bolt was driven or placed perpendicularly in the top of the stump. On that pin a wheel was placed horizontally so that it revolved around the pin. A nut on the top of the pin prevented the wheel from coming off, and an iron washer was placed under the hub of the wheel and resting on the top of the stump of the tree. The evidence does not show the diameter of the wheel, but it was described as being the front wheel of a dump wagon and weighing from 80 to 120 pounds. Six ropes were at-

tached to the rim of the wheel, and they hung down to a point near the ground with a loop at the lower end.

The school children played therewith by hanging on to the ropes or putting a foot in the loop at the end thereof and swinging themselves around the tree. On October 31, 1916, three of the ropes were cut off. The use of the swing continued and it remained in that condition until the day of the accident, September 27, 1917.

That morning three boards, each 12 or 14 feet long, 10 or 12 inches wide, and 1½ inches thick, were placed in the loops of the three remaining ropes, so as to form a triangle from 10 to 12 feet on each side and were lashed together where they joined. These board were teeter boards taken from another apparatus in the school yard. The apparatus being thus changed, about 25 or 30 boys got on to the board, some standing, some sitting, while others pushed, so that they swung around. Before school opened that same morning the stump broke about 5 feet from the top. In falling the wheel struck Joseph Solomon on the head, causing his death as before stated. It is alleged in the complaint that "said Joseph Solomon was standing near said contrivance or appliance" at the time of the accident, but the evidence shows that he was upon one of the boards riding around with the other children.

It is not disputed that said swing was constructed and furnished by said defendant to be used as a plaything by the children attending said school. The liability of defendant for the accident is claimed by plaintiff to be based upon the theory:

"That said contrivance or appliance was very attractive to children, but that the same, by reason of the unsoundness of said stump and the weight of said wheel, was naturally and inherently unsafe and dangerous, and was constructed in a careless and negligent manner, and in its condition was unsafe and dangerous for the children using the same, or for children coming in close proximity to said contrivance or appliance while the same was being used by other children."

In its answer appellant denied that said contrivance was constructed in a careless and negligent manner, "or that its condition at the time alleged in plaintiff's complaint or at any other time or at all was unsafe or dangerous to the children using the same or for children coming in close proximity to said contrivance or appliance where the same was being used by other children or at all." It is also claimed in the answer that said contrivance was so constructed as to be a safe and proper thing for use as a plaything by said children, and that had said appliance been used in the manner and for the purpose for which it was constructed no injury could have resulted therefrom. It was further alleged in the

answer that pupils attending said school without the knowledge or consent of the defendant caused a triangle to be made around said tree as hereinbefore described, and that the same was caused to revolve at a high rate of speed, and "a great tension placed thereon caused the wheel to give way and be disconnected from the said tree and in so doing the said Solomon as alleged and set forth in said complaint was struck and injured."

It is also set out that said appliance was manufactured and placed upon said playground by the said Red River Lumber Company at the instance and request of the board of trustees of said school district, and that defendant at no time alleged in plaintiff's complaint nor at any other time had any direct control or management of said appliance or of said pupils attending said school "or the method or manner in which said appliance could be used or was used than any other citizen in the said town of Westwood."

[1] No doubt exists that the complaint states a cause of action upon the theory that defendant did not exercise ordinary care in constructing said contrivance. This conclusion follows from the application of familiar principles of the law of negligence, but respondent contended in the trial, and the court seems to have agreed with him, that there was involved also the doctrine of what is known as the turntable cases. Respondent, indeed, states in his brief:

"The plaintiff's theory of this case is: (1) That the apparatus was attractive to children, and not only was it attractive but that the children of the Westwood school were invited to play upon and about it, and that it came under the rule of the turntable cases."

We are satisfied, however, that the effort to apply the doctrine of those cases to the situation herein could result only in uncertainty and confusion and was likely to produce prejudicial error. In those cases is involved a machine or contrivance that is both "dangerous" and "attractive." It can be said, also, that a swing of the kind used herein may be both dangerous and attractive. Thus far the analogy may be complete, but the vital element in the turntable cases which makes the owner or the one maintaining the dangerous and attractive mechanism liable for injury to another is the failure to use proper care to "prevent" the injured person from using said contrivance. Herein no such negligence could, of course, be imputed, because the swing was constructed for the use of the children. In one case the contrivance is used by different persons and for an entirely different purpose from what was contemplated, while in the other it was constructed for the use of the injured person and for the very purpose for which he was using it, that is, as a plaything. In the turntable cases the machine is required to be se-

cured so that it cannot be used as a plaything, while herein it is required to be left unsecured so that it can be so used. The element of allurements, also, has no such significance herein as in the other cases. That quality therein is considered as equivalent to an invitation to children to "meddle with such machinery" or to go about or upon it and attempt to use it for their own pleasure, so that it cannot be said that, in so doing, they are trespassers. Herein, however, the fact that the swing was made attractive has no relation to the question of negligence. The element of trespassing is not involved, and it was entirely proper for the defendant to make the swing as attractive as possible to promote the purpose had in view.

The dangerous character of the machine in those cases referred to in the decisions is also an inherent and uncommon feature peculiar to the particular instrumentality which is known to the owner and with which children are not supposed to be familiar, and is independent of any fault in its construction. It is true that some hazard attends the operation and use of such a swing as the one in question, but it is not the novel and hidden danger that is regarded as so important in the turntable cases.

That the essential principle of those cases is foreign to any consideration herein we think is made plain by the decisions of the appellate courts of this state.

In the leading case of *Barrett v. Southern Pacific Co.*, 91 Cal. 296, 27 Pac. 666, 25 Am. St. Rep. 186, the basis for the holding is indicated in this quotation:

"And it has been held in numerous cases to be an act of negligence to leave unguarded and exposed to the observation of little children dangerous and attractive machinery which they would naturally be tempted to go about or upon, and against the danger of which action their immature judgment opposes no warning or defense."

In *Peters v. Bowman*, 115 Cal. 345, 47 Pac. 113, 598, 56 Am. St. Rep. 106, the principle is declared to be limited to a particular class of cases and resting upon the ground that the immature judgment of a young child could not well determine or provide against the danger of meddling with such machinery. Furthermore, the court said:

"And the cases to which the rule has been applied, so far as our attention has been called to them, are nearly all cases where the owner of land had erected on it dangerous machinery, the consequences of meddling with which are not supposed to be comprehended by infant minds."

In the opinion by the learned chief justice denying the petition for rehearing the limitations of the doctrine are clearly set forth, and it was declared:

"As to common dangers existing in the order of nature, it is the duty of parents to guard

and warn their children, and, failing to do so, they should not expect to hold others responsible for their own want of care. But, with respect to dangers specially created by the act of the owner, novel in character, attractive and dangerous to children, easily guarded and rendered safe, the rule is, as it ought to be, different, and such is the rule of the turntable cases, of the lumber pile cases, and others of a similar character."

In *George v. Los Angeles Railway Co.*, 126 Cal. 357, 58 Pac. 819, 46 L. R. A. 829, 77 Am. St. Rep. 184, it was held that trailer cars standing upon a track when not in use, and secured in place by ordinary brakes, are not "dangerous machines" within the meaning of the rule applied in certain turntable cases. Therein the cars were secured and that circumstance distinguishes the case from *Cahill v. Stone Co.*, 153 Cal. 571, 96 Pac. 84, 19 L. R. A. (N. S.) 1094, wherein the car was left entirely unfastened. The unfastened car was a trap for children, but when fastened with a brake in the ordinary manner, it would be a common and familiar appliance and would put the child upon guard against the danger incident to its operation.

In *Loftus v. Dehail*, 133 Cal. 217, 65 Pac. 380, it is said:

"To what was there said [referring to *Peters v. Bowman*, supra], it may be added that the turntable might well be considered peculiarly attractive to children—a movable machine in the nature of a merry-go-round—but at the same time, the children being ignorant of the dangers and injury to which they were exposed in revolving it, the unprotected machine itself became a trap for them, and these cases may therefore be properly classed with those which hold the owner responsible for that reason."

It is furthermore said that it is not true that anything which may be found to be attractive as a playground or plaything for children "casts a responsibility of guard and care upon the owner of that thing."

In *Giannini v. Compodonico*, 176 Cal. 548, 169 Pac. 80, the foregoing earlier cases are reviewed, and it was held that the doctrine of the turntable cases did not apply, since a stable is not an "attractive nuisance" within the meaning of the decisions.

In *Polk v. Laurel Hill Cemetery Ass'n*, 37 Cal. App. 624, 174 Pac. 414, the elements involved in the turntable cases are clearly pointed out, and it is held that—

"A cemetery association maintaining an unguarded reservoir alongside a driveway near an entrance to the cemetery is not liable, under the rule of the turntable cases, for the drowning of a child of the age of eight years."

In *Faylor v. Great Eastern Quicksilver Mining Co.* (Cal. App.) 187 Pac. 101, the deceased child fell to his death into a stope driven through the floor of the tunnel on mining property into which the child had wandered while playing with the cars in which

the ore was moved, and "it was held to be a question for the determination of the jury whether the mining company was negligent in failing to close the mouth of the tunnel." Therein the conditions that exist in the turntable cases are pointed out, but emphasis is laid upon the fact that the actionable negligence grows out of the failure to adopt suitable precautions to prevent the use of the contrivance by children. In passing we may state that in the *Faylor* opinion the court was in error in declaring that in *Polk v. Laurel Hill Cemetery Association*, supra, "the rule of turntable cases was applied to a reservoir of water in which a child was drowned, apparently because the reservoir was so concealed as to be dangerous to persons passing it." The fact is that in the *Polk* Case it was clearly held that said doctrine did not apply for reasons stated therein.

In considering the philosophy of the rule in those cases, it is said in some of the decisions that the owner or the one in charge of the dangerous contrivance ought reasonably to anticipate that an injury to children would occur, if the machine is not properly guarded, and therefore he must be held to have anticipated it and to be guilty of negligence if it does cause injury. The reason for the rule, and therefore the rule itself, must fail herein because the swing was not naturally dangerous to children but a safe and common apparatus with which children habitually play without injury. Hence, injury from its use in the ordinary way would not be likely to occur, and no one is under obligation to anticipate what is unlikely to happen. In this connection it will not be disputed that one who furnishes or maintains such an instrumentality is bound to anticipate and provide against only the natural and probable consequences that may result therefrom.

The question then arises whether the erroneous view of the trial judge as to the application of said doctrine resulted in prejudice to appellant. This consideration requires an examination of some of the instructions given to the jury.

[2] Defendant requested the following instruction:

"If you believe from the evidence that the appliance was made and manufactured by the Red River Lumber Company and the Red River Lumber Company knew the purpose for which it was to be used, and it was manufactured sufficiently strong for the purpose for which it was intended to be used, and while used for that purpose no injury or loss occurred, I charge you that you cannot find damage against the defendant."

The court gave the instruction, but added the following modification:

"Unless you find such appliance constituted an attraction calculated by its nature to attract or lure children of immature mind to med-

dle with it or otherwise interfere with or make use of it, and as a fact did so to their injury by reason of the inherent danger attendant to the setting of such appliance in motion, as otherwise instructed you herein."

[3] It may be doubted whether the jury fully understood the instruction as given. Indeed, it seems to us quite confusing and misleading. It was likely to be construed as meaning that, although the jury believed that the defendant constructed the swing sufficiently strong for the purpose for which it was designed, yet if they believed that it constituted an attractive and alluring contrivance and there was danger connected with its operation, then defendant would be liable for the injury. The truth is that, if properly constructed for the purpose for which it was intended, culpability does not attach to the defendant by reason of the fact that it was made attractive and alluring, or that inherent danger may have attended its operation. It was proper, as we have seen, for the defendant to make the swing attractive and alluring, and any inherent danger, that is, danger arising from the nature of the contrivance, is a common and familiar danger not imputing negligence to the defendant. We do not think that the instruction as proposed by defendant and thus modified should have been given.

[4] Again, defendant requested this instruction:

"If you believe from the evidence that after the appliance had been made and set up by the defendant's agent or employees, its character and use was materially changed without any knowledge of or consent of the defendant, and after its character and use was changed the accident occurred, I charge you that you cannot find against the defendant."

The court gave it, but added the following:

"Provided you find such appliance as so first constructed was, and continued to be, not inherently dangerous, or was not, or did not continue to be an appliance attractive to children of immature mind and calculated to attract them to meddle with, interfere with it, or otherwise set it in motion to their injury by reason of the inherent danger attendant to the setting of such contrivance in motion."

As proposed, it may be admitted that the statement was somewhat inaccurate, but the natural effect of the instruction as given would result in this impression that, although the jury believed that the accident was directly and proximately due to the act of third persons who changed the character and use of the swing without the knowledge or consent of the defendant, yet they must find for the plaintiff if they believed it was originally an attractive and alluring contrivance inherently dangerous. In other words, the probabilities are that the jury would understand from the instruction that, although they might be satisfied that the injury was

caused by the intervention of a separate and independent agency, yet they were at liberty to apply the rule of the turntable cases, and so might find for plaintiff. The trial court probably did not intend this result, but the peculiar language used makes the instruction susceptible to such criticism.

[5] A similar addition was made to this proposed instruction:

"If you find from the evidence that after the appliance was set up and had been used in accordance with the purpose for which it was constructed, and it was so changed that an additional burden and weight was put thereon and that the additional burden and weight caused the breakage, and you further find from the evidence that the change was made without any knowledge or consent of the defendant, then I charge you that your verdict must be for the defendant."

There was evidence to support the theory therein contained, and we can see no legal objection to the instruction as proposed, and we think it ought to have been given without adding a recital of the inappropriate and inapplicable doctrine.

[6] Another contention of appellant is that there is no evidence that the swing was negligently constructed. In this connection we recall that respondent relied only upon the claim that the tree was unsound and therefore unsafe, and that appellant was charged with knowledge of its condition. The burden of proof was upon plaintiff to support this claim, and, of course, the defect must have related to the time when the swing was constructed. Defendant would not be liable in consequence of any unsoundness that may have developed after the swing had been used since it was under the care and control of the school authorities. But plaintiff offered no evidence as to the time when it was constructed or as to the condition of the tree when the swing was placed upon it. His witnesses apparently never saw the tree before the accident or ever examined it before it broke. For example, Paul Tessoroff testified:

"I recall the occasion of the little Solomon boy getting killed. I was present about ten minutes afterwards. I saw the appliance on which the children were playing at the time. The appliance was in the first place a rotten tree. * * * I examined the stump when I went there about five minutes after the child was hurt. * * * It was not rotten, but it was old and kind of—it wasn't like a young tree; a young tree is full of life, but this tree was dried out like. * * * At the time I saw it, I am not able to say whether or not the tree had been dead for some time. I can't say exactly how long it had been dead. It did not have the appearance of having recently died. It had the appearance as if that wheel had been on the tree a long time and it had in that time decayed or dried out."

There is evidence that the swing had been in use since October of the preceding year,

but how much longer does not appear. Evidence that the tree had dried out a year or longer after the swing had been constructed would not be sufficient to support the contention that it was defective at the time the plaything was installed.

In *Ferraris, Adm'r, etc., v. Kyle*, 19 Nev. 435, 14 Pac. 529, it was said:

"The district court correctly considered that a knowledge of the condition of a brush fence at the time of trial was not a fact from which the jury could infer its condition 29 months before."

[7] Nor could such evidence be regarded as sufficient to disclose the negligence of defendant upon the theory that there was a continuing obligation upon its part to keep the swing in a safe condition. This duty devolved upon the school district, its officers and teachers, under the general mandate to maintain, supervise, and repair public school buildings and premises. After the swing was put in place through the order of the school board, it was at all times under its care and control. The duty belonged to the school authorities to keep the apparatus in repair and to supervise the play and conduct of the children on the school premises. They are charged with knowledge of what takes place thereon, and if through use or the flight of time, the stump or any other portion of the contrivance deteriorated and became unsafe and thereby the accident happened, defendant could not be held responsible.

In *Bruenn v. North Yakima School District*, 101 Wash. 374, 172 Pac. 569, some of the boys removed a teeter board and placed it across a swing, using it as a combined teeter swing. When the school bell rang, the boys jumped off the board, one end struck the plaintiff's ankle and severely injured him. The court held that the school district and the teachers were negligent in permitting the boys to take the board and place it upon the swing. The court said:

"If the teacher knew it, it was negligence to permit it; and, if she did not know it, it was negligence not to have observed it."

In *Kelley v. School District No. 71*, 102 Wash. 343, 173 Pac. 333, a child was injured by the breaking of a swing which was suspended from an iron ring which passed through the eye of a staple. When the ring wore sufficiently thin, it broke. It was held that the negligence of the school district in failing to inspect the apparatus and keep it in repair was the proximate cause of the injury.

Other cases along the same line cited by appellant are the following: *Redfield v. School District No. 3*, 48 Wash. 85, 92 Pac. 770; *Howard v. Tacoma School District No. 10*, 88 Wash. 167, 152 Pac. 1004, Ann. Cas. 1917D, 792; *McCarton v. New York*, 149 App. Div. 516, 133 N. Y. S. 939; *Ching v.*

Surrey County Council, 102 L. T. R. N. S. (Eng.) 414; *Morris v. Carnarvon County Council*, 102 L. T. R. N. S. (Eng.) 524, 1 K. B. 840.

[8] Another serious question is presented by the contention of appellant that the injury was proximately caused by the intervening act of a third party. The principle of law involved in this claim is, of course, well settled; the only difficulty is in its application to the peculiar facts of the case. It is the position of appellant that the proximate cause of the injury was the intervening act of the third party who attached the boards to the swing and thereby broke the line of causation from any negligence of defendant in the original installation of the contrivance. Among the cases cited is *Schwartz v. Cal. G. & E. Corporation*, 163 Cal. 398, 125 Pac. 1044. Therein one of defendant's servants dropped on the land of plaintiff an insulator from the defendant's power line. The suit was brought for injury to plaintiff's horse caused by his stepping on the insulator so dropped. The defendant requested the court to instruct the jury that the defendant was not liable unless the evidence showed:

"That the employees of defendant negligently placed said insulator on the premises where it is claimed said horse was injured, and at the point where the evidence shows said horse was in fact injured."

The instruction was modified so as to read:

"That the employees of defendant negligently placed or permitted said insulator to remain on the premises where it is claimed said horse was injured, and at a point where the evidence shows some injury might result."

The Supreme Court held this to be prejudicial error, saying:

"It seems plain that if appellants carelessly dropped the insulator upon the premises and did not remove it they would be guilty of negligence, but after it was dropped if somebody else picked it up and moved it to this spot where the damage was done, it was the negligence of the latter that proximately caused the injury. It would not be a case of correlative and concurring causes, but of proximate and remote agencies independent of each other."

Other interesting and instructive cases cited by appellant are: *Pittsburg Reduction Co. v. Horton*, 87 Ark. 576, 113 S. W. 647, 18 L. R. A. (N. S.) 905; *Carter v. Towne*, 103 Mass 507; *Cole v. German Savings & Loan Socy.*, 124 Fed. 113, 59 C. C. A. 593, 63 L. R. A. 416; *Burt v. Advertiser Newspaper Co.*, 154 Mass. 238, 28 N. E. 1, 13 L. R. A. 97; *Claypool v. Wigmore*, 34 Ind. App. 35, 71 N. E. 509; *Dolan v. Callender et al.*, 26 R. I. 198, 58 Atl. 655; *Marsh v. Giles*, 211 Pa. 17, 60 Atl. 315; *Saverio-Cella v. Brooklyn Union Elevated R. R. Co.*, 55 App. Div. 98, 66 N. Y. Supp. 1021; *Fishburn v. Burlington, etc., Ry. Co. (Iowa)* 93 N. W. 380.

Respondent also cites a line of authorities which he claims upholds him in the contention that the case is not one of intervening independent agency, among which we may specifically notice only the two California decisions. *Pastene v. Adams*, 49 Cal. 87, and *Merrill v. Los Angeles, etc., Co.*, 158 Cal. 499, 111 Pac. 534, 31 L. R. A. (N. S.) 559, 139 Am. St. Rep. 134. It is apparent in these cases that the original negligence was operative until the accident and was a contributing cause thereto. Its effect was not broken or disturbed by the intervention of the other cause but was simply accelerated or augmented thereby. In the *Pastene Case* the lumber remained in the same negligent condition in which it was piled by the defendant and the one who drove against it was guilty of a concurring and contributing act of negligence. If, after the defendant had negligently piled the lumber, some one had changed it and thereby made it dangerous, and the injury had thereafter occurred, would not the causal connection with the original negligence have been destroyed? *Fowles v. Briggs*, 116 Mich. 425, 74 N. W. 1046, 40 L. R. A. 528, 72 Am. St. Rep. 537.

If in the *Merrill Case* the pipe had been defectively constructed, but the leak had been caused by the act of a third party in tampering with it, the gas company would hardly be liable for the injury unless it had an opportunity to repair it. *Luehrmann v. Laclede Gas Light Co.*, 127 Mo. App. 213, 104 S. W. 1128.

Herein we must remember that, when the swing was placed in position there were six ropes attached to it, some time thereafter three of these were removed and for a long time with the remaining three ropes the children swung around from day to day without any accident. Then came the vital change in the structure produced without any participation on the part of appellant and the injury immediately followed.

It seems clear that in consequence of this intervening act appellant was relieved of liability for any negligence in the construction of the swing, unless it can be said that the danger was not increased by the addition of the boards and the change in the manner of using the swing, or that this deviation from the original method should have been reasonably anticipated by appellant.

As to the increased burden and strain thereby imposed upon the stump of the tree, there can hardly be any question—not only was it subjected to a greater weight than when used as before, but by reason of the weight's immobility and unequal distribution it greatly added to the tension. It cannot be said that the change was unimportant or that the break would have occurred if the children had used the swing as it had been used for some time.

[9] As to the remaining consideration, the rule admittedly is that appellant was requir-

ed to foresee and make preparation for the natural and probable consequences of the installation of the swing, in other words, what a reasonable person would be supposed to anticipate in reference to its use. Is it a proper application of this principle to hold that notwithstanding the swing was constructed, as we have seen, with ropes, appellant should have foreseen that planks would be attached thereto and the additional burden thereby imposed? Manifestly, there is no certain test for the determination of this question and it is doubtful whether much aid is furnished by the adjudicated cases. Appellant, however, claims that many analogous cases hold that a party cannot be held to anticipate such a contingency. Among these, in the *Marsh Case*, supra, the defendant left a stone three feet long, six inches wide, and three inches thick leaning against an electric pole in a street. Two boys attempted to ignite the light on the top by jarring the pole in pulling the top of the stone a few inches back and letting it fall against the pole. In doing so one of the boys injured his finger. It was held that the injury "was the immediate consequence, not of the position of the stone as placed by the defendants, but of the independent, intervening act of the plaintiff's companion in making a use of the stone not reasonably to have been foreseen." The court further declared that "plaintiff's injury could not reasonably have been contemplated as a result of the defendant's act in placing the stone on the footway."

In the *Saverio-Cella Case*, supra, defendant left a windlass standing in the street with the drum and cogs tied with a rope so that they could not be revolved. Boys cut the rope and placed another around the drum and by pulling it caused the drum and cogs to revolve, thereby injuring another child who had climbed on the windlass and had his foot caught in the cogs. It was held that the defendant was not negligent, since it left the windlass safe, and that it could not be reasonably anticipated that the rope would be cut and another placed on the drum; it being said in the opinion:

"I think that a man of reasonable prudence and care, under the circumstances of this case, might not reasonably have expected that the rope might be cut, and the machine might thereupon be completed by a new drum rope, and that thereupon the drum rope might be manned and tugged upon by a gang of lads so that the wheels might be put in motion, and that thereupon at such a time a lad playing in the street might so clamber upon the machine as to come in contact with the revolving cogs; and so the law frees the defendant."

[10] But if it should be thought that herein defendant should have anticipated that the natural curiosity and venturesome disposition of the immature mind might prompt the children to so change the apparatus, it could

hardly be supposed and foreseen that any person of mature judgment would so recklessly convert it into a dangerous instrumentality. Herein it may be said that one of the children testified that the boards were put upon the swing by the teacher. This answer was stricken out on the ground that the answer had alleged that this was done by the children. Thereupon appellant asked permission to amend the answer, by substituting "some person" for "pupils attending said public school," stating that it had not discovered until two days before that the change was made by the teacher instead of by the boys. The court denied the motion. The general rule is that an amendment of pleadings should be allowed at any stage of the trial when it is necessary for the purpose of justice. *Guidery v. Green*, 95 Cal. 630, 30 Pac. 786. As stated in the *Guidery Case*:

"If, by reason of such amendments, the court was satisfied that the plaintiff was taken by surprise, and required further time in which to make suitable preparations for meeting such defense, it could have continued the case or postpone the further hearing until the plaintiff should have reasonable time to make such preparation, and at the same time would impose upon the defendant such terms as would compensate the plaintiff for the expense and delay caused thereby."

It is seldom that a court is justified in denying a party the privilege of amending his pleading so that he may properly present his case, and obviate an objection that the fact sought to be proven is not embraced within the issues made by the pleadings. *Marr v. Rhodes*, 131 Cal. 267, 63 Pac. 364.

We can perceive no good reason why the amendment should not have been allowed so as to permit the real situation to be developed by the evidence.

Under well-established principles, we are satisfied the judgment must be reversed, and it is so ordered.

We concur: FINCH, P. J.; HART, J.

PEOPLE v. MANDEVIL et al. (Cr. 858.)

(District Court of Appeal, Second District, Division 1, California. April 26, 1922.)

Homicide §234(1)—Evidence held to sustain conviction for assault with deadly weapon with intent to murder.

Where, in a prosecution for assault with a deadly weapon with intent to murder, the evidence was ample to establish identity of both accused and that they both participated in the assault, as opposed to testimony supporting the defense of an alibi, *held* sufficient to support a verdict of guilty.

Appeal from Superior Court, San Bernardino County; J. W. Curtis, Judge.

Alferdo Mandevil and another were convicted of assault with a deadly weapon with intent to murder, and they appeal. Affirmed.

Albert D. Trujillo, of San Bernardino, for appellants.

U. S. Webb, Atty. Gen., and John W. Maltman, Deputy Atty. Gen., for the People.

JAMES, J. Defendants were convicted of the crime of assault with a deadly weapon with intent to murder. They have appealed from the judgment of imprisonment.

The sole contention urged in the brief of appellants is that the evidence is insufficient to support the judgment. At the trial both defendants insisted that they did not commit the assault; that they were not, at the time at or near the place referred to in the information and testimony. The complainant was the marshal of the city of Colton. He testified that on the 14th day of July, 1921, at about 6 o'clock in the afternoon, he went to a point where a bridge crosses the Santa Ana river, and there observed an automobile and a man standing near to it, and also a quantity of new shoes in the brush close at hand; that he alighted from the automobile in which he was riding, went over to the other machine in which the man he had observed was, by this time, seated, and talked to the latter; that he (the marshal) wore his badge of office in plain sight; that after some preliminary conversation he asked the man what he was doing with the shoes and that thereupon the individual in the car produced a "gun" and began to fire at him; that the first shot was fired when the marshal was about three feet away from the person mentioned and that about nine shots in all were fired at him; that before the firing ceased he had taken refuge behind a telegraph pole and that he fired from that point of vantage until he had emptied his gun, after which he went to a neighbor's and procured an old rifle. In the meantime a second individual had joined the first in the automobile and the tires of the officer's machine had been punctured and

the two men were driving away. The marshal discharged several shots from the rifle, but the men made their escape. Notwithstanding the great number of shots fired, it was a bloodless battle. These defendants were arrested at different places a considerable time after the commission of the alleged offense and in counties other than San Bernardino. There was ample evidence to establish the identity of both defendants and to show that both participated in the assault upon the officer. Aside from the individual who fired the shots from the automobile (Martinez), the second defendant named was observed by another witness, who testified that Mandevil was concealed in the brush close at hand; that he had a revolver; and that he fired it at the officer. The marshal did not observe Mandevil, but he did not state that all of the shots fired at him proceeded from Martinez's weapon. There was, to be sure, unequivocal testimony supporting the defense of an alibi, but the facts were for the jury to resolve. There was substantial evidence to support the verdict.

The judgment is affirmed.

We concur: CONREY, P. J.; SHAW, J.

(188 Cal. 429)

**GISE v. FIDELITY & CASUALTY CO. OF
NEW YORK. (L. A. 6950.)**(Supreme Court of California. March 17, 1922,
as Modified March 27, 1922.)

1. Insurance Ⓔ332¼, New, vol. 14 Key-No. Series—Employer's agreement, as part of compensation policy, that no person below legal age would be employed, held a "warranty."

Employer's agreement, constituting a part of workmen's compensation policy, that no person was or would be employed in violation of law as to age, held a warranty in view of Civ. Code, § 2608, since employment of person under legal age materially affected the risk.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Warranty.]

2. Insurance Ⓔ437—Insurer relieved of obligation to defend employer against claim for compensation by employer's breach of warranty not to employ persons under legal age.

Illegal employment of boy, in violation of warranty constituting part of compensation policy, held to relieve insurer of the obligation imposed upon it by policy of defending the employer, in proceeding before the Industrial Accident Commission for compensation for injury to the boy.

3. Insurance ~~388~~(5) — **Employer's insurer held not estopped to deny liability for expenses incurred by employer in workmen's compensation proceeding.**

Where insurer promptly repudiated any liability for compensation to insured's employee, and refused to defend insured in employee's proceeding for compensation, it was not estopped to deny liability for expenses incurred by insured in such proceeding, by appearing therein solely to protect its own interests.

4. Insurance ~~601~~ — **Insurer required to pay compensation to one employed under legal age, in violation of warranty, could recover amount thereof from insured.**

Where compensation policy contained warranty that employer would not employ persons under the legal age and that no default of the employer should affect the right of employees to recover from the insurer, the insurer could recover from the employer compensation it was required to pay injured employee who was under legal age.

In Bank.

Appeal from Superior Court, Los Angeles County; L. H. Valentine, Judge.

Action by E. C. Gise against the Fidelity & Casualty Company of New York, a corporation. From judgment rendered, both parties appeal. Reversed and remanded, with directions.

Amend & Amend, of Los Angeles, for plaintiff.

Jennings & Belcher, of Los Angeles, for defendant.

PER CURIAM. This action was instituted by the plaintiff, an employer, to recover of the defendant, his insurance carrier, the sum of \$521, expended by him in resisting a claim made against defendant and himself, by an injured employee, upon the refusal of the defendant plaintiff's interests in a proceeding before the Industrial Accident Commission. In addition to a general and specific denial, the defendant interposed a counterclaim for the sum of \$1,590.21, the amount of the award made by the Commission, and paid to the injured employee by the defendant. The court denied relief to the plaintiff, and refused judgment to the defendant on its counterclaim, leaving the parties in the same situation as they were before the action was commenced. Thereupon both the plaintiff and the defendant perfected appeals. The matter is presented to this court by stipulation, upon one transcript and one set of briefs. Since both the parties are appellants and likewise respondents, we shall, for the sake of clarity, refer to them by their original designation as plaintiff and defendant. Plaintiff claims that the lower court erred in refusing to give judgment in his favor, for the sum expended in defending himself before the Industrial Acci-

dent Commission. Defendant's contention is that this ruling of the lower court was correct, but that the court erred in refusing to give it judgment against the plaintiff for the amount paid to the injured employee.

Both parties base their claim upon the terms of a California workmen's compensation policy, issued by the defendant and designed to cover the workmen employed by the plaintiff in a butcher shop operated by him. The policy contains the usual stipulations as to the liability and duty of the insurance carrier. The defendant agrees, among other things, to defend, in the name and on behalf of the plaintiff, any suits or other proceedings instituted against him under the provisions of the compensation law, and covered by the insurance agreement. Another provision in the policy, styled "Condition M," provides that the plaintiff, by his acceptance declared certain statements, indorsed thereon and numbered 1 to 17, inclusive, to be true. One of these declarations (item 14) is to the effect that no person was or would be employed by the assured in violation of law as to age. It is further stipulated, in said condition, that the policy is issued in consideration of these statements, and the provisions of the policy, as respects its premium and the payment thereof. The same clause provides, however, that—

"Nothing in this condition (M) and no default on the part of the assured with respect to any of the provisions or conditions of the policy, shall in any way affect the right of any employee, or his dependents, to recover from the company the compensation provided for by law and intended to be insured hereunder."

In plain disregard of the agreement on his part, not to employ any person in violation of the law as to age, the plaintiff employed Wesley Clark, a minor, not yet 15 years of age, who, while engaged in operating a meat grinding machine in plaintiff's shop, suffered an injury which resulted in the loss of the fingers of one hand. Thereafter the injured employee filed an application for compensation before the Industrial Accident Commission, against both the plaintiff, Gise, and the defendant, insurance company. The defendant refused to defend the proceedings before the Commission in behalf of the plaintiff, upon the ground that the plaintiff had breached the policy of insurance by employing Wesley Clark, in violation of the law as to age. The plaintiff thereupon expended, in his own behalf, the sum of \$521 for counsel fees and costs, which sum the lower court finds to be a reasonable amount to have been paid for such purposes. The insurance company defended, the proceeding on its own behalf, not only upon all grounds of defense urged by plaintiff Gise, before the Commission, but also sought to evade liability for compensation to Wesley Clark, because of the viola-

tion of the declaration or warranty in the policy by the plaintiff to the effect that no person would be employed by him in violation of the law as to age, and upon the further ground that the injured employee was not covered by the policy. The Industrial Accident Commission held that the plain terms of the proviso in the policy, contained in said condition M, voided any contradictory provisions contained in the warranty as to employment of any one by the plaintiff in violation of the law as to age, in so far as any employee was concerned, and rendered the defendant liable for the payment of compensation to any such injured servant of Gise. *Clark v. Gise et al.*, 5 Dec. of Ind. Ac. Com. 219. The Commission, therefore, dismissed the plaintiff from the proceeding, and made an award in favor of Clark and against the defendant in the sum of \$1,590.21, for compensation and doctor's bills. The defendant made an application for a writ of review, for the purpose of having the lawfulness of the order making the award inquired into and determined. This court held that the Industrial Accident Commission correctly construed the policy of insurance, and denied the application. *Fidelity & Casualty Co. of New York v. Ind. Ac. Com'n*, 178 Pac. 896. Defendant thereupon paid the amount of the award to the injured employee. When the plaintiff sought to recover the amount expended by him in defending against the claim of the injured employee, it interposed a counterclaim for the amount of the award paid by it.

[1, 2] The trial court found, and the finding is amply supported by the evidence, that, by reason of the employment of Wesley Clark by the plaintiff, and because of the boy's age, the manner and place of his employment, and the nature of his work, coupled with the failure to obtain for him from the superintendent of schools a permit to work, the plaintiff breached the contract or policy of insurance. Consequently, it held, and correctly so, that the defendant was released from the obligation to defend the plaintiff in the proceeding before the Industrial Accident Commission. In that behalf, we adopt the portion of the opinion of the District Court of Appeal, material to the appeal prosecuted by the plaintiff:

"A statement in a policy, which imports that it is intended to do or not to do a thing which materially affects the risk, is a warranty that such act or omission shall take place." Civ. Code, § 2608. Under this language it would seem that the terms of item 14 amounted clearly to a warranty. The item imported that plaintiff intended not to do a thing; that is, employ a person in violation of law as to age, and the thing he intended not to do, if done, would materially affect the risk, for immaturity of years is accompanied by immaturity of judgment, and lack of judgment in an employee will always affect the risks of his employment and, therefore, the risk insured against by such a

policy as the one now in question. It is to be remembered, also, that, according to the provisions of condition M, the policy was issued in consideration of plaintiff's declaration of the truth of the statements made in items one to seventeen. In addition to the section of the Code the terms of which are above set forth, the fact that item 14 carried a warranty into the policy is established by several decided cases (*McKenzie v. Scottish U. & N. Ins. Co.*, 112 Cal. 548, 44 Pac. 922; *Porter v. Gen. Acc. Assur. Corp'n*, 30 Cal. App. 198, 157 Pac. 825), although the decision last cited is based upon a section of the Civil Code (2607) concerning statements of existing facts, as distinguished from statements of things to be done or omitted. Also, it is plain from cases cited by plaintiff himself that, after the illegal employment of Clark, and but for the exception contained in condition M, the policy would have been ineffective with respect to any considerations arising from the injury to Clark, including, of course, any claim attempted to be made under its terms by him; this because of the inclusion of item 14 in the instrument. *Louis F. Kleeman Co. v. New Amsterdam Cas. Co.*, 177 Mo. App. 397, 164 S. W. 167; *Mason-Henry Press v. Aetna L. Ins. Co.*, 211 N. Y. 489, 105 N. E. 826; *Maryland Cas. Co. v. Ind. Ac. Com'n*, 179 Cal. 716, 178 Pac. 858. We have to consider, therefore, nothing but the meaning of the exception. It seems plain to us, beyond the necessity of construction. It saved to Clark (the injured employee) the right 'to recover from the company the compensation provided for by law and intended to be insured' under the policy; but, considering what we have said above, it saved nothing else. Upon plaintiff's violation of the law in the employment of Clark, the policy at once became ineffective as indemnity for any expense or outlay arising through any injury to Clark, save that covered by the exception. The plaintiff was not entitled to recover."

[3] When the injured employee made his demand for compensation, the defendant promptly repudiated any liability under the policy, and refused to defend plaintiff in the proceeding instituted before the Industrial Accident Commission. It in no way controlled or sought to direct his action, but confined its efforts solely to a protection of its interests. It was not thereby estopped to deny any liability for the expenses incurred by plaintiff in making his affirmative defense before the commission. *Mt. Vernon, etc., Co. v. Frankfort, etc., Ins. Co.*, 111 Md. 561, 75 Atl. 105, 134 Am. St. Rep. 636; *Mason-Henry Press v. Aetna L. Ins. Co.*, 211 N. Y. 489, 105 N. E. 826; *Sargent Mfg. Co. v. Travelers' Ins. Co.*, 165 Mich. 87, 130 N. W. 211, 34 L. R. A. (N. S.) 491.

While the foregoing authorities, and those cited in the opinion of the District Court of Appeal, clearly deny to the employer the right to recover from the insurance carrier in cases like this, and that is so, even though the injury was not the proximate result of the illegal employment (*Goodwillie v. London Guarantee, etc., Co.*, 108 Wis. 207, 84 N. W.

164) we have been cited to, and have found, no case involving the question presented by the counter action of the defendant, to recover the amount it paid to the injured employee under the award of the Industrial Accident Commission. In none of those cases was consideration given to the effect of a provision, such as that contained in condition M of the policy here, on the reciprocal rights of the parties under such circumstances. The trial court decided that as, by reason of the terms and provisions of such condition, the injured boy, although employed in violation of the law as to age, was covered and protected by the policy, the defendant was legally held and obligated to pay the amount of the award, and could not recover any part of the sum from plaintiff. The District Court of Appeal held that, as the policy provided, by the exception in condition M, that the injured employee should "recover" compensation from defendant, despite the fact that he was illegally employed, if the plaintiff should be required to reimburse defendant, the "recovery" would not be from the defendant but from the plaintiff. We are unable to agree with either of these positions. The latter court was correct in its interpretation of the policy when, in dealing with the effort of the plaintiff to recoup his costs, it said that the provision of condition M was one for the benefit of the employee, and was not intended to protect the employer from the consequence of his own breach of the insurance compact. The effect of that stipulation was not, as urgently contended for by the plaintiff, to read out of the policy the warranty, on the part of plaintiff, that he would not employ any person in violation of law as to age, which was one of the covenants, and a material part of the consideration on which the policy was issued. As we understand its decision (supra), the Industrial Accident Commission held that condition M voided any contradictory provision contained in the policy, only so far as the employee was concerned, and the opinion of this court on denying the writ of review (supra) goes no farther. Notwithstanding the right reserved to the employee to recover from the insurance carrier in case of injury, which was assented to by the defendant when it issued the policy containing the proviso, the basic contract between plaintiff and defendant was unaffected thereby. The employment of the boy, Clark, by plaintiff in violation of the child labor law, was illegal, and, as between the plain-

tiff and defendant, was not included in the policy of insurance. Maryland Casualty Co. v. Ind. Acc. Com'n, supra; Mt. Vernon, etc., Co. v. Frankfort, etc., Ins. Co., supra. In some of the cases we have examined, in looking for precedent applicable to the facts here, it has been suggested that a contract to insure one against injury, arising out of employment in violation of law, would be against public policy, and therefore void, but we deem it unnecessary to pursue that phase of the matter any farther.

[4] It seems only reasonable to hold, and, in the absence of authority to the contrary, we are of the opinion, that, when the plaintiff, in plain disregard of the terms of the policy of insurance, employed Clark, in violation of the law as to age, the defendant, not having in any way consented thereto, and, not being estopped to deny its liability in the matter in so far as the plaintiff was concerned, a burden was cast upon defendant which it would not have had to assume but for the unwarranted and illegal act of the plaintiff. It was not contemplated by the parties to the contract that such a situation would arise. On the contrary, it was expressly stipulated against. It seems only reasonable to hold, therefore, that the facts presented by the appeal of the defendant call for the application of the simple rule of law that one party to a contract, who is caused to suffer loss by reason of the violation of its terms by the other party thereto, may recover from the one at fault the amount he has been damaged thereby.

It is conceded that the defendant paid the amount of the liability covered by the policy as aforesaid and, on account of the injury to said employee, Wesley Clark, the aforesaid sum of \$1,590.21. There is no dispute about the fact. Under these circumstances there is no necessity for a new trial. The rights of the parties can be fully adjusted by directing a judgment in accordance with our conclusions aforesaid.

The judgment is reversed, and the case is remanded, with directions to the lower court, upon the going down of the remittitur, to forthwith enter a judgment that the plaintiff take nothing by his action, and that the defendant recover of the plaintiff the sum of \$1,590.21, together with costs.

SHAW, C. J., RICHARDS, Justice pro tem., and SLOANE, WILBUR, WASTE, LAWLOR, and SHURTLEFF, JJ., concur.

188 Cal. 336

In re JOHNSTON'S ESTATE. (L. A. 6901.)

(Supreme Court of California. March 2, 1922.)

1. Wills ⚡290—Missing will presumed to have been revoked.

Where a will, last seen in hands of testator, cannot be found after all reasonable and possible effort has been made to do so, the presumption arises that it was destroyed by him with the intention of revoking it.

2. Wills ⚡198—Not revived by revocation of subsequent will.

A will, expressly revoked by a subsequent will, is not revived by revocation of the later will, unless it appears by the terms of such revocation of such later will that it was the testator's intention to revive and give effect to the first will, under Civ. Code, §§ 1292, 1296, 1297.

3. Wills ⚡306—Revocation by lost or destroyed will may be proved by one witness.

The due execution of a will, which is either proved or presumed to have been destroyed *animo revocandi*, may be proved so as to give effect to its revoking clause by one witness, or in other words by the same amount and quality of evidence generally required and held sufficient for the proof of any fact under Code Civ. Proc. § 1844, whatever section 1339 may require for the proof of a lost or destroyed but unrevoked will.

In Bank.

Appeal from Superior Court, Los Angeles County; Fred H. Taft, Judge.

In the matter of the estate of David S. Johnston, also known as D. S. Johnston, deceased. From a judgment, refusing admission of alleged olographic will to probate and dismissing petition for probate thereof, Margaret Matilda Mesmer appeals. Affirmed.

Henry E. Carter, of Los Angeles, (Flint & Mackay and Wm. A. Brown, all of Los Angeles, of counsel), for appellant.

Bicksler, Smith & Parke, Marshall Stimson, and Noel C. Edwards, all of Los Angeles, for respondents.

PER CURIAM. This is an appeal from a judgment of the superior court of the county of Los Angeles, sitting in probate, adjudging and decreeing that a certain olographic will of David S. Johnston, deceased, offered for probate on behalf of the appellant as the beneficiary thereunder, is not the last will and testament of said decedent, and dismissing the petition for the probate of the same.

David S. Johnston died in the county of Los Angeles on or about the 18th day of November, 1919, leaving real and personal estate therein of an amount in excess of \$10,000 in value. He was unmarried, but left as his heirs at law a brother, Arthur Charles

Johnston, and certain children of a deceased brother. Thereafter, and on or about April 9, 1919, letters of administration on the estate of said deceased were granted and issued to said Arthur Charles Johnston, upon his petition therefor, showing that no will of the decedent had been found. Thereafter, and on or about May 27, 1920, Margaret Matilda Mesmer filed a petition in the matter of said estate for the probate of an alleged olographic will of said decedent, bearing the date of March 23, 1917, and found among the effects of said deceased on or about May 10, 1920, and in which alleged will she was named as the sole beneficiary. To this petition Arthur Charles Johnston filed a contest upon two main grounds: First, that the document for which probate was sought was not a will, and that it did not purport to transfer, will, or dispose of any of the decedent's property to any person whatever; that it was not wholly or at all in the handwriting of said decedent; and that said decedent had not subscribed his name thereto as and for his last will and testament, or as and for any testamentary or other purpose whatever or at all. Second, that said document was not the last will and testament of said decedent for the reason that said deceased did, on or about April 25, 1918, make and execute a document as and for his last will and testament in the presence of, and which was duly attested by, two witnesses, wherein and whereby he directed the disposition of his estate in accordance with the laws of the state of California, and also wherein and whereby he expressly revoked all former wills made by him.

The contestant did not offer said will for probate, relying solely upon the revocatory clause thereof as the foundation for this latter ground of objection to the probate of said purported olographic will. To this contest an answer was filed by Margaret Matilda Mesmer, wherein all of its allegations were specifically denied, and wherein the purported olographic will was again asserted to be the last will and testament of said decedent. This contest came on for hearing before the court, and considerable evidence pro and con was presented thereon, and, the matter having been submitted, the court filed its findings of fact and conclusions of law. The court did not assume in these to deal with the first ground of opposition presented by Arthur Charles Johnston assailing the testamentary character or due execution of the said purported olographic will, but, in its said findings, dealt exclusively with the question as to whether or not the decedent made and executed the alleged later will bearing the date of April 25, 1918, and containing the clause revoking all former wills. In that behalf, the court found that the decedent, being of sound and dispos-

ing mind, did, on said last-named date, make and sign a will, the full text of which is set forth in said findings; that said will was, on the date thereof, signed, sealed, and published as, and declared by him to be his last will and testament, in the presence of two witnesses, Ethel L. Lich and William T. Blakely, each residing in said county of Los Angeles, who, at his request and in his presence and in the presence of each other, subscribed their names as witnesses thereto. The court further found that, although all reasonable and possible effort had been made to find said last will and testament of said decedent bearing said date, the said document could not be found. The court further found that, by said document, the said decedent did expressly revoke all former wills by him made. As conclusions of law from the foregoing findings of fact, the court found that the document offered for probate by said Margaret Matilda Mesmer was not the last will and testament of said decedent, and hence that the petition of said Margaret Matilda Mesmer for the probate thereof should be dismissed. Judgment was entered accordingly, and it is from such judgment that this appeal has been taken.

The question as to whether or not the alleged olographic will of the decedent is in form a valid will is discussed by respective counsel in their briefs upon this subject. The trial court made no express finding upon that subject, and we do not deem it necessary to pass upon it nor to present or discuss the form, the changes in, or the final substance or effect of, said document for reasons which will hereafter appear. The sole question which requires discussion and determination herein is as to whether the evidence in the case is sufficient to sustain the finding of the trial court that the decedent, David S. Johnston, did, on the 25th day of April, 1918, make and execute the will bearing that date and containing the express revoking clause which, according to the finding of the court, was effective to work the revocation of former wills by him made.

On the threshold of this discussion there are certain preliminary matters to be considered and disposed of. First of these is the fact that the contestant of the probate of the so-called olographic will of May 23, 1917, has not offered the document purporting to be the will of April 25, 1918, for probate as the decedent's last will and testament, but has based his contest of the olographic will upon the existence and effect of the revoking clause in the later document.

[1] The next consideration is that the uncontradicted evidence in the case shows that said later document bearing the date of April 25, 1918, and purporting to be the said decedent's last will and testament, was, when last seen or known to exist, in the possession of the decedent. The uncontradicted

evidence also shows, and the court finds, "that all reasonable and possible effort has been made to find said last-named will and testament * * * but that said document cannot be found." From the foregoing facts and finding, the presumption arises that the will, last seen and known to have been in the possession of the decedent and which cannot be found after his death, has been destroyed by him with the intention of revoking it. Estate of Sweetman (Cal.) 195 Pac. 918; 14 Ency. of Evidence, 440; Matter of Cunnion's Will, 201 N. Y. 123, 94 N. E. 648, Ann. Cas. 1912A, 834; In re Keene's Estate, 189 Mich. 97, 155 N. W. 514, Ann. Cas. 1918E, 367; In re Miller's Will, 49 Or. 452, 124 Am. St. Rep. 1051, 14 Ann. Cas. 277, 90 Pac. 1002; Van Dyke v. Mack, 139 Ark. 524, 214 S. W. 23; Rape v. Cochran (Tex. Civ. App.) 217 S. W. 250; In re Wear's Will, 131 App. Div. 875, 116 N. Y. Supp. 304.

[2] We are thus brought by the undisputed proofs in the case, by the findings of the court, and by the operation of the foregoing presumption, to the conclusion that the purported last will and testament of the decedent, dated April 25, 1918, is to be treated as a document which was revoked by the decedent during his lifetime by its destruction by him *animo revocandi*. This being determined, the immediate question which is next presented is as to the effect of such revocation upon the express clause therein revoking all former wills. As to this question but little discussion is required since it is settled by the provisions of the sections of the Civil Code relating to the matter of the revocation of wills. Section 1292 of the Civil Code provides that:

(1292) "Except in the cases in this chapter mentioned, no written will, nor any part thereof, can be revoked or altered otherwise than (1) by a written will or other writing of the testator, declaring such revocation or alteration, and executed with the same formalities with which a will should be executed by such testator."

Section 1296 of the Civil Code provides:

(1296) "A prior will is not revoked by a subsequent will, unless the latter contains an express revocation, or provisions wholly inconsistent with the terms of the former will."

Section 1297 of the Civil Code provides:

(1297) "If, after making a will, the testator duly makes and executes a second will, the destruction, cancellation, or revocation of such second will does not revive the first will, unless it appears by the terms of such revocation that it was the intention to revive and give effect to the first will, or unless, after such destruction, cancellation, or revocation, the first will is duly republished."

This court has recently construed these sections of the Civil Code to mean that a former will is revoked by a later will con-

taining an express revoking clause, and is not revived by the revocation of such later will unless it appears by the terms of such revocation of such later will that it was the testator's intention to revive and give effect to the first will. *Estate of Thompson* (Cal. Sup.) 198 Pac. 795. We are thus brought to the precise controversy in the present case. Upon the trial of the contest herein, the contestant offered as a witness, to prove the due execution of the purported will of the decedent, dated April 25, 1918, one William T. Blakely, an attorney, who testified, in substance, that, on said April 25, 1918, he had drawn, at the request of David S. Johnston, the document purporting to be his last will of said date, and that said David S. Johnston had thereupon signed, sealed, published, and declared the same to be his last will and testament in the presence of said Blakely and of one Ethel L. Lich, who, at his request and in his presence and in the presence of each other, subscribed their names as witnesses thereto. The said witness also testified that he had retained a carbon copy of said document, from which he had later made other copies thereof, which he had sent to certain relatives of the deceased. The original carbon copy he testified that he had retained in his office for a time, but that it had been stolen out of his office, but that he was able to identify one of the copies thereof from which he was able to state the precise terms of the original document and which, upon his identification as a copy thereof, was admitted in evidence. The contestant did not, however, produce or offer as a witness Ethel L. Lich, the other subscribing witness to said document. The reason for this sufficiently appears from other evidence in the case, showing that said Ethel L. Lich had no recollection of having witnessed the alleged execution of said document or of having signed her name as a subscribing witness thereto.

[3] Upon this state of the record, the question at issue arises, the appellant insisting that, in order to give effect to the revoking clause in the decedent's purported will dated April 25, 1918, it was necessary to prove the due execution of said document by two witnesses, and that, this not having been done, the evidence was sufficient to justify the finding that said instrument was duly executed by the decedent as and for his last will and testament so as to give effect to its revoking clause as working the revocation of his former olographic will. This question has, however, been recently set at rest by the decision of this court in the case of the *Estate of Thompson*, supra, for, while in that case the court was divided upon the question as to whether evidence less than that required under section 1339 of the Code of Civil Procedure for the proof of a lost or destroyed, but unrevoked, will, namely,

that "of two credible witnesses" could be permitted to establish and give effect to a revoking clause in such will, the court was in agreement in holding that the due execution of a will, which was either proved or presumed to have been destroyed *animo revocandi*, might be proved so as to give effect to its revoking clause by one witness, or, in other words, by the same amount and quality of evidence generally required and held sufficient for the proof of any fact under section 1844 of the Code of Civil Procedure. In the prevailing opinion of the court in *Estate of Thompson*, supra, Mr. Justice Wilbur thus stated the rule:

"If the will of 1916 had been revoked by cancellation or otherwise the evidence of one witness to the contents of the will of 1916 would be sufficient to establish that it contained a revoking clause; for section 1297, Civil Code, declares that the revocation of a revoking will does not revive the first will 'unless it appears by the terms of such revocation that it was the intention to revive and give effect to the first will.' No doubt can be entertained that, where the second testamentary act is revoked, evidence of the contents of the revoked will may be considered to determine the effect of such revocation upon an earlier will still in existence."

In the dissenting opinion in the same case, Mr. Justice Olney states:

"The leading opinion admits that, if the will containing the revocation clause is in turn revoked, the revocation is yet effective, the instrument cannot be probated, and, if destroyed, two witnesses as to its contents are not required for the purpose of proving the revocation."

The same learned justice cites, as supporting this rule, the case of *In re Wear's Will*, 131 App. Div. 875, 116 N. Y. Supp. 304, which interprets sections 2621 and 1865 of the New York Code of Civil Procedure (from which sections 1292 et seq. of our Civil Code were taken), relating to the character of proof required to entitle a lost will to probate, as distinguished from that required to prove the existence of such later will for the purpose of giving effect to its revoking clause. This case is so nearly identical as to its facts with the case at bar that we deem the following excerpt from it profitable:

"The objection urged, on this appeal from the decree of the surrogate refusing probate to the first will, is that the proof offered and received of the execution of the second will is inadequate. The appellant contends that the proof must be of the character required by sections 2621 and 1865 of the Code of Civil Procedure, entitling a lost will to probate. The requirement of this section is that the provisions of such lost will must be established 'by at least two credible witnesses, a correct copy or draft being equivalent to one witness.' We are of the opinion that this contention cannot be sustained. It is one thing to admit to probate a will disposing of a man's estate where

the will cannot be found, and quite another thing to merely establish that a second will, revoking a former will, has been duly made and executed and left in the possession of the decedent. In the one case, we are assuming to dispose of property in a manner different from that prescribed by law in the absence of a will, while in the latter case we are merely permitting the property to descend in the manner which the law designates. In the case now under consideration the execution and delivery of the will to the decedent was proved by Mr. Eckstein, who drew both wills, and who was a subscribing witness in both of them. He would have been entirely competent to have proved the execution of the will, if it had been found, the remaining subscribing witness being dead; and he was equally competent to prove the execution and delivery of the will to the decedent, not for the purpose of establishing a lost will, but to show that the will offered for probate was not the last will and testament of the decedent, and that such an instrument was executed and left in such a custody that the presumption is that it was destroyed with the intention of revocation, with the result that the decedent died intestate. We are of opinion that the authorities relied upon by the learned surrogate support his conclusion, and that the decree refusing probate to the will of June, 1900, was properly made."

From the foregoing discussion we conclude that the evidence of the witness Blakeley was sufficient, if believed by the trial court, to establish the fact as found by it, that the will of the decedent dated April 25, 1918, had been duly executed by him so as to render effective its revoking clause to the extent of revoking all former wills by him made, and that said revoking clause remained in full force and effect as to former wills of the decedent, although said later will had been presumptively destroyed by the testator with the intention of revoking same. This conclusion renders unnecessary any further discussion as to the form, substance, or effect of the prior holographic will of the decedent, which the trial court by its judgment rightly held to have been revoked and hence properly denied admission to probate.

Judgment affirmed.

SHAW, C. J., and RICHARDS, Justice pro tem., and WILBUR, LAWLOR, SHURTLIFF, SLOANE, and WASTE, JJ., concur.

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VETERANS' WELFARE BOARD et al. v. RILEY, State Controller. (S. F. 10161.)

(Supreme Court of California. April 10, 1922.)

1. States ☞114—Application of money for soldiers' benefit is for "public purpose."

Legislation having for its purpose the giving of a benefit to soldiers having served their

country in time of war is the application of public money for a public purpose.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Public Purpose.]

2. States ☞114—Loan to soldiers expenditure for "public purpose."

A loan to soldiers who had served their country in time of war is an expenditure of money for a public purpose.

3. States ☞119—Veterans' Welfare Act and Veterans' Farm and Home Purchase Act not unconstitutional as a "gift from state" or "loan of state's credit."

St. 1921, p. 969, establishing the Veterans' Welfare Board, known as the California Veterans' Welfare Act, providing for the purchasing and improving of lands and selling in small parcels to veterans who will become actual settlers, and St. 1921, p. 815, creating Veterans' Farm and Home Purchase Act, in so far as the laws relate to the appointment of the Veterans' Welfare Board and the incurring by them of expenses for carrying out of the laws, are not invalid within Const. art. 4, §§ 31 and 32, as a gift from the state or loan of its credit.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Gift; Loan.]

4. States ☞119—Veterans' Welfare Act and Veterans' Farm and Home Purchase Act held not "grant of extra compensation" or "allowance" prohibited by Constitution.

Const. art. 4, § 32, prohibiting the granting of extra compensation or allowance to a public servant after service rendered, repudiates claims based on moral obligations growing out of service to the state, and if St. 1921, pp. 815 and 969, known as the Veterans' Welfare Act, and Veterans' Farm and Home Purchase Act, provide for gifts or loans of credit in violation of Const. art. 4, § 31, they cannot be excepted from its provisions on the ground that the payments are made in discharge of a moral obligation, but such acts are not "grants or allowances of extra compensation," and hence are not prohibited by section 32.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Allowance; Extra Compensation.]

5. States ☞115—Appropriations for veterans held not to create any "debt."

Appropriations by the Veterans' Welfare Act and Veterans' Farm and Home Purchase Act (St. 1921, pp. 969, 815), from the public funds available for purposes thereof held not to be a creation of "debt," and within the limitation of Const. art. 16, § 1.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Debt.]

In Bank.

Application for writ of mandate by the Veterans' Welfare Board and others against Ray L. Riley, as Controller of the State of California, requiring him to issue warrants for the payment of certain obligations of pe-

tioners as members of the Board. Writ granted.

Milton Sapiro and George J. Hatfield, both of San Francisco, and M. B. Silberberg, Walter K. Tuller, O'Melveny, Milliken & Tuller, all of Los Angeles, for petitioners.

H. C. Lucas and Dion R. Holm, both of San Francisco, for respondent.

WILBUR, J. The Veterans' Welfare Board, appointed under and by virtue of section 3 of an act entitled "An act creating a veterans' welfare board and defining its powers and duties and making an appropriation in aid of its operations," approved May 30, 1921 (Stats. 1921, p. 969), petitions for writ of mandate to compel the respondent, the state controller, to issue warrants for the payment of certain obligations incurred in the performance of its duties under the above-entitled act, and also to issue warrants for obligations incurred by the Board in carrying out the provisions of "An act to provide educational opportunities for persons who served in the army, navy or marine corps of the United States in time of war, and making an appropriation therefor," approved May 30, 1920 (Stats. 1921, p. 967), and also to issue warrants for the payment of expenses incurred in carrying out the provisions of an act entitled "An act providing for farm and home aid for veterans, defining the powers and duties of the Veterans' Welfare Board in respect thereto, and making an appropriation therefor," approved May 30, 1921 (Stats. 1921, p. 815).

The respondent has refused to issue the warrants, upon the ground that each of these statutes is unconstitutional and void. The claims involved in this proceeding have each been audited and approved by the Veterans' Welfare Board and by the State Board of Control. The respondent has demurred to the petition herein, and claims that these acts, and each of them, is in violation of article 4, §§ 31, 32, article 16, § 1, article 1, § 21, and article 4, § 25, subd. 19, and cites in support of that contention *People v. Johnson*, 6 Cal. 499; *Nougues v. Douglass*, 7 Cal. 65; *Stevenson v. Colgan*, 91 Cal. 649, 27 Pac. 1089, 14 L. R. A. 459, 25 Am. St. Rep. 230; *Bourn v. Hart*, 93 Cal. 321, 28 Pac. 951, 15 L. R. A. 431, 27 Am. St. Rep. 203; *Conlin v. Board of Supervisors*, 99 Cal. 17, 33 Pac. 753, 21 L. R. A. 474, 37 Am. St. Rep. 17; *McClure v. Nye*, 22 Cal. App. 248, 133 Pac. 1145; *Molineux v. State of California*, 109 Cal. 378, 42 Pac. 34, 50 Am. St. Rep. 49; *Taylor v. Mott*, 123 Cal. 497, 56 Pac. 256; *Powell v. Phelan*, 138 Cal. 271, 71 Pac. 335. He also cites a recent decision of the Court of Appeals of the state of New York, *People v. Westchester County National Bank*, 231 N. Y. 465, 132 N. E. 241, 246, 15 A. L. R. 1344, wherein an act authorizing the payment of a bonus to veterans was held violative of article 7, § 1, and

article 8, § 9, of the New York Constitution, prohibiting the giving or loaning of the credit or money of the state.

The court has concluded that further argument is desirable with regard to the demand for obligations incurred under the "Act to provide educational opportunities for persons who served in the army, navy or marine corps of the United States in time of war." Stats. 1921, p. 967. That branch of the case is entirely separable from the demand under the other two acts. As to that branch, the matter will be continued for additional argument under the order hereinbefore made to that effect. The demands under the other acts involve different questions, which have been fully argued, and upon which we have reached a conclusion which may be announced at once.

[1, 2] The fundamental question involved in this legislation, or any legislation by which individuals profit by the moneys raised by public taxation, is the question as to whether or not such moneys are expended for a public purpose. This question is discussed by the petitioners, and the point is apparently conceded by the respondent. However, in view of the importance of the question and the bearing it has upon the points raised and discussed, it should be stated that legislation having for its purpose the giving of a benefit to soldiers who have served their country in time of war is uniformly recognized as the application of public money for a public purpose. It is so thoroughly established that a public purpose is accomplished by such legislation, even though the appropriation or benefit is conferred by legislation enacted after the service is completed that it is only necessary to cite a few of the more recent cases on the subject wherein will be found a discussion and collation of the earlier cases supporting that view. *Opinion of Justices*, 211 Mass. 608, 98 N. E. 338; *People v. Westchester National Bank*, 231 N. Y. 465, 132 N. E. 241, 15 A. L. R. 1344; *State ex rel. Atwood v. Johnson*, 170 Wis. 218, 175 N. W. 589, 7 A. L. R. 1617; *State ex rel. Atwood v. Johnson*, 170 Wis. 251, 176 N. W. 224; *State ex rel. Hart v. Calusen*, 113 Wash. 570, 194 Pac. 793, 13 A. L. R. 580.

The loaning of money to private persons has been held violative of the express or implied constitutional requirement against taxation for private purposes. This was held to be true even where the city of Boston had been nearly destroyed by fire, and it was proposed to aid private persons to rebuild (*Lowell v. Boston*, 111 Mass. 454, 15 Am. Rep. 39), and similar legislation for the purpose of rebuilding Charleston was also declared unconstitutional (*Feldman & Co. v. City Council of Charleston*, 23 S. C. 57, 55 Am. Rep. 6). Although it was held by the Supreme Court of Massachusetts (*Lo-*

well v. Boston, supra) that the making of a loan for such a purpose is not a public purpose, a grant of money to ex-soldiers in the nature of compensation or bonus was nevertheless subsequently held to constitute a public purpose. Opinion of Justices, 211 Mass. 608, 98 N. E. 338. It is manifest, if an outright gift of public moneys in aid of ex-soldiers is a public purpose, that a loan to them would also be an expenditure of money for a public purpose.

The rule is stated in the recent case of *People v. Westchester County National Bank*, supra, where the Court of Appeals in New York held that the statutes of that state providing for the sale of bonds and a payment of a bonus to soldiers who served in the world war was violative of certain provisions in the New York Constitution, but also held that the payment of such bonus was a public purpose. In that connection the court made the following statement:

"It is said that this act serves no such purpose. We think, however, that it does. In deciding whether the object for which taxation is imposed is for a public object the courts 'must be governed mainly by the course and usage of the government, the objects for which taxes have been customarily and by long course of legislation levied, what objects or purposes have been considered necessary to the support and for the proper use of the government, whether state or municipal. Whatever lawfully pertains to this and is sanctioned by time and the acquiescence of the people may well be held to belong to a public use, and proper for the maintenance of good government, though this may not be the only criterion of rightful taxation.' *Loan Association v. Topeka*, 20 Wall. 655, 665. In this state the granting of pensions and gratuities for military service is not a new experiment. By the Act of May 11, 1784, public land was granted to Revolutionary veterans. By chapter 8 of the Laws of 1814, pay in addition to that granted by the United States was given to soldiers of the War of 1812. By chapter 178 of the Laws of 1904 a pension was granted to the last survivor of that war. By section 220 of the Military Law a pension was given to any member of the militia who had been disabled within ten years in the performance of duty. A pension policy has long been adopted by the United States and acts similar to ours have been passed in at least nineteen other states.

"The payment of a pension or a bonus for past services showing the gratitude of the people, showing that the state is mindful of those who have made sacrifices for it, is an incitement to patriotism and an encouragement to defend the country in future conflicts. Even if such a payment is not clearly one made in the general interest, at least there is such ground for the claim that, where the Legislature has accepted that view, the courts may not interfere. That they believe the action unwise or unnecessary is immaterial. As to that question the Legislature [in the absence of constitutional restrictions] is the final arbiter. *Jones v. City of Portland*, 245 U. S. 217; *State ex rel. Atwood v. Johnson*, 175 N. W. Rep. 589; *State*

ex rel. Atwood v. Johnson, 176 N. W. Rep. 224; *Gustafson v. Rhinow*, 144 Minn. 415; *State ex rel. Hart v. Clausen*, 194 Pac. Rep. 793; *Opinions of Justices*, 211 Mass. 608. What long custom and usage has sanctioned, what the weight of judicial authority has approved, that we should be slow to declare wrongful. Nor may a distinction be made between such a bonus as our act provides and a pension. The one is a reward for past military services payable at once; the other such a reward payable in installments. * * *

It is claimed that the purpose of these two acts (Stats. 1921, pp. 815, 969) is a public one because in furtherance of the settlement of lands and of the agricultural development of the state. There are decisions which support this view (*Hill v. Rae*, 52 Mont. 378, 158 Pac. 826, L. R. A. 1917A, 495, Ann. Cas. 1917E, 210; *Wheelon v. S. Dak. Land Settlement Board*, 43 S. D. 551, 181 N. W. 359, 14 A. L. R. 1145; *State v. Clausen*, 110 Wash. 525, 188 Pac. 538, 14 A. L. R. 1133; *Green v. Frazier*, 253 U. S. 233, 40 Sup. Ct. 499, 64 L. Ed. 878; *Smith v. Kansas City Title Co.*, 255 U. S. 180, 41 Sup. Ct. 243, 65 L. Ed. 577; *McMahan v. Olcott*, 65 Or. 537, 133 Pac. 836; *State ex rel. Goodwin v. Nelson County*, 1 N. D. 88, 45 N. W. 33, 8 L. R. A. 283, 26 Am. St. Rep. 609), and other earlier decisions taking a more strict view which would lead to the opposite conclusion (*Allen v. Inhabitants of Jay*, 60 Me. 124, 11 Am. Rep. 185, *Kingman v. City of Brockton*, 153 Mass. 255, 26 N. E. 998, 11 L. R. A. 123; *Lowell v. City of Boston*, supra; *Curtis' Adm'r v. Whipple* and others, 24 Wis. 350, 1 Am. Rep. 187; *Deal v. Mississippi County*, 107 Mo. 464, 18 S. W. 24, 14 L. R. A. 622; *State v. Township of Osawkee*, 14 Kan. 418, 19 Am. Rep. 99; *Loan Assn. v. Topeka*, 21 Wall. 655, 22 L. Ed. 455), but we base our conclusion as to the public character of the expenditure proposed entirely upon the fact that such expenditures are for the benefit of veterans of the World War and are for that reason of a public nature.

[3] The next question presented is the claim that the acts provide for a gift or loan in violation of sections 31 and 32 of article 4 of the Constitution. These sections, so far as material, are as follows:

"Credit of State or Municipalities not to be Loaned.

"Sec. 31. The Legislature shall have no power to give or to lend, or to authorize the giving or lending, of the credit of the state, or of any county, city and county, city, township, or other political corporation or subdivision of the state now existing, or that may be hereafter established, in aid of or to any person, association, or corporation, whether municipal or otherwise, or to pledge the credit thereof, in any manner whatever, for the payment of the liabilities of any individual, association, municipal or other corporation whatever; nor shall it have power to make any gift, or authorize the

making of any gift, of any public money or thing of value to any individual, municipal or other corporation whatever. * * *

"Extra Compensation to Officers Forbidden.

"Sec. 32. The Legislature shall have no power to grant, or authorize any county or municipal authority to grant, any extra compensation or allowance to any public officer, agent, servant, or contractor, after service has been rendered, or a contract has been entered into and performed, in whole or in part, nor to pay, or to authorize the payment of, any claim hereafter created against the state, or any county or municipality of the state, under any agreement or contract made without express authority of law; and all such unauthorized agreements or contracts shall be null and void."

It is clear from these provisions, and from the above-cited decisions of this court, that, if the statutes in question provide for a gift, or for a loan of the credit of the state, they are to that extent a violation of these provisions of our state Constitution, notwithstanding the purpose of the legislation is public and most laudable.

Before, further considering the question thus presented, we will state in general terms the scope and effect of the laws involved in this controversy. The act establishing the Veterans' Welfare Board (Stats. 1921, p. 969), known as the California Veterans' Welfare Act, authorizes the welfare board to purchase and acquire land and water rights, to improve and subdivide such lands and sell the same at an amount which would return the purchase price and expenses incurred in connection therewith, plus 5 per cent. interest thereon. Sales are to be made to "any veteran who is not the holder of agricultural land or possessory rights thereto of the value of fifteen thousand dollars and who, by this purchase would not become the holder of agricultural land or possessory rights thereto exceeding such value, and who is prepared to enter within six months upon actual occupation of the land acquired. * * *" The land is to be paid for in 40 years, together with interest thereon at the rate of 5 per cent. per annum, compounded at periods fixed by the board. The amount due for improvements on the land shall be paid on amortized payments extending over a period not exceeding 20 years. The act also provides for the making of loans "not to exceed three thousand dollars to any one settler for the purchase of necessary live stock and equipment such loans to be secured in any manner that the board may direct or without security other than the personal obligation of the settler."

The general scheme of this statute, then, is to provide for the purchasing and improving of lands and the selling of the same in small parcels to veterans who will become actual settlers, the purchase price to represent the pro rata proportion of the actual

cost of such land and improvements, the purchase price to bear interest at 5 per cent. per annum, and to be compounded if not paid.

The statute providing for farm and home aid to veterans (Stats. 1921, p. 815), known as the "Veterans' Farm and Home Purchase Act," authorizes the Veterans' Board to purchase for resale to veterans of land for agricultural purposes not exceeding to each the value of \$7,500, or a home or home site not exceeding the value of \$5,000. The purchase is to be made when the board is "satisfied of the desirability of the real estate and of the ability of the applicant, and that such applicant is a veteran, and that such applicant has agreed with the board to actually reside upon such real estate within six months from the date of the purchase by the board." The board is to enter into a contract with the owner for the purchase from the owner upon such terms as may be by them agreed.

"The board shall enter into a contract with the applicant for the sale of said land to said applicant at a price to be fixed by the board, which will make the purchase price and sale price reciprocal, taking into account the difference, if any, in the interest rate to be paid on deferred installments by the board and the applicant respectively, which price shall include the cost of such real estate and all expenses and costs incurred and estimated to be incurred by the board in relation thereto, inclusive of interest, administration, appraisals, examination of title, incidental expenses and such sum as shall be deemed necessary to meet unforeseen contingencies."

The applicant is required to make an initial payment of 10 per cent. in case of a farm and 5 per cent. in case of a home or home site, the balance to be amortized over a period not exceeding 40 years with 5 per cent. interest per annum.

In considering the attack made upon these laws it should be observed that we are only dealing with the question of whether or not there is sufficient validity in these laws to justify the appointment of the Veterans' Welfare Board and the incurring by them of expenses covered by the claims set out in the petition looking towards the carrying out of the laws. Even though some portions of these statutes, or some features of the law, may be unconstitutional, it is only necessary for the purpose of this case for us to determine whether or not there is sufficient validity in the laws to justify the arrangement made for carrying them out. Each law carries with it an appropriation. The law known as the California Veterans' Welfare Act (Stats. 1921, p. 969) makes an appropriation of \$1,000,000. The Veterans' Farm and Home Purchase Act (Stats. 1921, p. 815) makes an appropriation of \$2,000,000.

It is evident that a scheme of the Califor-

nia Veterans' Welfare Act, by which the state purchases large tracts of land, improves and subdivides it, and resells it at its total cost to the state, with interest at 5 per cent., is not a gift of either land or its value to the purchaser from the state. The advantage, if any, derived by the purchaser from the state would be altogether due to the wisdom and judgment of the Welfare Board in making its purchases and its ability to secure large areas of land at comparatively low prices, and consequently to sell at a low price, and also to the unusually long time which may be allowed by the board in which the purchaser may make the deferred payments. The plan of operation provided by the act is the very familiar one by which large tracts of land are provided with water for irrigation, improved, subdivided, and sold in small tracts to individual buyers on convenient terms of payment of deferred payments, with a small initial payment. So far as the purchase and sale of the land is concerned, it is not a gift. If it is not a gift, is it a loan of the credit of the state within the meaning of article 4, §§ 31 and 32? The answer is that, so far as the appropriation made is concerned, the state is not lending its credit, but, if the arrangement for the purchase and sale of land at all partakes of the nature of a loan, it is a loan of money and not of credit. Section 31, art. 4, does not prohibit the lending of the money of the state, but only of the loaning of the credit thereof. The distinction between the loaning of the money of the state and the loaning of its credit is clearly pointed out by the Court of Appeals of New York in *People v. Westchester County National Bank*, supra. In that case the court made the following statements:

"This report, which was adopted with immaterial verbal alterations, became a part of article 7 of the Constitution. No longer under any circumstances might the credit of the state in any manner be given or loaned to or in aid of any individual, association or corporation.

* * *

"This article as reported was confined solely to limiting the power of the Legislature as to debts. It did not touch the power to appropriate the property of the state or the money it might raise by taxation for payments or gifts to individuals or corporations so long as such payments or gifts subserved the public good. It was proposed to limit this power also. Mr. Charles O'Connor suggested the addition to the section of the provision 'Nor shall any gift of public moneys or property be made, except as a reward for military services, or by the release of escheats and forfeitures.' This was objected to, however, and as the evil apparently was not serious, the effort was abandoned and the section was allowed to stand as reported. Debates of the Convention, p. 722. In the address by the members of the convention to the people it was said: 'They have incorporated many useful provisions more effectually to secure the people in their rights of

person and property against the abuses of delegated power.' Convention Journal, p. 1547.

"Cut off from the right to loan or give the credit of the state, however, by 1867 the Legislature had begun to resort freely to grants of public funds to railroads and to charitable associations. Therefore, in the constitutional convention of that year the attempt was renewed to deprive it of that power. Sanford E. Church, later the distinguished chief judge of this court, reported from the committee of finance a proposed article of the constitution. It contained a section numbered eleven. 'Neither the credit, money or property of the state shall in any manner be given or loaned to or in aid of any individual, association or corporation.' Proceedings of Debates, p. 791. This proposal was debated at length but it was not adopted.

"This constitution having been rejected by the people, a commission was appointed in 1872 to consider amendments. It was again proposed to limit the right of the state with regard to gifts and loans of its property. The committee on sectarian appropriations reported a clause: 'Neither the credit nor the money or property of the state or of any county, city, village or town shall in any manner be given or loaned to or in aid of any association, corporation or other private institution whatever.' Later a substitute for this proposal was accepted—'Neither the credit nor the money of the state shall be given or loaned to or in aid of any association, corporation or other private undertaking.' Still later the word 'other' was deleted. In the report it was said that this proposed amendment 'cuts off all gifts of money and all loaning of the credit of the state to all other associations, corporations, etc., but they are all subject to the same objection and appropriations to them of the money of the state are liable to the same abuses. They must all stand or fall together.' Journal, p. 452. In this form the section now stands in our Constitution. Article 8, § 9.

"We find, therefore, among others, two limitations imposed on the Legislature in addition to the one that was always implied. They both relate to gifts or loans either of the credit or the moneys of the state. 'The credit of the state shall not in any manner be given or loaned to or in aid of any individual.' Article 7, § 1. 'Neither the credit nor the money of the state shall be given or loaned to or in aid of * * * any private undertaking.' Article 8, § 9. They both also represent the triumph of efforts to prevent improvidence, to make useless any pressure from special interests, to safeguard the credit of the state, and the interests of the people as a whole. They are not to be brushed aside. They are to be fairly construed to obtain the object for which they were intended. * * *

"As we have seen, this act provides that \$45,000,000 shall be raised by the state upon its bonds and the proceeds applied as a bonus to those who have been in the military service of the United States. We have seen also that the proceeds can be used only for this one object. Is this a gift or a loan of the credit of the state? Clearly it is not a loan. A loan implies repayment. Here there is no such situation. The bonds are issued for full value.

Their proceeds are transferred absolutely with no promise, express or implied, of return.

"If not a loan then does this act contemplate a gift of the state's credit? In answering this question the mere form of the transaction is immaterial. If the gift of the bonds of the state to a railroad corporation would be such a gift—and it undoubtedly would be—then so would be an issue of bonds by the state with the express condition that their proceeds should be given to the same corporation. The evasion of the constitutional prohibition would be palpable and it could not and should not be permitted.

"The important question is, therefore, whether under this act the provisions made for the soldiers and sailors is a gift to them or a gift in their aid. * * *

"Such we believe is the situation here. The state proposes to give its credit to the soldiers and sailors, not to satisfy any obligation that it owes them, but as a gratuity. The act is, therefore, prohibited by section 1 of article 7 of the Constitution. * * *

(Italics ours.)

We are fully in accord with the conclusions expressed by the Court of Appeals of New York in relation to the distinction between a loan of money and one of credit. As pointed out by that court in the gift of the money of the state, raised by current taxation, we are expressing our own gratitude, by giving our own, but when the gratitude is expressed in the issuance of bonds and the gift of the proceeds of the sale thereof, we are expressing our generosity at the expense of our posterity. When the people have so keen a sense of gratitude, or of public purpose that they are willing to give of their substance to express that conviction, there is little danger that excessive or unreasonable burdens will be thus assumed, but when one generation can be generous at the expense of the next, there is danger that the expression may not be so reasonable or so well considered. Hence it is clear that there is a marked distinction between the loan of money and a loan of credit. This distinction is equally clear, if the loan is for a short time as if for a long time, although the reasons for the distinction are not the same. This question is not new in this state, and perhaps it would have been sufficient merely to cite a decision of this court under the Constitution of 1849, which also contained a prohibition against giving or loaning the credit of the state. Article 11, § 10, Const. Cal. 1849. It is as follows:

"Sec. 10. The credit of the state shall not in any manner be given or loaned to or in aid of any individual, association, or corporation; nor shall the state, directly or indirectly, become a stockholder in any association or corporation."

This court held in *People v. Pacheco*, 27 Cal. 175, that a bond issue of \$1,500,000 in aid of the Central Pacific Railroad was not a violation of the section quoted when the act authorizing the issue levied a tax and appropriated the fund from the successive tax lev-

ies to pay the bonds. The argument advanced in support of that conclusion is that the law authorizing an expenditure did not create a debt within the meaning of article 8 of the Constitution of 1849 (similar in terms to article 16 of our present Constitution) when accompanied by a provision for a tax levy and an appropriation thereof to pay the same (*State v. McCauley*, 15 Cal. 429; *Koppikus v. State Capitol Com.*, 16 Cal. 249); hence it was held that, as there was no debt of the state within the meaning of article 8, Const. 1849, there was no loan or gift of credit within the meaning of article 11, § 10, Const. 1849. In the course of its decision the court made the following observations concerning the matter:

"Besides, as we held in the discussion of the first point, no debt on the part of the state is created, and consequently no credit in any proper sense of the term arises. The act of the state in assuming to make these payments, consists in a single provision made in advance, raising a fund, setting it aside and specifically appropriating it to the payment of the interest semiannually, from year to year, upon the presentation of the coupons at the state treasury—these coupons serving as warrants upon which the money is to be drawn from the treasury. As no debt or liability in the constitutional sense is created, so no credit in the constitutional sense arises, or is loaned or given. A fund is provided in advance for the purpose, and out of it the services to be rendered by the company to the state are to be paid, but the payments are to be made on behalf of the company, in satisfaction of interest due from it to certain designated creditors. The money being provided in the first instance, and being in contemplation of law, always on hand in the treasury, before the installments of interest accrue, the transaction on the part of the state upon the principles before stated, is regarded as a cash transaction. From these views, it follows, that, the act in question is not repugnant to section 10 of article XI of the Constitution.

"Our conclusion is that the act in question is constitutional.

"The judgment, so far as it denies the relief asked for in the complaint, must, therefore, be affirmed. * * *

These cases form a part of the judicial history of the state and an authoritative interpretation of similar provisions in the Constitution of 1879: *Sharon v. Sharon*, 67 Cal. 185, 7 Pac. 456, 635, 8 Pac. 709; *People ex rel. Parsons v. Edwards*, 93 Cal. 153, 28 Pac. 831; *People v. O'Brien*, 96 Cal. 171, 31 Pac. 45. This distinction is pointed out by the Supreme Court of Wisconsin in *State ex rel. Atwood v. Johnson*, 170 Wis. 251, 176 N. W. 224, 228, *supra*, and it is there held that no gift of credit is made by the soldiers' educational bonus act of that state where the appropriation is accompanied by a tax levy covering 5 years.

It follows that there is a clearly recognized distinction between the loaning of credit and the loaning of money. Indeed the distinction

is clearly recognized in article 4, § 31, which prohibits the Legislature from giving or lending of the credit of the state, and also prohibits "the making of any gift, of any public money or thing of value to any individual, municipal or other corporation whatever," but does not prohibit the loaning of the money of the state.

We conclude, therefore, that the act known as the Veterans' Welfare Act is not violative of article 4, § 31, of the Constitution so far as it permits the use of money appropriated by the act from funds not otherwise appropriated for the purchase and sale of land. The exigencies of this case require us to go no further, but, as we have pointed out, the loaning of money derived from a bond sale is held by the Court of Appeals of New York to be a loan of the credit of the state, inasmuch as the statutes under consideration contemplate a sale of \$10,000,000 in state bonds under the Veterans' Bond Act (Stats. 1921, p. 959) to raise additional moneys to carry out their purposes (Stats. 1921, § 23, p. 976; Stats. 1921, § 8, p. 818). The point is involved in the entire legislative scheme, but is not involved in the case before us, because, if the law is constitutional as to the use of the appropriations already made, the writ should be granted. We therefore do not wish to be understood as passing upon the validity of the Veterans' Bond Act (Stats. 1921, p. 959, *supra*).

In the Veterans' Farm and Home Purchase Act (Stats. 1921, p. 815) the law does not specifically state that the Board shall make payment to the owner of the land purchased. The statute, considered without reference to constitutional limitations, would perhaps justify the interpretation that the Board might enter into contracts for the purchase of homes or land to be paid for in installments and then sell upon a similar contract payable upon similar terms as to time and interest, and thus in effect arrange for the payment by the veteran to the owner of the land through the medium of the Veterans' Board. If such an arrangement was made it would no doubt be in its purpose and effect a loaning of the credit of the state, for the only thing invested by the state in the land under such circumstances would be its credit or guaranty; otherwise the arrangement might as well been made by the veteran, as vendee, with the landowner for direct payments to him as such vendor. The only purpose of the intervention of the Veterans' Board would be to assure the vendor that he would be paid. The law, however, provides for the purchase of real estate by the Board and its resale, and we must assume that in carrying out the law it would be done in the manner which conforms to the Constitution, and not by an arrangement whereby the credit of the state is pledged for the payment of the debt of the veteran. The question as to the method of purchase is not involved in this proceeding

except in so far as is necessary to hold that the law can be carried out in a constitutional manner.

This statute also provides for loans not to exceed \$3,000 to each individual for the purchase of stock and farm improvements, the purpose being to permit a veteran who becomes an actual settler not only to acquire the land upon easy terms of payment, but also to acquire the necessary equipment for the profitable operation of the land in order that thereby he may be able to pay the purchase price of the land, improvements, and stock. The law does, however, authorize loans to the extent of \$3,000 without security. If the question were directly involved as to whether or not such a loan might be made without security upon the terms which delayed the repayment to the state for 5 years, and which would permit the veteran to sell the property acquired by the money so advanced to him by the state without restriction, it might well be contended that such a loan to a financially irresponsible person would be in effect a gift, and thus violative of the Constitution. The question, however, is not directly involved, as no such loan has been made or is contemplated, and here again we must assume that, if such an unsecured loan is a gift in violation of the Constitution, the Welfare Board will not make such an unsecured loan, but that it will require adequate security so that the transaction may be in fact as well as in name a loan and not a gift. We refer to this matter for the purpose of calling attention to the fact that the validity of this provision of the law is not involved in this proceeding, and that we do not pass upon it for that reason. If the proceedings were not avowedly for the purpose of testing the validity of the statute, we would not feel it necessary to note these limitations upon the question which we are authorized to determine, as such limitation is always implied.

[4] What has been said concerning article 4, § 31, of the Constitution largely determines the alleged invalidity of the scheme of land purchase under section 32 of the same article. This section prohibits the granting of extra compensation or allowance to a public servant after service rendered. This section repudiates claims based upon moral obligations, growing out of service to the state (*Stevenson v. Colgan*, 91 Cal. 651, 27 Pac. 1089, 14 L. R. A. 459, 25 Am. St. Rep. 230, *supra*; *Bourn v. Hart*, 93 Cal. 327, 28 Pac. 951, 15 L. R. A. 431, 27 Am. St. Rep. 203, *supra*; *Conlin v. Board of Supervisors*, 99 Cal. 21, 33 Pac. 753, 21 L. R. A. 474, 37 Am. St. Rep. 17, *supra*), and hence decisions in other states holding that payments made where there is a moral obligation are not gifts or loans do not apply in this state (*People v. Westchester County National Bank*, *supra*, 231 N. Y. 476, 132 N. E. 241, 15 A. L. R. 1344, citing on this point *Munro v. State*

of New York, 223 N. Y. 208, 215, 119 N. E. 444; *Cole v. State of New York*, 102 N. Y. 48, 6 N. E. 277; *O'Hara v. State of New York*, 112 N. Y. 146, 19 N. E. 659, 2 L. R. A. 603, 8 Am. St. Rep. 726; *Wheeler v. State of New York*, 190 N. Y. 406, 83 N. E. 54, 123 Am. St. Rep. 555; *Lehigh Valley R. R. Co. v. Canal Board*, 204 N. Y. 471, 97 N. E. 964, Ann. Cas. 1913C, 1228; *Spittorf v. State of New York*, 108 N. Y. 205, 15 N. E. 75). If, therefore, the statutes in question otherwise provide for gifts or loans in violation of section 31, art. 4, they cannot be excepted from such provisions on the ground that such payments are made in discharge of a moral obligation; on the other hand, if they are not grants or allowances, as we hold, then section 32 does not prohibit them.

[5] Respondent contends that the appropriations made in the two laws under consideration, aggregating \$3,500,000 violate section 1 of article 16. This section prohibits the Legislature from creating debts or liabilities aggregating together with all previous debts and liabilities, the sum of \$300,000, except in case of war, to repel invasion or suppress insurrection, unless the same shall be authorized by law for some single object or work to be distinctly specified therein, which law shall provide ways and means, exclusive of loans, for the payment of the interest of such debts or liability as it falls due, etc. It is sufficient to say that the legislation in question does not create any debt or liability or purport to. The legislation in question appropriates from public funds available for that purpose the amount specified in each law for the purposes therein indicated. It does not authorize the petitioner to contract any indebtedness in excess of the amount appropriated or actually available for the purposes of executing the law. See *State v. McCauley*, supra; *Koppikus v. State Capitol Com.*, supra; and *People v. Pacheco*, supra. In so far as the Home Purchasing Act could be construed to authorize the petitioner to purchase farms and homes in excess of the amount appropriated by the Legislature to pay for such homes or available from the funds set apart for that purpose, it might well be claimed that the making of contracts by which the state, through the Veterans' Welfare Board, agreed to purchase from the owners homes and farms for resale to the veterans, would be violative of this constitutional provision if the board endeavored to execute contracts by which they, as officers of the state, were obligated to pay for such homes and farms an amount larger than the appropriation available for such purpose, relying upon the veteran to make the payment to the board and for the payment of the land from such funds. In other words, if the total indebtedness assumed by the board exceeded the appropriation, it might be well said that, not only was the

scheme violative of the provision prohibiting the lending of the credit of the state, but also that by so lending the credit of the state the indebtedness assumed by the state, if it exceeded the amount limited in section 1 of article 16—namely, \$300,000—would be also violative of this section of the Constitution. We are not required to anticipate that this will be done; on the contrary, we should assume that the petitioner, in carrying out the laws in question, will construe them in conformity with the Constitution, and that their conduct thereunder will be regulated by the Constitution and such construction of the statutes. There is, therefore, no violation of section 1 of article 16 in the law if properly construed with relation to its constitutional restriction upon legislative power.

The writ is granted as to all items of expenditure under the Home and Farm Purchasing Act (Stats. 1921, p. 815) and the Veterans' Welfare Act (Stats. 1921, p. 969). That is to say, the writ is granted as to the claims set out in Exhibits A and B to the petition.

We concur: SHAW, C. J.; LENNON, J.; SLOANE, J.; WASTE, J.; SHURTLEFF, J.; LAWLOR, J.

188 Cal. 535

ARMSTRONG et al. v. PAYNE et al.
(Sac. 3005.)

(Supreme Court of California. April 4, 1922.
As Amended April 27, 1922.)

1. Waters and water courses ☞152(7)—Oral agreement for use of water with former owner admissible to show continuity and character of use.

In an action by riparian owners to quiet title to waters of a creek, where defendants alleged prescriptive rights, evidence of an oral agreement with former owner made in 1887, under which defendants claimed use of the water was continued until 1897 until death of former owner, and thereafter until 1914, when one of plaintiffs purchased the land was admissible to characterize the subsequent use of the water, and as tending to establish that the use by defendants thereafter was under a conceded and uninterrupted claim of right, and for the purpose of establishing defendants' claim as against the riparian claim of the former owner and his successors, and not because it was valid agreement, nor because it was declaration of predecessor of former owner.

2. Waters and water courses ☞137—Single interruption once in 5 years prevents acquisition of title by prescription.

A single interruption once every 5 years under such circumstances as to challenge the right of adverse claimant would prevent acquisition of title by prescription, for there would be no period of continuous user for period of five years.

3. Waters and water courses ⇨137—Interruption of adverse user of water must be by resumption of possession under claim of right with notice to adverse claimant.

To interrupt the running of the statute of limitations as to flowing water, there must be a resumption of the possession thereof under a claim of right brought home to the adverse claimant either by express notice to that effect or by conduct so notorious and unequivocal as to imply such notice.

4. Waters and water courses ⇨136—Continuity of intermittent use of water will establish corresponding prescriptive right.

An adverse claimant may establish a right to use water intermittently and for part of the irrigation season only and if that right is insisted upon and maintained without interruption, a corresponding prescriptive right arises.

5. Waters and water courses ⇨137—Frequent destruction of diverting dam by riparian owner under circumstances giving notice of his claim of right prevents title by prescription.

If riparian owner frequently destroyed diverting dam in creek under claim of right brought home to adverse claimants by express notice, or if destruction thereof resulted in such a resumption of possession of riparian rights and for such time as would give notice of his claim of right, adverse use of claimants would be interrupted, and they could not acquire title by prescription.

6. Waters and water courses ⇨143—Prescription as to flood waters limited to quantity beneficially used.

A claimant to a portion of flood waters only is entitled to such proportion thereof as has been actually diverted and put to beneficial use and used adversely during the period of flood waters continuously and without interruption for a period of 5 years.

In Bank.

Appeal from Superior Court, Modoc County; C. A. Raker, Judge.

Action by W. E. Armstrong and others against H. G. Payne and others. From judgment for plaintiffs establishing riparian rights and enjoining defendants from diverting water, defendants appeal. Reversed.

Curtis Hillyer, of San Francisco, and C. S. Baldwin, of Alturas, for appellants.

Jamison & Wylie, of Alturas, for respondents.

WILBUR, J. This is an action by riparian owners along Fitzhugh creek in Modoc county to quiet their title to all the waters of Fitzhugh creek, and enjoin the defendants from interference therewith. The defendants rely upon an appropriation of 200 inches made in 1886 and one of 50 inches made by defendant Gertrude French in September, 1912, and upon adverse use of the waters of said stream from 1886 and 1912, respectively. The trial court found that there was

no prescriptive right in the defendants in and to any portion of the waters of Fitzhugh creek, and adjudged that all the waters of said creek belonged to the plaintiffs as riparian owners. Defendants appeal from the judgment, and attack the findings with relation to adverse use. It appears from the evidence without contradiction that in 1886 H. G. Payne posted a notice of appropriation of 200 inches of water at the point of diversion on Fitzhugh creek above the land of the plaintiffs; that at the same time he also posted a notice of appropriation of 200 inches of water on a stream known as Mill creek, and recorded copies of such notices. The watersheds of Mill creek and of Fitzhugh creek are entirely separate, and the land upon which the defendants diverted the water from said streams is outside the watershed of both streams. In pursuance of the notice of appropriation the defendant H. G. Payne built a ditch and flume about two miles long to carry the waters of Mill creek to a point in Fitzhugh creek about seven miles above their point of diversion, at which defendants also constructed a diverting dam, ditches, and flume leading from Fitzhugh creek to their land, and constructed upon their land certain reservoirs in which the waters diverted from Fitzhugh creek could be stored when not otherwise used. It was conceded in the trial court that the defendants were entitled to take from Fitzhugh creek all the waters they deposited in said creek from Mill creek, less an estimated evaporation of 15 per cent., and the decree established that right by providing that measuring boxes should be placed at the point of diversion from Fitzhugh creek, and at the point where the waters from Mill creek were emptied into Fitzhugh creek, and fixed the right of the defendants at the point of diversion as 85 per cent. of the amount actually emptied into Fitzhugh creek from Mill creek, and no more. Both Fitzhugh and Mill creeks are fed by melting snows. The watershed of Mill creek is at a much higher elevation than the watershed of Fitzhugh creek; consequently the snow melts later in the spring in Mill creek watershed than in Fitzhugh creek watershed. During the early part of the spring the snows melt with such rapidity in the watershed of Fitzhugh creek that the stream overflows its banks. The defendants claim that from and after 1886 they continuously diverted 200 inches of water from Fitzhugh creek at the point of diversion; that this use was continuous during the entire period that such an amount of water was flowing in the stream. They and their successors, some of whom are not parties, consequently claim that the right to take the full 200 inches of water at the point of diversion on Fitzhugh creek has been established by reason of such adverse use. Of the 200 inches so diverted one-fourth be-

longs to Carlos Payne and 33 inches has been conveyed to others not parties, and the total amount claimed by H. G. Payne is 117 inches continuous flow, and by Gertrude French, 50 inches. The latter right is claimed, under her appropriation made in the year 1912, "during the period of melting snows."

In ordinary seasons the Mill creek water was turned into Fitzhugh creek about June 10th, but sometimes the water was turned in as early as May 15th, and it had been turned in as late as July 15th. H. G. Payne testified that his diversion ditch ran full at all times when water was running in Fitzhugh creek, regardless of whether Mill creek was diverted thereto. The defendants claim that their title to the waters of Fitzhugh creek, during the early spring, before the Mill creek waters were deposited therein, is thus established by adverse use. The only conflict in the evidence is as to the quantity of water actually diverted by the defendants from Fitzhugh creek and from Mill creek and as to alleged interruptions of the adverse use of the waters of Fitzhugh creek by the defendants.

The plaintiffs rely upon the proposition that the use of the defendants was interrupted from time to time, and that because of such interruptions there was no period of five years during which the defendants continuously diverted the water claimed by them. The defendants, on the other hand, claim that the interruption of their use was surreptitious and covert; that such breaches as were made in their diverting dam were at once repaired by defendants, and the water was again diverted into the defendants' ditch, and that, by reason of the surreptitious character of the acts alleged to constitute the interruption, if they occurred as claimed by plaintiffs, such acts were insufficient in law to break the continuity of use necessary to establish defendants' rights by prescription.

The defendants thus claim the right to 117 inches of the waters of Fitzhugh creek up to the time Mill creek waters are deposited therein, and particularly during the usual flood period claim such right, plus the 50 inches appropriated by Gertrude French.

We will first consider an erroneous ruling as to the admissibility of certain evidence which will require a reversal. The defendants offered to prove a verbal agreement between John Doten made in 1887 when he owned the property now owned by the plaintiffs, Clark brothers, whereby some arrangement was made as to the use of the waters of Fitzhugh creek, defendants claiming that the use was continued under said agreement until 1897, when John Doten died, and thereafter until the Clark brothers bought the place in 1914. The offer was objected to by the plaintiffs; the objection was sustained, but subsequently the evidence was admitted and then stricken out. Its general charac-

ter can be seen from the following excerpt therefrom:

"Q. What was this arrangement, Mr. Payne? A. The arrangement was that I was to run all Fitzhugh creek water and to take all of the water in the fall of the year except sufficient water to water his stock, and that I was to have my appropriation, excepting in the fall of the year I was to let enough water go down the creek for his stock water.

"Q. You were always to permit sufficient water to run down to his place on Fitzhugh creek for stock purposes; is that it? A. That was it exactly.

"Q. Was there any arrangement between you and Mr. Doten in regard to the Mill creek water? A. No, sir; only he told me at that time that he had been to Mill creek and he was satisfied that we were running the full amount of water, and that he had been up to Mill creek and had seen the water running. * * *

"Q. Was there any arrangement with you as to not turning the water from Mill creek until a certain season of the year? A. Yes, sir; part of the agreement was that I was not to turn the Mill creek water in until the first part, or about the tenth of June, and the reason he stated was because it damaged him by making the water too high, and that it cut out the dam at the house, and that if I put the Mill creek water in too early it was dangerous to his ranch. It was settled by us on that basis that I was not to put the water in from Mill creek until between the 1st and 10th of June, and I was to leave sufficient water in the creek to water his stock, and that was all he needed after the 1st day of June, as he had no use for the water except for stock.

"Q. From that time on did you always turn the Fitzhugh creek water and the Mill creek water and handle it in accordance with this arrangement you had with him? A. Yes, sir. John Doten is dead. He died in December, 1897, 11 years after I made my appropriation.

"Q. During those 11 years, Mr. Payne, were you using water continuously from Fitzhugh creek and Mill creek under your appropriation and in accordance with your agreement, that is in the manner that you had agreed on with Mr. John Doten? A. Yes, sir.

"Q. During that time did he ever make any objection or in any way interrupt your use of the water? A. He did not. * * * The agreement was, that I was to continue running the water the way I was from Mill creek, but that I was not to turn the water in before the 1st or 10th of June, and he had no objection to my running the water of Fitzhugh creek, and after July or August in the fall of the year I was to take my full amount of water, but I was to allow sufficient water to go down the creek to water his stock.

"Q. He agreed that you could turn Mill creek water into Fitzhugh creek and then take it out again, and that was all he agreed to, was it not? A. No, sir; it was not.

"Q. What was the agreement, then? A. I was to run the Mill creek water, but I was to take my appropriation from Fitzhugh creek also.

"Q. He agreed that you might take the waste water—take the water of Fitzhugh creek when

he did not need it? A. He agreed that I should take my appropriation. * * *

"Q. After the irrigating season was over he did not object to your taking the Fitzhugh creek water if you let enough come down the creek for his stock and irrigating purposes; is that correct? A. He did not object to my taking all my appropriation out of Fitzhugh creek. If my 200 inches would not dry the creek, he had no objection, but he wanted me to allow enough water to come on down for his stock. * * *

"Q. He never agreed with you that you could take 200 inches of water from Fitzhugh creek and deprive him of it, did he? A. That is what he agreed to; that if the water was not there before I turned it in from Mill creek, I was to have my 200 inches of water, just the same.

"Q. But during the irrigating season you were only to take out from Fitzhugh creek only what was turned in from Mill creek; isn't that the case? A. No, sir; I was to have my 200 inches of water, and by reason of my putting that Mill creek water in about the 10th of June he was not damaged in any way.

"Q. He did not object to your taking out 200 inches of water during the irrigating season because you put that much in from Mill creek and he never lost it; is that the case? A. He told me he was willing for me to run that 200 inches, because he had been to Mill creek and knew I was not damaging him.

"Q. Are you willing to say to the court in this case that John Doten agreed with you that you could take out 200 inches of water from Fitzhugh creek any time of the year, regardless of what you put in from Mill creek? A. Yes, sir; and that is a fact.

"Q. Why did you say a few minutes ago that in the fall of the year you were to have this right? A. That was, if the creek was to get down low, it was understood that I was to leave enough water for his stock, because in the irrigating season there was plenty of water."

[1] The evidence should not have been stricken out. The evidence of the agreement was clearly admissible to characterize the subsequent use of the water, and as tending to establish that the use by the defendants thereafter was under a conceded and uninterrupted claim of right, and for the purpose of establishing the defendants' claim as against the riparian claims of John Doten and his successors, the Clark brothers. *Bakersfield T. H. Ass'n v. Chester*, 55 Cal. 98, opinion on petition for rehearing, p. 102; *Oneto v. Restano*, 78 Cal. 374, 20 Pac. 743; *Northern California Power Co. Cons. v. Flood* (Cal. Sup.) 199 Pac. 315; *Bree v. Wheeler*, 4 Cal. App. 111, 87 Pac. 255. The agreement was not admissible because it is a valid agreement or solely because it is a declaration of a predecessor of the Clark brothers (sections 1849, 1853, Code Civ. Proc.), but because it shows the nature of the claims of the respective parties during the time the statute of limitations was running, and the extent of the defendants' claims.

If the defendants, by reason of such agreement and a continuous adverse use there-

under for five years, had established their right to the use of the waters of Fitzhugh creek, or to any portion thereof, as against the riparian rights of the Doten property, and had failed to acquire such right as against the Armstrong property, the decree should have adjudicated their respective priorities and rights accordingly. The case was apparently tried on the theory that the riparian rights of the plaintiffs were identical, and were both preserved against the claims of the defendants by interruptions of their adverse use by either, while, in fact, the defendants may have secured a prescriptive title to the water of Fitzhugh creek against one lower riparian owner and not against another.

This ruling on the evidence was prejudicial, and necessitates a retrial. In view of a new trial, we will consider the contentions of the parties as to what constitutes an interruption of an adverse use of water. In the case of *Cave v. Crafts*, 53 Cal. 135, 138, a statement is quoted from 1 Wood on Nuisances, p. 438, to the effect that any interruption of the continuity of use by an adverse claimant, "however slight," prevents the acquisition of the right by such use. In that case it does not clearly appear from the opinion what the nature of the interruption was. In that case Crafts claimed several distinct rights in the water flowing in a diverting ditch. Some of his claims were conceded. It was conceded that Crafts had the right to use all the water of the stream from 3 p. m. to 9 p. m. on Tuesday and Friday in each week, but Crafts, in addition, claimed the right to use the flow of one-sixth of the stream from 3 to 9 p. m. of the other 5 days by reason of his ownership of a tract of land known as the "Carpenter" ranch, and also that he was entitled by reason of adverse possession to a reasonable flow of water for irrigating and domestic purposes upon two other places owned by him known as the "See" place and "Criswell" place. With reference to the alleged tolling of the statute of limitations by interruptions, the court merely said:

"It is enough to say that the use of water upon those places—as the case clearly shows—was not peaceable, as that term is applied in connection with the subject we are considering, but was disputed and not infrequently interrupted by plaintiffs, and their grantors."

The case, therefore, is only authority for the proposition that, where the claimed use is frequently interrupted, and the possession is not peaceable, there can be no title by prescription. However, this case is cited in *Ball v. Kehl*, 95 Cal. 606, 613, 30 Pac. 780, 782, as authority for the proposition that:

"Interruption of adverse user, however slight, prevents acquisition of title by prescription."

But the latter case involved a claim of adverse use where the claimant had used the water "during a part of the period of five years" (95 Cal. 614, 30 Pac. 782), and consequently is not authority upon the question as to how slight an interruption or what sort of an interruption would prevent the prescriptive right accruing. Both cases are cited in *Bree v. Wheeler*, 129 Cal. 145, 147, 61 Pac. 782, 783, to the same effect, as follows:

"Interruption of adverse user, however slight, prevents acquisition of title by prescription."

The trial court in that case had found as a fact:

"That the use of said water by the defendant has been every year, *at least, once* interrupted, by turning it out of the head of defendant's ditch by the plaintiff, but the court finds such acts by the plaintiff to have been mere trespasses." (Italics ours.)

In commenting upon this finding, the court stated:

"It may have been interrupted many times during each year, and the finding be true. The court adds that the interruptions were 'mere trespasses.' If the water was the property of plaintiff, he had the right to turn it out of defendant's ditch, and he would not commit a trespass in so doing. A man can do as he pleases with his own property without committing a trespass. *The finding does not show how long these interruptions continued, nor whether they were as continuous as the use by defendant.* Neither does the finding show that the use by defendant has been open or notorious." (Italics ours.)

Upon the second appeal of this case after a new trial (*Bree v. Wheeler*, 4 Cal. App. 109, 87 Pac. 255), it was said:

"As the plaintiff interrupted the defendant's use annually, no title by adverse possession could accrue. * * *

However, the nature of the interruption is shown by the opinion of the court. Plaintiff claimed all the water, and the defendant claimed half of it. It was agreed to divide the water equally. Pursuant to this agreement measuring boxes were installed, but the plaintiff became dissatisfied and tore out the measuring boxes, and thereafter the defendant used all the water. It appears from the opinion that the defendant's right to the water was continually protested and was actually interrupted by the destruction of the measuring boxes.

The rule with reference to continuity of use is thus stated in *Gould on Waters* (3d Ed.) § 335, pp. 636, 637:

"In order to support an easement by prescription, the adverse use must be continuous. * * * An occasional suspension or interruption of the enjoyment will not defeat the right, if it arises from such causes as the dryness of the season; a temporary failure to exercise the right to the extent claimed; or fluctuations in the flow of the stream. So an entry by stealth, or for

purposes other than those connected with the right to enter, will not break the continuity of exclusive possession in another. * * *

Section 336: "The diversion of water from a stream by means of a trench is substantially continuous, although exercised only in certain months, or when subject to interruption during a part of each year by the owner of the land through which the trench is dug."

The cases cited in support of this latter statement, however, show that the interruption referred to was with the consent of the adverse users. *Bolivar Manuf. Co. v. Neponset Manuf. Co.*, 16 Pick. (Mass.) 241; *Cowell v. Thayer*, 5 Metc. 257, 38 Am. Dec. 400; *Swan v. Munch*, 65 Minn. 500, 67 N. W. 1022, 35 L. R. A. 743, 60 Am. St. Rep. 491.

In 1 *Wiel on Water Rights in the Western States* (3d Ed.) § 584, p. 630, it is said:

"The terms 'exclusive' and 'uninterrupted' probably represent the same thing in this connection; namely, that to the extent of the right claimed, the claimant must not have shared the use with the true owner, nor suffered any act of dominion by him, such as an interruption. The use must be uninterrupted. Mere verbal objection is not an interruption; it must be some act actually causing a stoppage in the adverse use for a reasonable time, though it has been held that use under continual dispute is not adverse."

In 2 *Kinney on Water and Water Rights* (2d Ed.) § 1052, the right to acquire title by adverse possession by appropriation for definite periods of time is recognized, and it is stated in that regard:

"But where the interruption in the continuity of the use is caused by the acts of the party against whom the adverse user is running, and not from the claimant's own free will, no right can be acquired by prescription."

In section 1053 the author, in dealing with an interruption, says:

"It may be made by the shutting off of the water at the time the claimant needs it"—citing in support of the text the following California cases: *Bree v. Wheeler*, supra; *Cave v. Crafts*, supra; *Last Chance*, etc., *Co. v. Heilbron*, 86 Cal. 1, 26 Pac. 523, and also *Wasatch Irr. Co. v. Fulton*, 23 Utah, 466, 65 Pac. 205.

The cases cited have been already discussed, excepting the last two. In *Last Chance*, etc., *Co. v. Heilbron*, supra, there could have been no serious question as to the sufficiency of the interruption, and in the *Utah* case cited, the only question pertinent to the statement in the text was in regard to the admissibility of evidence of the tearing out of a diverting dam as evidence tending to prove an interruption.

The authorities all seem to agree that the act of the owner, in order to constitute a tolling of the statute, must be open, and either upon a claim of right, or so notorious as to constitute such a claim. If secret or surreptitious, it is unavailing. In 1 *Ruling Case Law*, § 39, p. 723, it is said:

"The running of the statute of limitations will be tolled by the owner's entry upon the land when accompanied with an explicit declaration of his purpose to repossess himself thereof, or by such open and notorious acts of dominion as make that purpose manifest. * * * In all cases, however, the intent, as expressed, or evidenced by acts of ownership, is that which governs the effect of the entry. The mere act of going upon the land is not enough. The owner must assert his claim to the land, or perform some act that would reinstate him in possession, before he can regain what he has lost. It is evident, therefore, that an entry by stealth, under circumstances going to show that he claimed no right to enter, or an entry for purposes other than those connected with a right to enter, would not break the continuity of the disseisor's possession."

See 2 Farnham on Water and Water Rights, § 539, p. 1750, section 561, p. 1807. In 2 Corpus Juris, p. 96, par. 118, it is said:

"While the essentials of an entry effective to interrupt an adverse possession will vary according to the premises involved, yet it must not be of a casual or secret character, but must be either known, or made under such circumstances as to enable the party in possession, by the use of reasonable diligence, to ascertain the right and claim of the party making the entry, and thus enable him to resort to legal remedies for its protection. There must be an explicit declaration or an act of notorious dominion by which the claimant challenges the right of the occupant. * * * It may be observed in this connection that there is a close analogy between the acts necessary to interrupt an adverse possession and those necessary to constitute open and notorious possession for the purpose of acquiring title by adverse possession."

[2] A single interruption once every five years, under such circumstances as to challenge the right of the adverse claimant, will prevent the acquisition of a title by prescription, for there would then be no period of continuous user for 5 years. It was so held in the case of Trenton Water Power Co. v. Raff, 36 N. J. Law, 335, 338, where the right to maintain a dam by which a portion of the plaintiff's land was flooded was involved, and it was claimed that there had been a maintenance of the dam and a right to flood said land obtained by adverse usage. It was said:

"The proof was, that its maintenance had not been peaceably acquiesced in, and that on one occasion at least, within nineteen years before the trial, it had been torn out by persons who felt aggrieved by its existence. The court should have been asked to leave the question to the jury, whether the old dam had been maintained for the prescriptive period, under such circumstances as would give a right by prescription, with the instruction that if it had been so maintained, the plaintiffs were entitled to damages only for the injury in excess of that which resulted from the old dam."

The acts of the owner must be open and notorious and under a claim of right. Creech

v. Jones, 5 Sneed (37 Tenn.) 631; Maysville & Big Sandy R. Co. v. Holton, 100 Ky. 665, 675, 39 S. W. 27, 19 Ky. Law Rep. 1; Nelson v. Johnson, 189 Ky. 815, 226 S. W. 94; Murphy v. Commonwealth, 187 Mass. 361, 371, 73 N. E. 524; Byers v. Danley, 27 Ark. 77, 93; Thomas v. Spencer, 69 Wash. 433, 125 Pac. 361; Brattain v. Conn, 50 Or. 156, 91 Pac. 458. In the last-cited case (Brattain v. Conn, supra) the court held that frequent destruction of a diverting dam, if secret and clandestine, did not interrupt the statute of limitations. In that regard the court stated:

"It clearly appears that for more than 20 years the plaintiffs and their predecessors in interest have asserted and exercised the right each year to construct and maintain, whenever necessary, a temporary dam or obstruction in the main channel of the river to divert from 2,000 to 2,500 inches of water into Small creek for irrigation purposes, and without any intimidation from defendants or their predecessors in interest that their right was questioned. It is true that defendant George Conn testifies that he often tore out and removed the dam, but there is no evidence that plaintiffs knew of this fact, or that it was done at a time when they needed the water. It was a clandestine and secret invasion of their rights, and we do not understand that an entry by stealth and without the knowledge of the party in possession is sufficient to break the continuity necessary to constitute an adverse possession or to establish a right by prescription."

The rule in 1 Cyc. pp. 1010, 1011, subdivisions "b" and "c," is cited with approval in Thomas v. Spencer, supra, and applied to a clandestine attempt to toll the statute of limitations by the partial damming of a stream by throwing a few sticks and stones therein.

[3] Without further citation of authorities or critical analysis of those already cited, it is clear that in order to interrupt the running of the statute of limitations, as to flowing water, there must be a resumption of the possession thereof under a claim of right brought home to the adverse claimant either by express notice to that effect or by conduct so notorious and unequivocal as to imply such notice. In other words, the interruption of the possession must rise in dignity and character to that required to initiate an adverse possession. The rule in regard to the latter is stated in Thompson v. Pioche, 44 Cal. 508, 517, as follows:

"To constitute adverse possession, the occupation must be open, visible, notorious, and exclusive, and must be retained under a claim of right to hold the land against him who was seized; and the person against whom it is held must have knowledge, or the means of knowledge, of such occupation and claim of right. Such knowledge, or the means by which such knowledge may be attained, must be brought home to the person who was seized or possessed of the land; because the statute proceeds on the ground that he, knowing that a cause of action exists in his favor for the intrusion, yet acquiesces in it, and does not attempt to regain

the possession of his land in the mode provided by law. Aug. Lim. §§ 391, 398; 2 Wash. on Real Prop. 490. A clandestine entry or possession will not set the statute in motion, because the owner of the land cannot be said to have acquiesced in the wrongful entry or possession. The owner will not be condemned to lose his land because he has failed to sue for its recovery, when he had no notice that it was held or claimed adversely; but the statute cuts off his remedy only when he has neglected to commence his action beyond the period assigned for it."

See, also, *Grigsby v. Clear Lake W. Co.*, 40 Cal. 396, 406.

[4] The testimony offered in this case is to the effect that Armstrong frequently destroyed the diverting dam in Fitzhugh creek. If the court finds that this was done under a claim of right brought home to the defendants either by express notice to them, or that such destruction resulted in such a resumption of the possession of his riparian rights for such a time as was reasonably calculated to give the defendants, as reasonable men, notice of such claim of right, or of such resumption of possession, then the adverse use of the defendant was interrupted, and if each 5-year period of adverse user was so interrupted—that is, if there was no period of five years of continuous adverse user without such interruption—the defendants would not have prescriptive title as against the riparian owner so interrupting the adverse use.

[5] The defendants only claim the waters of Fitzhugh creek during the early spring and summer before the waters of Mill creek are turned in, and during the season of flood waters. Consequently, in considering the effect of the interruptions which are relied upon by the plaintiffs to break the continuity of use essential to establish title by prescription, it should also be noted that the use does not have to be of a continuous flow in order to establish a prescriptive right. That is to say, the adverse claimant may establish a right to use water intermittently and for part of the irrigating season only. If that right is insisted upon and maintained without interruption, a corresponding prescriptive right arises. This principle is thoroughly established in this state. The latest expression of this court upon that subject is *Northern California Power Co., Consolidated, v. Flood* (Cal. Sup.) 199 Pac. 315, wherein the court stated as follows:

"A right to the use of water for irrigation of land may be acquired by prescription without showing that the water is actually kept running upon the land all the time. Irrigation, as usually practiced, is required only at intervals during the season. If the claimant takes the water and uses it at the time when it is necessary to do so and does this under claim of right, without molestation by others interested in the stream or ditch, and with their knowledge, actual or implied, it will be sufficient with respect to the continuity of use, *although there may be many days or weeks during which he does not use it at all*. The evidence leaves the question

of the use of the water during the night time uncertain, not showing clearly whether the continuous use spoken of was during the day only or both day and night for the entire irrigating season. The value of water for irrigation is too great in this state to allow a land owner to gain a right thereto for the entire twenty-four hours of each day by using the same for only a half or any other portion of the time less than the whole. If he has used it continuously for a certain period each day long enough to gain a prescriptive right to such use he would have the right only for that period, and he could not lawfully object to the use by others of the flow during the intervening time of each day." (Italics ours.)

In one of our earlier cases (*American Co. v. Bradford*, 27 Cal. 360, 366) it is said:

"The general and established doctrine is that an exclusive and uninterrupted enjoyment of water, *in any particular way*, for a period corresponding to the time limited by statute within which an action must be commenced for the recovery of the property or of the assumed right held and enjoyed adversely, becomes an adverse enjoyment sufficient to raise a presumption of title as against a right in any other person which might have been, but was not asserted. 3 Kent's Com. 441 to 446; *Bealey v. Shaw*, 6 East. 214; *Shaw v. Crawford*, 10 John, 236; *John v. Stevens*, 3 Vermont, 316; *Union Water Co. v. Crary*, 25 Cal. 504." (Italics ours.)

In *Davis v. Gale*, 32 Cal. 26, 35, 91 Am. Dec. 554, the court said:

"Although the plaintiffs may have had the prior right, yet if they or their grantors allowed the defendant to acquire and hold for five years adverse possession of the water which they had appropriated, *or any part thereof*, they, to that extent, lost their right by force of the statute. Upon this question, in the *Union Water Company v. Crary*, 25 Cal. 509, we had occasion to say that 'The right of the first appropriator may be lost, in whole, or in some limited portions, by the adverse possession of another. And when such person has had the continued, uninterrupted, and adverse enjoyment of the watercourse, *or of some certain portion of it*, during the period limited by the Statute of Limitations for entry upon lands, the law will presume a grant of the right so held and enjoyed by him.'" (Italics ours.)

The decision in the case of *Santa Paula Water Works v. Peralta*, 113 Cal. 38, 44, 45 Pac. 168, furnishes an illustration of a case in which a right by an adverse user was obtained to use the water for certain days of the week only, during the balance of the week the water being returned to the stream and having been appropriated below. The prescriptive right obtained was commensurate with the use, namely, a certain amount of water for certain days in the week and an additional amount during the whole period as domestic water.

In *Smith v. O'Hara*, 43 Cal. 371, 376, it is said:

"It is usually the case that the amount of water to which the several persons claiming it

use are entitled, is measured by inches, according to miner's measurement, or by the capacity of the ditches through which it is conducted from the stream, but there is no reason why the amount may not be measured in some other mode. They hold the amount appropriated by them respectively as they would do had the paramount proprietor granted to each the amount by him appropriated. The right to use the waters, or a certain portion of them, might be granted to one person for certain months, days or parts of days, and to other persons for other specified times. An agriculturist might appropriate the waters of a stream for irrigation during the dry season, and a miner might appropriate them for his purposes during the remainder of the year. And so may several persons appropriate the waters for use during any different periods. There is no difference in principle between appropriations of waters, measured by time, and those measured by volume."

It is clear, then, that right may be gained to use water for certain periods of time as well as for certain amounts measured by volume or by flow, and that the measure of the prescriptive title is the use, under a claim of right adverse to all others, for the period of 5 years. Consequently an interruption during the time that the Mill creek waters were flowing in the Fitzhugh creek was not necessarily an interruption of the adverse right asserted by defendants to the waters of Fitzhugh creek.

As to the flood waters which continued to flow within the banks of Fitzhugh creek, the plaintiffs, as riparian proprietors, had a right to prevent an obstruction to such flow. The defendants, in order to divest this right of plaintiffs to such flood waters, must rely on grant from plaintiffs, or prescription against them, precisely the same as in the case of the ordinary flow of the stream. With respect to the annually recurring flood waters of said creek which do not remain within the banks of the channel which confines the stream in ordinary stages of flow, but which overflow and spread out beyond such banks and over the lands of the plaintiffs, it is conceded that the only benefit which plaintiffs do or can derive from them arises from the fact that it deposits silt which enriches the land. Whether or not the water so escaping from the stream remains a part thereof, subject to the riparian right, or ceases to be subject thereto and becomes the "vagrant water" referred to in *Miller & Lux v. Madera Canal Co.*, 155 Cal. on pages 64, 76, and 77, 99 Pac. 502, 22 L. R. A. (N. S.) 391 (see *Gray v. Reclamation Dist.*, 174 Cal. 647, 163 Pac. 1024, as to the effect of this case), is a question which is largely a question of fact, and, as the court below made no findings relating to it, we express no opinion thereon. The findings do not show an intent to include such water in the scope of the decision. The general question is one which is becoming more and more

important in this state, and requires careful consideration.

[6] As to defendant Payne's claim to flood waters, it is sufficient to say that he made no separate or special claim thereto as such, and his rights therein depend upon his ability to establish adverse possession for five years of the quantity of water he claims. Gertrude French claims a portion of the flood waters only, and is entitled to such proportion thereof as has been actually diverted by her and put to beneficial use and used adversely during the period of flood waters continuously and without interruption for a period of five years.

It appears from the record that the testimony was very conflicting as to the amount of water used by the defendants and running in their ditches. Some finding of the fact should be made on the next trial.

Judgment reversed.

SHAW, C. J., LAWLOR, J., LENNON, J., SHURTLEFF, J., RICHARDS, Justice pro tem., and SLOANE, J., concur.

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ROSS v. KEATON TIRE & RUBBER CO.
(Civ. 3629.)

(District Court of Appeal, Second District, Division 1, California. March 13, 1922.)

1. Landlord and tenant  200(1)—Rental based on value of building costing \$31,837 held not to comply with lease providing it should cost "approximately" \$21,000.

Under Civ. Code, § 13, providing that words shall be construed "according to the context and the approved usage of the language," where a lease provided for a rental based partly on a percentage of the value of a building to be erected and to cost approximately \$21,000, the amount named was not the maximum limit of the cost for estimating rent, but a rental based on a percentage of the cost of a building costing \$31,837 was not in accordance with the lease, "approximately" meaning "very nearly, but not absolutely," "about," and is used in the sense of an estimate merely, meaning more or less, but about and near the amount, quantity, or distance specified.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Approximate—Approximately.]

2. Landlord and tenant  200(1)—Finding held not to show that requested changes of plans by a tenant added to cost of a building.

Where a lease provided that a rental was to be based partly on a percentage of the cost of a building to be erected to cost approximately \$21,000, a finding that the building, which cost \$31,837, was erected according to plans and specifications suggested and approved by defendant and changed from time to time at

its special instance and request, and that defendant was fully informed and knew at all times the cost of the building, does not amount to a finding that the changes added to the cost of the building.

3. Landlord and tenant ⚡200(1)—Rule that a written contract should be interpreted against party drawing it held not to apply provision as to amount of rent.

Where a lease prepared by a landlord provided for a rental partly based on a percentage of the cost of a building, which was to be approximately \$21,000, the rule that a written contract should be construed against the party preparing it does not apply so as to limit the amount on which the percentage should be based to \$21,000, since it was only an estimate, and the lessee contemplated paying a percentage on more than that amount.

4. Landlord and tenant ⚡200(1)—Entry and occupation by lessee held not to waive his right to pay rental based on less than cost of building.

Where a lease provided that rent should be based partly on a percentage of the cost of a building to be erected at a cost of "approximately \$21,000," entry and occupation of the premises by a tenant did not waive his right to insist upon a rental based on a sum less than \$31,837, the actual cost, since the lease did not limit the amount the landlord might spend on the building; the amount specified being inserted to fix the amount of rent which the tenant would have to pay.

Appeal from Superior Court, Los Angeles County; J. P. Wood, Judge.

Action by Frances K. Ross against the Keaton Tire & Rubber Company. From judgment for plaintiff, defendant appeals. Reversed.

Devoto, Richardson & Devoto, of San Francisco, and O'Melveny, Millikin & Tuller, of Los Angeles, for appellant.

Frank G. Tyrrell, of Los Angeles, for respondent.

SHAW, J. Action in unlawful detainer. Judgment went for plaintiff, from which defendant has appealed.

[1] Plaintiff was the owner of a vacant lot in Los Angeles, and, by a lease prepared by her and executed by the parties on November 29, 1919, she let and demised the same, with a two-story building to be erected thereon, to defendant for a term of 10 years from the completion of the building. The portion of the lease pertinent to the question presented is as follows:

"The party of the first part [plaintiff] does hereby lease to the party of the second part [defendant] * * * her lot, 1337 S. Flower St., Los Angeles, California, with a two-story building to be erected thereon and to cost approximately twenty-one thousand dollars (\$21,000.00). In case of building being damaged or destroyed by fire, or other causes, party of the first part is to replace or build, as may be the

case, as soon as possible, and party of the second part is to continue the lease for the full term of ten years. * * * Said second party agrees to pay as rent for said premises the sum of 6% net on thirty thousand dollars (\$30,000.00), valuation of lot, 8% on cost of buildings, and to pay all taxes. * * * The object of this lease is to absolutely net the owner 6% on lot and 8% on cost of building."

About February 1, 1920, plaintiff commenced the erection of the building, in the design of which she selected an architect, who likewise, as plaintiff's agent, acted as superintendent of construction and the letting of the several contracts therefor, for all of which she expended the sum of \$31,837, which the court found was the reasonable cost of the building, which was completed about June 20, 1920, at which time defendant, with plaintiff's consent, took possession thereof and has continued ever since to occupy the same. As payment of the monthly rental, defendant tendered to plaintiff an amount equal to 6 per cent. net on the value of the lot and 8 per cent. net on \$21,000, which it claimed was the amount of rent it was required to pay under the terms of the lease. Plaintiff refused to accept this tender and demanded a rental on the building of 8 per cent. based upon the cost thereof as found by the court, plus 6 per cent. on the agreed value of the lot, and upon defendant's refusal to pay the same she on September 15, 1920, served upon defendant a notice to pay the rent within three days or surrender possession of the premises. This action followed defendant's failure to comply with such demand.

The solution of the question presented depends upon an interpretation of the provisions of the lease above quoted, wherein, among other things, it was expressly stipulated that the building which plaintiff was to erect upon the lot, and upon the cost of which defendant was to pay 8 per cent. was "to cost approximately \$21,000." Section 13 of the Civil Code provides that words are to be construed "according to the context and the approved usage of the language." The word "approximate" is defined "to come close to, as in quality, degree or quantity; approach closely without coinciding with exactly," or reaching the specified amount or quantity. *Bloomington Canning Co. v. Union Can Co.*, 94 Ill. App. 62. The adverb "approximately" has a different meaning. It is defined as "very nearly, but not absolutely." It is synonymous with and means "about," and is used in the sense of an estimate merely, meaning more or less, but about and near the amount, quantity, or distance specified.

In the absence of other evidence, and having reference to the context and subject-matter of the contract, we think it clearly appears that the term "to cost approximately

\$21,000" was by the parties employed in the sense thus defined; that is, as an approximate estimate, whether more or less, but about or near the sum specified, and not in the sense, as claimed by appellant, of restricting the cost to a sum not in excess of \$21,000, which might be the case if the clause read "to approximate a cost of \$21,000," the meaning of which would be to approach closely, but not coinciding with or reaching, the sum specified. On the other hand, and in the absence of evidence affecting the interpretation, the contract cannot be construed to mean that the parties contemplated the construction of a building to cost, as found by the court, more than 50 per cent. in excess of that agreed upon. Certainly plaintiff could not have insisted, over defendant's objection, that a building costing \$10,000 would have constituted a compliance with her contract to erect a building to cost approximately \$21,000. The case of *Vaughan v. Ford*, 162 Mich. 37, 127 N. W. 280, involved facts very similar to the instant case. In that case a contention arose over a change made in the plans for the doing of concrete foundation work for a structure, in accordance with which substituted plan the contractor, upon representations of the owner that the cement work called for by such change would be approximately the same as under the original plan, agreed to do the work for the original price. The proof showing that the plan as changed required an excess of 1,049 cubical feet in a total of 170,837 cubical feet, the court held that the work called for by the substituted plan was not approximately the same as that under which the contract was let; the reason assigned therefor being that the difference in the two plans was a matter of mathematical computation, and hence, since the substituted plan was in excess of that called for by the original specifications to the extent of 1,049 cubical feet, the contractor was entitled to compensation therefor. In other words, the difference, though appearing small, was so great that it could not be said to be approximately the same. In deciding the case the court said:

"The word 'approximately' is to be construed with reference to the subject-matter. An estimate of the cost of constructing a building, where uncertain factors enter into the estimate, might well be held to be approximately correct, although the actual cost exceeded the estimated cost by more than the difference in this case."

In the instant case no reason occurs to us why, at the time of the execution of the lease, the cost of the building which plaintiff proposed to erect was not a matter susceptible of an accurate estimate, and the construction thereof let to a competent and responsible contractor for a definite and certain sum. However this may be, and conceding such was not the case and that uncer-

tain factors entered into the estimate, it cannot, we think, be said that \$31,837 is approximately \$21,000.

[2] The record is brought up in typewritten form, and, though no reference is made thereto in the briefs of the parties, it appears from an examination of the same that soon after the execution of the lease plaintiff began the preparation of plans for the building, which, though under no obligation so to do under the lease, she submitted to defendant, who suggested certain changes therein which it is alleged in the complaint were adopted by plaintiff, the effect of which was to increase the cost of the building to the total sum of \$31,837. This allegation was denied by defendant, but, assuming that there might be evidence of acts of defendant which would render it liable for increased cost of the building due to its requests, there is no finding upon such issue, other than the following:

"That said building was erected according to plans and specifications suggested and approved by defendant and changed from time to time at its special instance and request; that defendant was fully informed and knew at all times the cost of said building."

While this finding is responsive to the issue as to whether or not defendant requested changes in the plans, it does not appear therefrom that such changes added one cent to the cost of the building. On the contrary, the effect thereof, as claimed by appellant, might have been to reduce the cost. Neither is there any evidence, so far as we are advised, as to the amount of such increased cost, if any, without which the trial court was not warranted in holding defendant liable therefor.

There appears in the typewritten transcript a number of letters, introduced en masse and marked Exhibit A, to which no reference is made in their briefs by either of the parties. Some of these letters are to and from parties whose connection with the transaction is not made to appear, and, while some of them seem to have reference to the matter in controversy, they are unsigned. It does appear, however, that prior to the commencement of construction differences existed between plaintiff and defendant as to the amount of rent which the latter should pay under said lease and the cost of the building, which were made the subject of correspondence. That defendant was informed by plaintiff on January 29, 1920, that the building, instead of costing \$21,000, would cost \$25,000, and that upon ascertaining the exact cost she would send defendant a new lease for execution, which she did in fact do. It was not accepted by defendant, who, prior to the letting of the contract, replied to her letter, stating in effect that it stood upon the terms of the lease, but further said:

"Under present conditions it does not seem to be the best time to build, and if you feel that you do not want to carry out the terms of the present lease as signed by you, we believe we would not insist so as to cause you a big loss, and would be inclined to favor you with a release from the present contract."

Now, while clearly of the opinion that appellant is in error in insisting that the lease should be construed as restricting the cost of the building upon which the rental is fixed at 8 per cent. upon an amount not in excess of \$21,000, but that such figure was intended as an estimate only, and might be either more or less than said sum, we are likewise of the opinion that the record as presented is insufficient to warrant the conclusion of the court in fixing the sum of \$31,837 upon which defendant should be required to pay 8 per cent. Neither is there in the muddled record presented to this court any evidence upon which we can say the parties placed a practical construction upon the terms of the indefinite provision of the lease.

[3] Appellant invokes the rule that a written contract should, in case of doubt, be interpreted against the party who has drawn the contract—in this case the plaintiff. Under our opinion, however, since we hold that it was not the intention of the parties under the terms of the written contract to limit the construction of the building to a cost of \$21,000, but that they contemplated the sum so specified merely as an estimate, and that the cost might vary more or less therefrom, such rule is not applicable. It is clear that the building cost more than \$21,000; it is likewise, we think, clear that defendant contemplated the possibility of paying the stated percentage on more than said sum. But, while this court upon the record presented is of the opinion that defendant is not chargeable with rent at 8 per cent. upon the cost of the building as found by the court, it is unable, upon the evidence presented and want of sufficient findings, to say just what it should be.

[4] We find no merit in respondent's contention that, regardless of the cost of the building, defendant, by entry and occupation of the same, waived its right to insist upon a rental based upon any less sum than its actual cost. There is nothing in the contract by which plaintiff was limited as to the amount which she might, at her option, expend in the construction of the building. The provision as to cost was inserted for the purpose of fixing the amount of rent which defendant should pay. If it be true that plaintiff expended a greater sum in the erection of the building than that upon which, under a proper interpretation of the contract, defendant was required to pay 8 per cent. as rental, its acceptance of the building did not constitute a waiver of the covenant. It is quite true, as held in *Weed*

v. Lindsay & Morgan, 88 Ga. 686, 15 S. E. 836, 20 L. R. A. 33, that if plaintiff had erected a building at a cost of \$10,000 only, and defendant had accepted the same, it would have constituted a waiver as to the erection of a building costing \$21,000, upon which, however, under the terms of the lease, it could only have been required to pay rent upon the actual cost. While no restrictions are imposed upon plaintiff as to the amount which she might expend in the erection of the building, nevertheless the amount of rent which she could exact from defendant as tenant was restricted to a certain percentage upon an amount to be ascertained under a proper interpretation of the lease.

The judgment is reversed, and a new trial ordered, if the parties are so advised, wherein, if had, the trial court is directed to construe the clause specifying a building "to cost approximately \$21,000" as an agreed estimate of such cost, the variation from which should be determined upon proper and competent evidence received touching the surrounding circumstances of the transaction; practical construction of the lease by the parties, if any; amount of increased cost of the building due to defendant's acts in changing the plans and specifications, if any, and for which, under the circumstances made to appear, it should be required to respond; and such other evidence as the court may deem proper.

We concur: CONREY, P. J.; JAMES, J.

57 Cal. App. 85

PEOPLE v. WATSON. (Cr. 848.)

(District Court of Appeal, Second District, Division 1, California. March 16, 1922.)

1. Searches and seizures ☞7—Fourth and Fifth Amendments to United States Constitution apply only to seizures by federal agencies.

Const. U. S. amends. 4 and 5, relating to searches and seizures, only apply to the federal government and its agencies.

2. Constitutional law ☞12—Federal constitutional amendments apply only to federal government, and do not limit power of states unless clearly indicated.

United States constitutional amendments apply only to the federal government, and constitute no limitation on the power of the states unless a contrary purpose is clearly stated or implied by the terms in which they are expressed.

3. Criminal law ☞395—Articles unlawfully seized properly admitted in evidence.

In a prosecution for burglary in the second degree, the fact that articles claimed to have been taken were seized from the person of accused without warrant in violation of

Const. art. 1, § 19, did not render their introduction in evidence error, although the court overruled the motion of accused to have the articles returned to him.

4. Criminal law ⇨1134(9)—Denial of motion to return articles unlawfully seized not reviewable on appeal.

In a prosecution for burglary in the second degree, denial of a motion to return to accused articles unlawfully seized will not be reviewed on appeal from judgment of conviction.

5. Criminal law ⇨1166½(12) — Remarks by court as to manner of questioning prospective juror not prejudicial.

The court's remarks while selecting jury that defendant's interrogation of a prospective juror was unfair held not prejudicial where the juror was excused upon peremptory challenge, and defendant did not exhaust such challenges.

Appeal from Superior Court, San Bernardino County; J. W. Curtis, Judge.

H. A. Watson was convicted of burglary in the second degree, and he appeals. Affirmed.

Walter C. Davison, of Riverside, for appellant.

U. S. Webb, Atty. Gen., and Arthur Keetch, Deputy Atty. Gen., for the People.

SHAW, J. Upon an information charging him therewith, defendant was convicted of the crime of burglary in the second degree. He has appealed from the judgment and an order denying his motion for a new trial.

That the evidence is ample to justify the verdict is not questioned. It appears that by means of a pass-key the house of J. M. Oakey was burglariously entered in his absence in the daytime, and a pair of socks, necktie, and a child's bank containing a small sum of money stolen therefrom. Shortly thereafter defendant was apprehended, and upon a search of his person, had without warrant, a bunch of pass-keys, the stolen necktie and socks, together with a small sum of money, were discovered in his possession.

When the case was called for trial defendant, pursuant to notice theretofore given, moved the court that an order be made requiring the articles so taken from defendant to be returned to him. The motion was denied, and, over defendant's objection, the articles were received in evidence, together with testimony that he had possession of the pass-keys. He insists that the ruling of the court in denying his motion and permitting the introduction of such evidence was in violation of his rights guaranteed by the Fourth and Fifth Amendments to the Constitution of the United States, and sections 13 and 19 of article 1 of the Constitution of

the state of California, in support of which he cites the case of *People v. Mayen*, 35 Cal. App. Dec. p. 442.

[1, 2] We may dismiss from consideration the provisions of the federal Constitution, for the reason that it is well settled that the Fourth and Fifth Amendments thereof, invoked by defendant, apply to searches and seizures only when made by the federal government and its agencies (*Weeks v. United States*, 232 U. S. 383, 34 Sup. Ct. 341, 58 L. Ed. 652, L. R. A. 1915B, 834, Ann. Cas. 1915C, 1177; *Barron v. City of Baltimore*, 7 Pet. 243, 8 L. Ed. 672; *Smith v. Maryland*, 18 How. 76, 15 L. Ed. 269), and constitutes no limitation on the power of the states. Indeed, the rule announced applies to all the amendments, unless a contrary purpose is clearly stated or implied by the terms in which they are expressed.

[3-4] As to the application of sections 13 and 19 of article 1 of the Constitution of this state, it must be conceded that the opinion of the District Court of Appeal in the case of *People v. Mayen*, supra, lends strong support to appellant's contention. That case, however, after decision by the Court of Appeal, was transferred to the Supreme Court, which, in an elaborate opinion (found in 205 Pac. 435), discussed the question presented by appellant in the instant case at great length, among other things saying that "evidence which is pertinent to the issue is admissible, although it may have been procured in an irregular or even in an illegal manner," and that in a criminal prosecution the action of the trial court in denying a timely application by the defendant for a return of the articles illegally seized from him, and later used as evidence against him, counter to his objection, cannot be reviewed on appeal from the judgment of conviction. Hence, conceding the articles were wrongfully and illegally taken from defendant's possession, and in violation of his constitutional rights, the ruling of the court in refusing to make an order that the same be returned to him, cannot be reviewed on this appeal, which is from the judgment pronounced upon his conviction in a criminal action. The *Mayen* Case, as decided by the Supreme Court, is an authority not only supporting the ruling of the trial court in receiving the articles in evidence, but also in support of the proposition that, on appeal from the judgment pronounced herein, defendant is not entitled to a review of the alleged erroneous ruling of the court in denying the motion.

[5] While selecting the jury the court, though not restricting the examination, gave expression to the opinion that defendant's interrogation of one of the prospective jurors was misleading and unfair. This action on the part of the court is assigned as

prejudicial misconduct. There is no merit in the contention. Not only was the juror excused upon the peremptory challenge of defendant, who did not exhaust his right to such challenges, but, conceding the court should have refrained from criticising the question which it permitted to be asked and answered, it is impossible to perceive how the substantial rights of defendant could in the slightest degree have been prejudiced by reason thereof.

The judgment and order appealed from are affirmed.

We concur: CONREY, P. J.; JAMES, J.

57 Cal. App. 36

WILLIAMS v. WILLIAMS et al. (Civ. 4114.)

(District Court of Appeal, First District, Division 2, California. March 11, 1922.)

1. Pleading $\S$ 406(5)—Probative facts alleged held merely defective allegation of marriage, sufficient in absence of attack.

In a complaint to annul a judgment for divorce which did not directly allege that the plaintiff was the wife of defendant, but which alleged numerous probative facts to that effect, the marriage was defectively pleaded and not entirely omitted, which is sufficient in the absence of an attack thereon.

2. Divorce $\S$ 167—In suit to vacate divorce for fraud, defendant cannot allege plaintiff was legal wife of another.

In a suit by a wife to annul for fraud a decree granting divorce to the husband, a cross-complaint by the husband, alleging that the wife had been formerly married to another and was not legally divorced from him, was not a necessary or proper pleading on behalf of the defendant.

3. Action $\S$ 50(4)—Suit to annul divorce for fraud and to recover damages from husband and subsequent wife does not improperly join two causes of action.

A suit by divorced wife against her husband and the woman he subsequently married to annul the divorce for fraud, and to recover from both defendants the damages occasioned to plaintiff, does not improperly join two causes of action.

4. Divorce $\S$ 167—Action to annul divorce, instead of motion, held proper remedy.

Where the divorced wife did not know of the entry of the judgment of divorce for more than two years after it became final, a suit in equity attacking the decree, instead of a motion, was the proper remedy.

5. Divorce $\S$ 167—Plaintiff held not guilty of laches in suit to vacate divorce.

Where a divorced wife did not learn of the entry of the final decree until more than two years thereafter and brought her suit to annul the decree for fraud within a month after learn-

ing of the decree, she was not guilty of laches which barred her right to relief.

6. Divorce $\S$ 79—Allegation in affidavit for publication that wife has "left the state" is not synonymous with statement that she has "departed from the state."

An allegation in an affidavit for publication of divorce summons that the wife has "left the state" is not synonymous with the phrase "departed from the state," used in Code Civ. Proc. $\S$ 412.

7. Divorce $\S$ 79—Affidavit destination of wife was unknown held material and false.

Where the affidavit for service of divorce summons alleged that the defendant's wife had "left" the state, instead of using the word "departed," as found in the statute, the further allegation that her destination was unknown, if it could be given effect to make the word "left" equivalent to the word "departed," was material and was false, where the evidence showed the affiant procured a pass for his wife to her destination and to that extent was a fraud upon the court.

8. Divorce $\S$ 79—Concealment of fact that husband was guardian for incompetent wife is fraud on the court.

A husband who had been appointed the guardian of his wife on adjudication of her incompetency owed to her and to the court a special duty and was guilty of a fraud in making affidavit for service of divorce summons upon his wife without revealing to the court the fact that she had been adjudicated an incompetent and that he was her guardian.

9. Divorce $\S$ 197—Attorney's fee cannot be recovered as damages in suit to annul divorce.

In a suit to annul a decree of divorce for fraud, the reasonable fee of plaintiff's attorney cannot be recovered as damages, since an attorney's fee was not an element of damages at common law and has not been made such by Code Civ. Proc. $\S$ 1021, or any other statute.

Appeal from Superior Court, City and County of San Francisco; George E. Crothers, Judge.

Action by Annabel Williams, adjudicated to be an incompetent person, by Lottie Rothman, her next friend, against Frank D. Williams and another, to annul a judgment for divorce. Judgment for plaintiff, and defendants appeal. Modified and affirmed.

A. J. Woolsey, of Oakland, and Ford & Johnson, of San Francisco, for appellants.

Henry B. Lister, of San Francisco, for respondent.

STURTEVANT, J. This is an appeal by defendants from a decree annulling the judgment which awarded the defendant Frank D. Williams a divorce from this plaintiff.

Several years prior to the 17th day of February, 1913, Annabel Williams and Frank D. Williams were married and had been living in Oakland. On the date last mentioned

they were occupying a house, 1561 Eighth street. At that time the defendant Katherine Specula was residing with them as a member of their household. A short time previous to that date, Mrs. Williams became afflicted with some sickness, and she seems to have been in a very debilitated state of health. While in that condition of health her husband filed a complaint charging her with being an insane person. A hearing was had, and on the 17th day of February, 1913, she was adjudged an insane person and was committed to the state hospital at Agnews and her husband was appointed guardian of her person and estate. She remained an inmate of the state hospital until December, 1915, when two of her sisters came to California, and while they were here the plaintiff was taken out of the asylum temporarily. A little later the husband consented that the plaintiff might accompany her sisters to Dodge City, Kan., provided that he should remain her guardian; and at the same time he promised to make a monthly remittance to his wife at Dodge City, Kan. As a part of this plan and for the purpose of carrying it out, the defendant Williams obtained for his wife a pass to Dodge City, Kan. The arrangement seems to have been amicably made, and good feeling seems to have prevailed all around. When the wife was about to leave, the husband brought her a box of candy and a pass to Dodge City, Kan., and, speaking to the plaintiff's sisters, said:

"Girls, you take my wife East, and, just as quick as she is able to come back, wire me and I will give you her fare. What is the use of taking her things? Because it will not be very long I am sure until she is back in her home."

Thereupon the wife left for Dodge City. The remittance was made monthly for three months and then it was stopped. On September 13, 1917, the defendant Williams filed in the superior court of San Francisco a verified complaint charging his wife with desertion. At the same time he filed an affidavit and took out an order for the publication of the summons. The action was brought on for a hearing on the 26th day of December, 1917. The husband appeared as a witness in his own behalf, testifying that he was a resident of San Francisco. He produced as a corroborating witness Katherine Specula, who testified that her residence was 1561 Eighth street, Oakland. On that day an interlocutory decree of divorce was entered, and thereafter, on December 28, 1918, at Los Angeles, the defendants Frank D. Williams and Katherine Specula were married and thereafter made their home in the house at 1561 Eighth street, Oakland.

After this plaintiff went to Dodge City, Kan. Her husband did not write to her personally, but did write to some of the members of her family residing in Kansas. The plaintiff did not write to her husband, but

a few letters were written to him by members of the plaintiff's family. The exact dates of each of these letters is not clear, but the testimony seems to indicate that a sister-in-law wrote a letter for the plaintiff and sent it to the plaintiff's husband in August, 1918. Whatever may be the date of the letter, the contents consisted of a request for permission that the plaintiff might return to the state of California. The letter was answered by the husband's attorney. The answer declined the permission and stated that "Mr. Williams had other obligations." No other correspondence was exchanged, and the plaintiff, without permission, returned to the state of California on the 19th day of February, 1920. After she arrived here, she learned of the changes that had been made in her affairs, and on March 10, 1920, she commenced this action.

[1] The defendants advert to the rule of law that a bill in equity must allege and show that it would be against conscience to allow the enforcement of the judgment in the divorce case, or that it would work injury or injustice to the plaintiff in some specific manner. They then urge the point that in her complaint the plaintiff does not allege that Annabel Williams and Frank D. Williams were ever married, or that they are husband and wife. It is true that there is no direct and concise allegation on that subject, but many probative facts are set forth in such a manner that we think the plaintiff's pleading is an example of facts defectively pleaded, but not an instance of a failure to state sufficient facts. If the two persons were never married, it was a very simple matter to have made the attack when the evidence was being introduced; but no such attack was made. Attached to the bill of exceptions, the appellant has a list of assignments of error which include 22 attacks on the insufficiency of the evidence to justify the findings. But in all those attacks there is not a word on the subject of marriage or no marriage.

[2] The defendant Frank D. Williams filed a cross-complaint setting up facts showing that the plaintiff had formerly been the wife of one John Kelly, and that she was not legally divorced from him. That paper might have been properly filed by John Kelly, but it was not a necessary or proper pleading on behalf of the defendant Williams.

In plaintiff's complaint she gave undue importance to certain matters regarding a charge of insanity which was filed against her by Frank D. Williams. The appellants did not move to have such matter stricken out, and now devote considerable portions of their briefs to those matters. They are quite immaterial so far as this action is concerned, except as may hereinafter appear.

[3] The appellants also make the point

that there are two causes of action improperly joined in the complaint. They assert that the complaint charges a cause of action against Frank D. Williams to vacate a judgment alleged to have been obtained by fraud and also to recover damages from him, whereas the cause of action against the defendant Specula is to recover damages only. The attack is entirely without merit. *San Diego Water Co. v. Flume Co.*, 108 Cal. 549, 556, 41 Pac. 495, 29 L. R. A. 839.

[4] The interlocutory decree of divorce of which complaint is made was filed December 26, 1917; the final decree was filed December 27, 1918. The plaintiff alleged that she did not know of the entry of the judgment until she returned to the state of California on the 19th day of February, 1920. This action was commenced March 10, 1920. The appellants claim that the plaintiff should have proceeded by motion instead of by action. Under the foregoing facts the respondent did not err in making her attack by filing a suit in equity instead of by motion.

[5] It is further claimed that the plaintiff was guilty of laches. The facts above recited do not sustain the claim. Neither is the claim supported by the fact that in or about the month of August, 1918, when the plaintiff had written for permission to return to the state of California, Williams replied by a letter written by his attorney that Williams "had other obligations."

The affidavit for publication of summons in the divorce case is as follows:

"That defendant left the state of California on the 25th day of November, 1915, for some place without the state of California unknown to affiant; that the last time affiant heard from defendant was by letter from one of her relatives dated March 29, 1916; that the present whereabouts of defendant is now unknown to affiant, but affiant has been informed and verily believes that defendant is now residing somewhere in the state of Kansas; that a summons was duly issued out of this court to the sheriff of the city and county of San Francisco, with directions to said sheriff to serve the same upon defendant, and that said sheriff has returned the same to the clerk of this court with his return thereon indorsed to the effect that the said defendant could not be found in the said city and county of San Francisco."

It will be noted it does not purport to rest on that part of section 412 of the Code of Civil Procedure referring to persons (1) who reside out of the state, or (2) cannot after due diligence be found within the state, or (3) conceals himself to avoid the service of summons; but it does purport to rest on that part of the statute that refers to a person who "has departed from the state."

[6] Let us now examine the affidavit to see how it squares with the call of the statute. The language is as follows:

"That defendant left the state of California on the 25th day of November, 1915, for some

place without the state of California unknown to affiant; that the last time that affiant heard from defendant was from one of her relatives dated March 29, 1916; that the present whereabouts of defendant is now unknown to affiant, but affiant has been informed and verily believes that defendant is now residing somewhere in the state of Kansas."

It will be noted that the statute uses the word "departed," but the affidavit uses the word "left." The two words are not synonymous. *Pezzoni v. Pezzoni*, 38 Cal. App. 209, 175 Pac. 801.

[7] If, for the purpose of strengthening the meaning of the word "left" and to give it something of the significance of the word "departed," we give some force and effect to the additional language contained in the affidavit, then the words "for some place without the state of California unknown to affiant" become material. But those words were false. Under the uncontradicted testimony, the defendant knew where the plaintiff was going when she left the state of California because at that time he obtained for her a pass to Dodge City, Kan. That portion of the affidavit "that the present whereabouts of defendant is now unknown to affiant, but affiant has been informed and verily believes that defendant is now residing somewhere in the state of Kansas," is not helpful. The "present whereabouts," etc., is not responsive to any call of the statutory provisions "has departed from the state." The statement on information and belief, "that defendant is now residing somewhere in the state of Kansas," is not, properly speaking, an affidavit. The false representation above referred to invalidated the affidavit, and the affidavit was to that extent a fraud on the trial court. *Parsons v. Weis*, 144 Cal. 410, 77 Pac. 1007.

[8] As the defendant Williams was the guardian and husband of the plaintiff, the highest duty was owing from him to her. As the defendant Williams was, as guardian, an officer of the court, a special duty was owing by him to the court. When he did not call to the attention of the trial court either in his complaint, or in the affidavit accompanying it, the fact that he was suing his ward, and that his ward was an incompetent person on whom a summons might not legally be served, he was guilty of concealment, another fraudulent act. *Silva v. Santos*, 138 Cal. 536, 71 Pac. 703; *Pomeroy's Eq. Juris.* 900, 902. It is clear, therefore, that the evidence sustains the findings.

[9] In her complaint the plaintiff pleaded:

"That, by reason of the wrongful acts of defendants herein in obtaining said fraudulent judgment of divorce, this plaintiff has been delayed and prevented from proceeding with an action against F. B. Williams defendant herein for her maintenance and support and has been compelled to hire an attorney to vacate said judgment of divorce. That the reasonable

value of the services of her attorney for such services is the sum of \$500."

As supporting the above allegations, on the trial she introduced evidence of the reasonable value of her attorney's fee and no other evidence. The trial court found the above allegation to be true and awarded damages as prayed. It thus appears that the theory of the pleader was that she was entitled to recover the attorney fee as an element of damage. Such was not the rule at common law. 1 Sedgwick on Damages, sec. 229. No statute in California has changed that rule. Code Civ. Proc. § 1021; Grannis v. Superior Court, 143 Cal. 630, 633, 77 Pac. 647. The judgment rendered by the trial court is modified by striking out that portion that awarded judgment against the defendants for damages in the sum of \$500. The respondent is awarded her costs on appeal.

As so modified, the judgment is affirmed.

We concur: LANGDON, P. J.; NOURSE, J.

57 Cal. App. 1

SESSIONS v. PACIFIC IMPROVEMENT CO.
et al. (Civ. 3815.)

(District Court of Appeal, First District, Division 2. California. March 10, 1922. Rehearing Denied April 8, 1922. Hearing Denied by Supreme Court May 9, 1922.)

1. Brokers ⚡53—Broker must show himself the efficient cause of sale.

Broker, seeking commission under contract entitling him thereto on sale resulting through "his negotiations or efforts," was required to show that he was the efficient cause of the sale.

2. Brokers ⚡52—Contract entitling broker to commission on sale which originated with him or on which he is employed construed.

Contract entitling broker to a commission on sale "which originated with you or upon which you are employed" entitled broker to commission regardless of whether he merely found the purchaser to whom the sale was made, or himself negotiated the sale, since a broker may originate sale without carrying it to completion.

3. Brokers ⚡52—Broker's contract held not applicable merely to services being performed at time of its execution.

Contract, entitling broker to commission on sale "upon which you are employed," held not limited to a sale resulting from services being rendered at the date of the agreement.

4. Brokers ⚡53—Contract construed so as to secure to broker, who has been procuring cause of sale, the payment of his commissions.

Wherever there is justification for treating the broker as the procuring cause of the sale, the law leans to that construction of the contract and to that interpretation of the facts

of the case and the acts of the parties which will best secure to the broker the payment of his commissions.

5. Brokers ⚡53—When broker is predominating effective cause of sale.

A broker, to be the predominating effective cause of a sale, must set in motion a chain of events which, without break in their continuity, cause the buyer and seller to come to terms as the proximate cause of his peculiar activities; the mere fact that he contributes indirectly or incidentally to the sale by imparting information which tends to arouse interest being insufficient.

6. Brokers ⚡53—Entitled to commissions where procuring cause, though negotiations were completed through some one else.

A broker, who is in fact the primary procuring cause, will not be deprived of his commission merely because negotiations were completed through some one else, even perhaps without broker having himself met or communicated personally with the buyer.

7. Appeal and error ⚡999(1)—Determination of question of fact by jury not disturbed on appeal.

Determination of question of fact by the jury will not be disturbed on appeal.

8. Brokers ⚡53—Broker held procuring cause of sale.

Where broker conducted negotiations with shipbuilding corporation for sale of site for shipbuilding yard, and the land was eventually purchased, at the price and on the terms named by broker to the shipbuilding corporation, with money furnished by the Emergency Fleet Corporation, on the advice of the shipbuilding corporation, to enable the shipbuilding corporation to take active management of shipyard and to build ships under orders of the Emergency Fleet Corporation, to facilitate the construction of ships during the World War, the broker was the procuring cause of the sale though the sale was consummated between owner and the Fleet Corporation.

9. Brokers ⚡50—Under ordinary brokerage contract broker must effect sale within limit of time granted.

A broker with a contract in the ordinary form must effect a sale within the limit of time granted, to be entitled to a commission.

10. Brokers ⚡50—Broker, who was procuring cause of sale, entitled to commission, though sale was effected after termination of contract.

Where a brokerage contract provided for termination thereof on 30 days' notice, the mere fact that the sale was completed more than 30 days after owner's notice terminating agreement, but expressing a willingness to pay broker a "commission on all sales * * * which originates with you or for which in the judgment of the directors you are responsible," did not deprive broker, who was the procuring cause of the sale, of the right to commission.

11. Corporations ⚡289—Bound by contract employing broker, signed by de facto general manager without written authority.

Contract employing broker, signed by acting general manager of the corporation, held to

bind the corporation notwithstanding absence of written authorization to sign contract, since a de facto general manager may bind a corporation without express written authority.

12. Brokers ⇐63(1)—May recover in assumpsit by showing prevention of performance.

A broker may recover from owner in assumpsit by showing prevention of performance.

13. Assumpsit, action of ⇐6(1)—Broker's contract cannot be set up to defeat implied assumpsit.

In broker's action in assumpsit for damages caused by prevention of performance, the broker's contract cannot be set up to defeat the implied assumpsit.

14. Assumpsit, action of ⇐25—Broker's contract admissible in action in assumpsit based on prevention of performance.

In broker's action in assumpsit for damages caused by prevention of performance, the broker's contract is admissible in evidence to show how the cause arose, and to supply a measure of damages.

15. Brokers ⇐86(1)—Evidence held sufficient for submission of question of prevention of performance to jury.

In broker's action in assumpsit based on prevention of performance, evidence held sufficient for submission of question of prevention of performance to jury.

16. Brokers ⇐82(1)—In broker's action in assumpsit based on prevention of performance, allegation that sum demanded was reasonable value of service was unnecessary.

In broker's action in assumpsit, based on prevention of performance, in which the broker relied on the rate of compensation specified by the contract as the standard of the value of his services, it was not essential to allege that the sum demanded was the reasonable value of the services.

17. Pleading ⇐369(1)—Plaintiff not required to elect between count seeking commission and count in assumpsit based on prevention of performance.

Broker, suing owner for commission in one count and in assumpsit based on prevention of performance in another count, was not required to elect between the two counts, but could submit entire case to jury, permitting jury to decide which count was supported by the evidence.

18. Trial ⇐330(5)—General verdict in action involving two counts will not be disturbed, where evidence supports verdict on either count.

Where complaint contained two counts, and the jury rendered a general verdict and the evidence supports a verdict on either count, the verdict and the judgment entered thereon must stand.

19. Brokers ⇐65(4)—Broker held not to have forfeited right to commission by accepting employment from purchaser.

Civil engineer, who was procuring cause of sale of land to be used for shipbuilding yard to Emergency Fleet Corporation, did not forfeit his right to commission, under contract entitling him thereto on sale of land, by accept-

ing employment with the government's engineers after the Fleet Corporation had obtained an option, where his services consisted in making the land more available for such purpose; there being no conflict between such services and his duty toward the owner.

20. Trial ⇐252(1)—Refusal of instruction not supported by evidence held proper.

Refusal of instruction not supported by the evidence held proper.

21. Appeal and error ⇐1064(4)—Instruction that words may be construed not reversible error for failure to positively declare the meaning.

Instruction that words used in a contract "may be construed as meaning," etc., without positively declaring the meaning, held not reversible error; any defect being formal.

22. Trial ⇐296(2)—Instruction, submitting question as to broker's right to commission, held sufficient in view of other instructions.

In broker's action for commission, instruction, entitling broker to commission if the sale resulted from negotiations conducted by him "in pursuance of" specified letter, held not objectionable for failure to specify what constituted service pursuant to the letter, in view of other instructions charging jury fully as to what performance was required as the basis of recovery.

Appeal from Superior Court, Alameda County; Dudley Kinsell, Judge.

Action by George L. Sessions against the Pacific Improvement Company, a corporation, and another. Judgment for plaintiff, and defendants appeal. Affirmed.

M. C. Chapman, of Oakland, and James F. Peck and Alan C. Van Fleet, both of San Francisco, for appellants.

Gorrill & Trowbridge and Cushing & Cushing, all of San Francisco, and C. E. Snook and Everett J. Brown, both of Oakland, for respondent.

JOHNSON, Justice pro tem. This is an action for the recovery of \$30,000 with interest from September 11, 1918, claimed by plaintiff to be payable to him by reason of the sale of a tract of land comprising 156 acres and forming part of a parcel known as tract 30, situated in the Oakland Harbor, and belonging to the defendants. The case was tried before a jury, which rendered a verdict in plaintiff's favor for the full amount of his claim against both defendants. From the judgment thereupon entered the defendants have appealed.

The land in question was conveyed on September 11, 1918, to the United States Shipping Board Emergency Fleet Corporation for the sum of \$1,000,000; and plaintiff claims a commission of 3 per cent.

The property stood of record in the name of the defendant Oakland Water Front Company. That defendant, however, held 434/779

of the land in trust for its codefendant Pacific Improvement Company, and this latter corporation owned about two-fifths of the capital stock of the Oakland Water Front Company.

The tract adjoins another parcel carved out of tract 30, which had previously been sold by the defendants to the Union Iron Works, and upon which was located the so-called Alameda plant of the Bethlehem Shipbuilding Corporation, one of the instrumentalities used by the United States government in providing itself with ships during the war. The purchase made by the Emergency Fleet Corporation was for the purpose of establishing a shipyard to be known as the Liberty Shipyard, for use by the Bethlehem Shipbuilding Corporation, in conjunction with its own plant, with a view to speedy augmentation of the supply of ships, then so urgently needed for the transport of troops and stores to the seat of war in Europe.

Acting under a contract which will presently be mentioned, plaintiff had carried on extended negotiations with representatives of the Bethlehem Shipbuilding Corporation between June, 1917, and April, 1918; and while these negotiations were undeniable links in the chain of causation, yet it is contended by defendants that plaintiff was not the immediate instrument through whom the sale to the Emergency Fleet Corporation was ultimately effected. It is chiefly upon this ground that plaintiff's claim to compensation is resisted by the defendants.

The defendants owned extensive areas of marsh and tide lands along the Oakland estuary, which they were desirous of marketing; and in furtherance of that design they took plaintiff into their employ in 1915, agreeing to pay him a stated monthly salary and a commission of 2½ per cent. of the proceeds derived from sales of land made with his aid. Plaintiff is a civil engineer by profession; and he came to this service with special knowledge of the property, acquired during a business association of almost a decade with his father, a specialist in such lands, from whom also had been transmitted to plaintiff a storehouse of information and data which enabled him to render, with respect to these lands, a unique service.

The employment of plaintiff on the terms mentioned continued until July 1, 1917; and plaintiff's duties pertained to the work of dredging, reclamation and development of the properties, combined with endeavors to find purchasers. The lands were partly submerged, and considerable reclamation work had to be done in order to prepare them for sale. For the purpose of giving access to ships and providing other facilities, it was necessary to dredge waterways, deepen channels, and impound filling material, and of all this work plaintiff had charge.

During plaintiff's original employment and by his aid the Alameda plant of the Bethlehem Shipbuilding Corporation was sold by defendants to the Union Iron Works in March, 1917. From a time antedating plaintiff's engagement the two defendants have had a common office in the Crocker building in San Francisco, and their administrative work has been done by a single staff of clerks. The directorates of the companies, while not identical in membership, have had a majority in common; and throughout the period of plaintiff's service the office management of both companies was in the hands of S. F. B. Morse. Officially he was the general manager of the Pacific Improvement Company and the secretary of the Oakland Water Front Company, and actually, as he himself testified and as the evidence otherwise shows, he was "the man in charge of the business of both companies."

Such was the state of affairs when on June 21, 1917, a new contract of employment was made with plaintiff, evidenced by the following letter written on a letter sheet of the Pacific Improvement Company:

Pacific Improvement Company,
Crocker Building, San Francisco.

June 21, 1917.

Geo. L. Sessions, Esq., 401 Crocker Building, San Francisco, California—Dear Sir: Your present connection with the Pacific Improvement Company, whereby you receive a certain salary, terminates the first of July. After that, you will work on the sale of the Oakland Water Front Company property on a commission basis.

We will pay you a commission of three per cent. (3%) on any sale that results through your negotiations, or efforts, or which originates with you, or upon which you are employed.

Until further notice we will not appoint any other agent or agents. This arrangement is subject to cancellation upon (1) month's notice.

Yours very truly, S. F. B. Morse,
SFBM/GP General Manager.

This new arrangement became effective on July 1, 1917, and under it plaintiff continued to render the same character of service as before. Apparently the only change made in the relation between him and the defendants was that he no longer received a stated salary, and in case of a sale he became entitled to a somewhat larger commission.

The land in question possessed a location which was pronounced "an ideal shipyard" by Mr. Tynan, the chief local representative of the Bethlehem Shipbuilding Corporation; and plaintiff bent his energies toward putting the land into condition for ready sale. Under his direction plans and surveys for dredging operations were made and reclamation work was pressed forward. At the same time plaintiff kept the attention of the representatives of the Bethlehem Shipbuilding

Corporation fastened on the property, and presented detailed information in a form which pictured the peculiar merits of the tract for shipbuilding purposes.

While these negotiations were being conducted, a small sale of a neighboring parcel was made in October, 1917, by plaintiff for defendants, for which plaintiff received the commission stipulated in his contract. And it is not without significance that while the Oakland Water Front Company disputes the authority of Mr. Morse to act for it as manager, yet the check given to plaintiff for the amount of his commission was the check of that company.

With respect to the tract in question, plaintiff between June, 1917, and April, 1918, had frequent meetings with Harrison S. Robinson, attorney for the Bethlehem Shipbuilding Corporation, and with J. R. Christy, manager of its Alameda plant. Through them maps, surveys, and other appropriate data prepared under plaintiff's direction were brought to the attention of Joseph J. Tynan, who had general charge of the Bethlehem Shipbuilding Corporation's interest about San Francisco Bay. In consequence of plaintiff's activities both Robinson and Christy became impressed with the superior advantages of the property; and their opinions, communicated to Tynan, had a potent influence in leading him to recommend the purchase by the government.

While plaintiff was constantly urging that the Bethlehem Shipbuilding Corporation should purchase the property for itself, such was not the thought in the minds of those who were speaking for that company. In January, 1918, Christy told plaintiff that the Bethlehem Corporation would probably not buy the tract, but that he wanted to find out about the land for the Fleet Corporation.

In February the Bethlehem Corporation and the Oakland Water Front Company arranged to join in a dredging operation to improve the launching facilities in front of their respective lands; and, a certain permit of the city council of Alameda being necessary, there was presented to the council, through the Bethlehem Corporation, a letter from A. F. Pillsbury, the district officer of the United States Shipping Board, asking favorable action on the part of the council in the interest of the government's shipbuilding program. Plaintiff attended the sessions of the council and assisted in getting the permit.

The dredging contract, made by the Bethlehem Corporation and the Oakland Water Front Company with a dredging company under the supervision of plaintiff, was executed March 18th. In so far as the defendants' tract was concerned, the work contracted for tended to enhance the salability of the land for shipping uses. It is not inconsequential, therefore, that on the very day

the dredging contract was signed Mr. Robinson, the attorney for the Bethlehem Shipbuilding Corporation, called at the office of the defendants, and asked plaintiff for a price on the property in question, saying that he was not inquiring for the Bethlehem Corporation, but for other interests which he himself could not then identify. Plaintiff, in the presence of the assistant secretary of the Oakland Water Front Company, named \$1,000,000, and on the following day Morse notified Robinson that the price quoted by plaintiff was approved. This offer was coupled with the condition that the purchaser should assume the expenses for the dredging work already undertaken. Before ratifying the price quoted, Mr. Morse had telephoned to, and received the assent of, Mr. Hammond, a director of both the defendants, who was regarded as having the controlling voice on the question of price, and in his conversation with Hammond, Morse informed him that the sale would be subject to a 3 per cent. commission to plaintiff,

Immediately after the conversation with Robinson, Morse instructed plaintiff to make no further quotations to brokers on lands of the Oakland Water Front Company, and a little later Morse informed plaintiff that an offer of \$500,000 had been made through Christy to Hammond. This offer plaintiff advised Morse not to accept.

At this juncture there was launched on March 21st the portentous spring drive of the German army through the allied line, the impulse of which, continuing to April 1st, made that Easter season probably the darkest the world has ever seen, and led Gen. Haig to declare that the allies were with their back against a wall. Straightway the United States proclaimed its determination to quicken mightily the transport of troops, and the Emergency Fleet Corporation girded itself for the task of speeding the building of ships. In this posture of affairs the Bethlehem Corporation's agents did not confine themselves to inquiries concerning tract 30, but investigated as well other sites about the bay which might be available for government use. While matters were proceeding in this fashion, plaintiff received on April 3d the following letter:

Pacific Improvement Company,
Crocker Building, San Francisco.

April 3, 1918.

Mr. George L. Sessions, Office. Dear Sir: This will give you notice that the arrangement which I made with you in letter of June 21, 1917, is terminated.

Hereafter, until further notice, you will be paid three per cent. commission on any sales made of the Oakland Water Front Company properties in which this company is interested which originate with you, or for which, in the judgment of the directors, you are responsible. Any offers which come to us direct, or sales

which result as a direct offer to us in which the directors feel you have not had an important part, you will not receive a commission, or if you are compensated the amount of the compensation shall rest entirely in the hands of the directors of the company.

Very truly yours,

[Signed] S. F. B. Morse,
S. F. B. M/GP General Manager.

On receipt of this letter plaintiff expressed to Mr. Morse dissatisfaction with its terms, and called to Morse's mind the negotiations already had with the Bethlehem Shipbuilding Corporation, saying that he believed a sale through Robinson and Christy would soon come about. By reason of plaintiff's unwillingness to assent to the changes proposed, he "declined to develop new service under that agreement," as he tells us, and about April 16th he moved from the office of the defendants. He did not, however, abandon the negotiations previously initiated. At various times after leaving the office plaintiff called on Robinson, and discussed with him the reclamation work then going on and the subsoil conditions.

Thus matters continued without any new developments until early in May, 1918, when J. W. Powell, vice president and general manager of the Bethlehem Shipbuilding Corporation, visited San Francisco. Powell had been at the Alameda plant of his company about six months previously, at which time Christy had called his attention to this portion of tract 30; and on this occasion in May Powell's visit was in part with a view to informing himself concerning additional shipyard space, which might be acquired through the Emergency Fleet Corporation for the operations of his company. And he told Christy that the government was considering the construction of an immense shipyard, and that he was going to submit data to the officials of the government. In their conversation Christy stated to Powell that tract 30 was probably the best and most available site around the bay, and its merits were discussed together by Powell, Tynan, and Christy. As Mr. Tynan testified, the matter of the purchase of tract 30 "got very serious when there was a possibility of the Emergency Fleet Corporation putting in a shipyard there." This was because such increase of facilities would mean increased work for the Shipbuilding Corporation.

Realizing that Robinson had a much more intimate knowledge of the details of previous negotiations, Tynan had Robinson join Powell and himself at the Alameda plant. The substance of Robinson's conference at that time is best told in his own words:

"Mr. Powell said, 'I understand you have a site here for a big shipyard,' we then standing at the end of the wharf, fitting up wharf on the Alameda plant. From the end of that you could look over the balance of tract 30. He said, 'The Fleet Corporation is pretty nearly

determined that they must put themselves in a position to build as speedily as possible a large fleet to transport—for the carrying of troops; that is the critical thing that is coming—and they want to build extensions to existing yards, in order that the building operations may proceed with the greatest possible rapidity, and it has been suggested by Mr. Tynan and Mr. Christy, and I understand by you'—said Mr. Powell—that this site here," pointing out over the rest of that tract 30, 'is well fitted for the purpose named.' The conversation continued. I cannot remember, of course, all that was said, and then Mr. Powell asked me if I had—we discussed the depths and all of the features, the site, the foundation, the water front, whether he could get 16 slips, building berths, in along the front, or adequacy of the remaining space for fitting up wharves; the matter of getting railroad transportation into the yards; where the lines of steam railway were; the matter of street car transportation for workmen; the matter of getting fuel oil; getting electric power and gas for manufacturing purposes—all of those various features of the site were discussed. And Mr. Powell asked me if I had any written data or formal data of the matter which he could take back with him. I told him that I had in my possession, and had had in my possession, surveys, survey plats, of this tract 30, and a vicinity map, which showed its relation to property and the adjacent waterways, and the adjacent railway facilities, and another map which showed the borings and soundings; that is, depths of water and the depths of hardpan on which a foundation could rest all over that tract; and Mr. Powell asked me if I would get several copies of those maps, and any other formal data to him as soon as possible, in order that he might take it East with him for the information of the officials of the United States Shipping Board, who had asked him to take the subject up when he was out here. Q. And those maps and plats that you had at that time were furnished by whom? A. George Sessions."

That same day Robinson and Powell went to the office of the defendants, and there had a discussion with the assistant secretary of the Oakland Water Front Company, from whom they procured several copies of the maps which Powell wished to take east with him. On May 10th additional maps and data were sent to Powell by Morse.

In the negotiations which plaintiff had had with Robinson and Christy, plaintiff had told them that when it came to fixing a price and arranging terms, it would be best to deal directly with Mr. Hammond; and this information was communicated by them in turn to Mr. Tynan. So immediately after the meeting with Robinson, Powell asked Tynan to see the owners; and Tynan accordingly called upon Hammond at once, who named to him the same price which plaintiff, with the approval of Morse and Hammond, had previously quoted to Robinson. Tynan thereupon reported the price to Powell and recommended the purchase; and on May 11th Powell, as vice president of the Bethlehem Ship-

building Corporation, wrote to Hammond, and, after referring to Tynan's call, added that Hammond's "proposition to dispose of this property for the purpose of the construction of a shipyard by the United States government for the sum of \$1,000,000" had been forwarded to Washington, and he hoped to be able to get a definite answer within a fortnight. On May 13th Hammond wrote in reply that the Oakland Water Front Company would hold itself in readiness to deed the property to the United States government at the price mentioned.

Mr. Powell, who had become convinced of the desirability of the purchase, hastened back East, and there presented the matter personally to the officials of the Emergency Fleet Corporation. His recommendation resulted in a decision to purchase the site and turn it over to the Bethlehem Shipbuilding Corporation, for use as a shipyard at which ships should be built under a contract with the government. This contract bears date June 21, 1918, and recited in formal terms that, the Bethlehem Corporation having facilities sufficient for its ordinary needs, the Fleet Corporation would purchase the shipyard site, and that the Bethlehem Corporation, as superintendent for the Fleet Corporation, was to make the shipyard ready for use, and there engage in the construction of ships as outlined in the agreement, in order to minister to the government's needs in the pressing emergency.

When the decision was reached, the Emergency Fleet Corporation, acting upon a suggestion of Robinson, arranged first to take an option to purchase. On June 21st, the very day of the contract with the government, Powell notified Tynan that the Emergency Fleet Corporation was "handling the purchase," and requested Tynan to help as much as possible. By reason of this request Tynan had Robinson meet Hammond; and after they had discussed together the provisions of the proposed option, the formal document was prepared by Robinson. The option ran for 60 days, and the price named was that originally quoted to Robinson by plaintiff and confirmed to Powell by Hammond. The option bore date of July 1, 1918, and was actually executed by the Oakland Water Front Company on July 2d. Attached to the option was a copy of a map prepared by plaintiff and previously furnished by him to Robinson. On July 31st the Emergency Fleet Corporation elected to exercise the option, and gave written notice accordingly. Under date of August 3d, the Oakland Water Front Company acknowledged receipt of this notice, stating that it understood the notice to be an unqualified acceptance of the option, and that a binding contract was accordingly in effect. This acknowledgment was signed on behalf of the Oakland Water Front Company by "S. F. B. Morse, Manager." On September 11th, the deed, which, like the option,

was prepared by the attorney of the Bethlehem Corporation, was executed by the Oakland Water Front Company to the United States Shipping Board Emergency Fleet Corporation, and the agreed purchase price was paid by the government.

While these occurrences were taking place no information was conveyed to plaintiff by either of defendants. But about June 6th the plaintiff called on Robinson to discuss matters pertaining to the reclamation work and the drainage of the land, and to urge the purchase of the tract. At that time he learned from Robinson that Hammond's written offer was before the Emergency Fleet Corporation. On June 13th plaintiff and Robinson had another discussion concerning the drainage problem. At Robinson's request plaintiff called also on certain engineers who were acting as advisers for the government, and not only discussed the tract with the engineers and Robinson, but accompanied them to the tract itself. The purchaser was allowed to take possession in June, and during the course of the investigations the engineers looked often to plaintiff for historical data and special information not easily obtainable elsewhere. In these matters plaintiff showed a willingness to assist; and apparently his services were found of such value that about the middle of July he was employed by the engineers as an adviser, and particularly to furnish the desired historical information. He continued in such employ for about three months, though meanwhile the purchase price was paid and the deed taken by the Emergency Fleet Corporation.

The complaint contains two counts, each setting forth a claim for \$30,000, and interest; the first, a cause of action based on the contract of June 21, 1917; the second, a cause cast in the form of a complaint in *indebitatus assumpsit*. Defendants assert that the second count and any verdict thereunder are vulnerable because of defects both of pleading and proof. But since the defendants' attack upon the judgment cuts deep into the vitals of the contract, it will be more profitable to consider first the essential merits of plaintiff's claim, disregarding for a time the questions of technique.

Defendants contend that there can rightly be no recovery by plaintiff, on the ground that he was not the procuring cause of sale; and they maintain that the owners made the sale without the least aid from the plaintiff, and through negotiations begun by themselves more than 30 days after the letter of April 3d, with a buyer with whom the plaintiff had never been in touch.

The contract of June 21, 1917, is quite different from the ordinary brokerage agreement. It affords to plaintiff four disjunctive bases for compensation. It contains a promise to pay compensation on any sale (1) which results through plaintiff's negotiations, or

(2) through plaintiff's efforts, or (3) which originates with plaintiff, or (4) upon which plaintiff is employed.

[1, 2] There is no appreciable difference in the meaning for present purposes between the words "negotiations" and "efforts." In either case, in order to bring himself within the conditions of his contract, plaintiff would be required to show that he was the efficient cause of sale. The two other expressions definitive of his contractual right embody, however, contrasting ideas. They are expressive of a distinction corresponding to the important distinction between finding a purchaser and negotiating a sale. *Handley v. Shaffer*, 177 Ala. 636, 653, 59 South. 286.

To originate a sale is to give to it a genesis, to stand as the parent, the creative force from which the final transaction traces its birth. The word carries no implication requiring the originator to be also the finisher, or to be at once the alpha and the omega. On the other hand, one may, of course, be employed upon a sale which he has not originated, and in that event he is in the ordinary position of a broker and subject to the common rule. One who merely originates a sale may be compared to the one who starts a hare which another is left to run down, while one only employed on a sale is like the man who runs down the hare which some one else has started.

Under a contract prescribing compensation to the broker alike whether he originates or is employed on a sale, his rights then will be the same whether he is the fertile mind that begins, or is the effective instrument that ends, a continuous series of negotiations leading to a happy consummation.

[3, 4] Referring to the terms under interpretation, counsel for defendants ask that the words be scrutinized to determine their precise meaning; and it is urged that the phrase "upon which you are employed" cannot be extended to include a sale brought about by future use or employment of plaintiff's services, but must be limited to a sale resulting from services in course of rendition at the date of the agreement. We do not think, however, that the contract should be so meticulously construed. The present is frequently used for the future tense, not only colloquially, but also in statutes and contracts. Here it is quite apparent that the agreement was not a studied production. It was rather a communication passing between two men who had been working together in the same office toward the same end, and who, believing that they understood each other, dealt in open-handed fashion, with little thought of niceties in the use of moods and tenses. There is no reason, therefore, for subjecting the phraseology to a committing analysis, or for sifting it through the mesh of legal dialectics. In fact, wherever there is justification for treating the broker

as the procuring cause of sale, his services are regarded as highly meritorious, and the law leans to that construction of the contract and to that interpretation of the facts of the case and the acts of the parties which will best secure to the broker the payment of his commissions. *Stewart v. Mather*, 32 Wis. 344, 350; *Duncan v. Borden*, 13 Colo. App. 480, 482, 59 Pac. 60.

But taking the contract as it is written, defendants assail the judgment on the ground that plaintiff neither originated, nor was employed upon, nor negotiated, nor exerted his efforts in, the sale to the Emergency Fleet Corporation; and they insist that the negotiations with that corporation were undertaken and completed by the defendants themselves through Mr. Hammond, after plaintiff's efforts with the Bethlehem Shipbuilding Corporation had come to naught, and after the contractual relations between plaintiff and defendants had been completely severed.

The jury were instructed as to the meaning of the expressions used by the parties, and received also in appropriate form a definition of the term "procuring cause of sale." But despite the import of the phrase "which originates with you," the court concluded its instructions by declaring to the jury that they were not to render a verdict in favor of the plaintiff unless they should find that the influence, means, or efforts put forth by plaintiff between July 1, 1917, and April 3, 1918, were "the procuring and efficient cause that resulted in the sale to the United States Shipping Board, Emergency Fleet Corporation."

In view of the interpretation which has been given to the word "originate," and which does not differ in sense from the meaning ascribed by the trial judge, we think the court's instruction was really more favorable to the defendants than they were entitled to. But since under that instruction a verdict was given in plaintiff's favor, it devolves upon us to consider whether, upon the law as applied to the evidence already detailed, plaintiff can fairly be deemed the efficient cause of the sale to the Emergency Fleet Corporation.

In *Roth v. Thomson*, 40 Cal. App. 208, 215, 180 Pac. 656, 659, the court, quoting from *Park v. Culver*, 169 Mo. App. 11, 154 S. W. 806, gives the following definition of the expression "procuring cause":

"In order for the broker to recover, the evidence must show that his efforts were the procuring cause and not merely one in a chain of causes. The expression 'procuring and inducing cause,' as used in the books, refers to the cause originating from a series of events that without break in their continuity results in the prime object of the employment of the agent."

Where several agencies have been active in bringing about a sale, it may happen that

each has contributed something without which the result would not have occurred. One may have found a buyer who would otherwise have been overlooked, and yet that buyer may actually make his bargain through a different instrumentality. In such case, the crucial question is, Which was the predominating efficient cause? A broker's contract presupposes that he shall be the *causa causans*, the foundation of the negotiations, but he need not be the sole cause or *causa sine qua non*. *Handley v. Shaffer*, 177 Ala. 636, 652, 59 South. 286.

[5] To constitute himself the *causa causans*, the predominating effective cause, it is not enough that the broker contributes indirectly or incidentally to the sale by imparting information which tends to arouse interest. He must set in motion a chain of events, which, without break in their continuity, cause the buyer and seller to come to terms as the proximate result of his peculiar activities.

In *Hafner v. Herron*, 165 Ill. 242, 246, 46 N. E. 211, 212, the court says:

"Nor is it always necessary, that the purchaser should be actually introduced to the owner by the broker, provided it appears affirmatively that the purchaser was induced to apply to the owner through the instrumentality of the broker, or through means employed by the broker. It is sufficient if the sale is effected through the efforts of the broker, or through information derived from him."

To like effect are: *Lloyd v. Matthews*, 51 N. Y. 124; *Sussdorff v. Schmidt*, 55 N. Y. 319; *Handley v. Shaffer*, 177 Ala. 636, 59 South. 286; *Shannon v. Potts*, 117 Ill. App. 80; *Masters v. Hunt* (Tex. Civ. App.) 197 S. W. 219; *Haun v. Rosenmayer* (Cal. App.) 189 Pac. 117; *Justy v. Erro*, 16 Cal. App. 519, 117 Pac. 575.

[6] So when the broker is in fact the primary procuring cause, the law will not deprive him of his commission because the negotiations were completed through some one else, and even perhaps without the broker having himself met, or communicated personally with, the buyer. As it is sometimes put in homely phrase in such cases, "He who shakes the tree is the one to gather the fruit."

[7] Whether or not the sale is primarily the result of the broker's efforts is a question of fact. The jury here, under the instructions given, may be assumed to have resolved the evidence in plaintiff's favor in this regard; and in the light of decisions rendered in analogous cases, we would not be justified in overriding the determination of the triers of the fact.

A case quite closely in point is found in *Carnes v. Finigan*, 198 Mass. 128, 84 N. E. 324. There the defendant employed the plaintiff to find a buyer for his liquor business. The plaintiff, knowing that a certain brewery often advanced money to buy saloons for persons who would engage to deal

in the company's brew, gave to the brewery's vice president, Casey, the name of defendant's saloon and also of two others. Casey, in turn, brought the saloon to the notice of one of the brewery's patrons named Silva, who with the brewery's money made his purchase of the business directly from the defendant, and without any communication with the broker. Casey acted in the matter, not as the agent of the broker, but for the benefit of his own brewery. After pointing the distinction between such a case and a case where the purchaser's dealings with an owner were indirectly brought about through information given by a broker to another and by him casually imparted to the buyer, the court said:

"But in the case at bar, although Casey did not intend to act as the agent for the plaintiff, the plaintiff intended to use Casey as an instrument in getting a purchaser for the defendant's saloon, and he was successful in getting a purchaser by those means. Casey did what the plaintiff hoped and expected he would do when he furnished him with the name of the defendant's liquor business for sale, namely, he brought it to the attention of a man to whom he was willing to advance the money necessary to buy the business in order to get another purchaser of his (Casey's) company's ale. In our opinion this was sufficiently direct to make out the fact that the plaintiff's services were the cause of the sale."

Another case worthy of study is *Burchell v. Gowrie & Blockhouse Collieries, L. R.* (1910) A. C. 614. The defendant, a British corporation and the owner of a coal mine in Nova Scotia, desiring to sell its property, employed for that purpose the plaintiff Burchell, who was a mining engineer and manager of the colliery. Burchell presented the matter to a successful promoter named Pearson, who was the leading spirit in a company owning a neighboring mine. Burchell had Pearson inspect the defendant's property, and showed him the opportunities presented for more advantageous development of Pearson's own mine through prosecuting certain workings already under way in defendant's property. Pearson, convinced of the superiority of this method of approach, took an option which, after certain renewals, was allowed to lapse on account of financial stringency. Negotiations continued, however, and later another engineer, Richardson, was sent from England to inspect defendant's mine, and report for the information of the stockholders. While engaged in this work, Richardson met Macdonald, a director in Pearson's company, who had already been brought into privacy with the negotiations between Burchell and Pearson, and met also McCurdy, a son-in-law of Pearson. Richardson and these two others returned to England in the same ship; and there, without the knowledge of Burchell, the defendant entered into an agreement of sale with Macdonald and McCurdy, and the property was ultimately con-

solidated with that of Pearson's company. When Burchell demanded his agreed commission, the defendant claimed that he was not the procuring cause of sale, and that the transaction was the direct result of efforts of Macdonald. The court, however, regarded Pearson as the dominating personality in the negotiations which culminated in the sale, and treated Macdonald and McCurdy as Pearson's agents, or coadventurers. Hence, the sale having been induced by the knowledge, exertions and skill of Burchell, and he having first introduced the company to the purchaser, the court awarded him his commission, saying at page 625:

"Pearson, acting with his associates in the interests of the North Atlantic Colliery, was the purchaser introduced. Pearson with his coadventurers acting in the same interests was the actual purchaser; in fact nothing was in reality altered but the consideration to be paid. Stock was to be given in a larger proportion than Burchell was authorized to accept. In all other respects the sale made and the sale authorized to be made by Burchell were in effect the same."

[8] So in the case at bar plaintiff intended to use the Bethlehem Shipbuilding Corporation either as a purchaser itself or as an instrument in getting a purchaser; and affairs so shaped themselves that the Bethlehem Shipbuilding Corporation and the Emergency Fleet Corporation came into close privity with each other in the transaction. They were coadventurers in the purchase, the Fleet Corporation furnishing the money to buy the property, and the Shipbuilding Corporation agreeing to take the active management, and to build ships under orders in the Fleet Corporation's yard. The transaction as ultimately carried out was at the same price and on the same terms as those named by the plaintiff in March to the Bethlehem Shipbuilding Corporation. It turned out, it is true, that the contract of purchase was made, and the purchase price was paid, by the Fleet Corporation instead of by its coadventurer, the Shipbuilding Corporation. But in the consummation of the sale the Shipbuilding Corporation acted as agent for the Fleet Corporation, and the transaction assumed the same form as if the Shipbuilding Corporation had been the legally constituted agent of the Fleet Corporation from the beginning. In his negotiations with the officers of the Shipbuilding Corporation plaintiff had performed the most effective and perhaps the hardest and most expensive part of the whole undertaking. The defendants knowingly took advantage of his labors, and concluded a contract of sale with a purchaser with whom they had really been put into touch by plaintiff. And that sale was made on terms which, under defendants' directions, had already been named by plaintiff to the intermediary. The sale was, beyond a doubt, the direct result of the original impulse pro-

ceeding from the plaintiff. It was brought about without the interpolation of any independent agency, and was closed in continuation of the negotiations initiated, and almost to the last moment conducted, by plaintiff alone. The worth of the plaintiff's service is not to be depreciated by attributing the sale to defendants' common director, Mr. Hammond, or by expunging all the intelligent effort, whereby the plaintiff had so well laid out the pathway that Mr. Powell had but to follow the finger post pointing to Mr. Hammond's door, and then, after a short conversation, depart with Mr. Hammond's written offer in his pocket to lay before his company's coadventurer for final action.

The views expressed receive support also from five cases cited in the plaintiff's brief which possess resemblances to the case at bar. These are *Lincoln v. McClatchie*, 36 Conn. 136; *Lloyd v. Mathews*, 51 N. Y. 124; *Sussdorff v. Schmidt*, 55 N. Y. 319; *Hosmer v. Fuller*, 168 Mass. 274, 47 N. E. 94; *Brooks v. Leathers*, 112 Mich. 463, 70 N. W. 1099.

[9, 10] But it is contended by defendants that the fact that no agreement of sale was made before the letter of April 3d, or at most within 30 days thereafter, precludes the allowance of any compensation to plaintiff. A broker with a contract in the ordinary form must unquestionably effect a sale within the limit of time granted. Plaintiff's contract was subject to cancellation on one month's notice. The letter of April 3d, read as a whole, does not purport to abolish the original contract entirely. The letter expresses willingness to pay a commission of 3 per cent. "on any sales made of the Oakland Water Front Company property in which this company is interested, which originates with you, or for which, in the judgment of the directors, you are responsible." Here was a clear recognition of a continuing obligation to pay the commission on any sales originating with the plaintiff. Hence nothing in this letter attempts to abrogate plaintiff's unquestioned right to compensation on sales originating with him. The sale effected did originate assuredly with plaintiff; therefore the mere fact that under the circumstances in evidence that sale was closed after the letter of April 3d cannot militate against recovery of the compensation promised for such service.

Nor does plaintiff's withdrawal from defendants' office impair plaintiff's rights. He was not required by his contract to be in attendance at any particular place, but was working on commission with a right to control his own actions and be master of his own time.

It is true plaintiff "declined to develop new service" under the terms of the April letter, but neither the contents of the letter nor plaintiff's conduct at the time furnish just reason for plucking from him the fruits of his efforts already exerted. His effective

work had been done, and the terms had already been named to the Bethlehem Shipbuilding Corporation. The situation was therefore the same in substance as if plaintiff had brought the Fleet Corporation itself as a buyer to the defendants' office before the receipt of the letter of April 3d, and had then left the parties to close the bargain themselves.

Under such state of facts, the postponement of the actual closing of the bargain until after the cessation of agency would not, of itself, be sufficient to alter the broker's character as the procuring cause of the sale, or to deprive him of his reward. The Bethlehem Corporation was but the messenger for the Fleet Corporation, and the Fleet Corporation on its appearance adopted the acts of its messenger. This was equivalent to a previous request to perform such acts.

In *Lincoln v. McClatchie*, 36 Conn. 136, a purchaser, Burdick, had obtained information about a residence from a friend, Goodwin, living in the vicinity, who, knowing Burdick's desire to be a neighbor, had procured for him particulars from plaintiff, the broker in whose hands defendant had placed the property for sale. Burdick purchased directly from the owner without himself ever having communicated with the broker. The court said (36 Conn. 142):

"Had Burdick in the first instance requested Goodwin to do what was done by him in this transaction, the case would have stood precisely as if Burdick had procured the information himself from the plaintiff, on the principle *qui facit per alium facit per se*, and the defendant in that case would clearly have been liable. Is the case materially different? Goodwin acted for Burdick in procuring the information. He did not casually obtain it, but went to the office of the plaintiff to ascertain what intelligence he had to disclose. Burdick acted upon the information when communicated to him by Goodwin, knowing from what source it had been obtained. He adopted the acts of Goodwin, which was equivalent to a previous request to perform the acts. The plaintiff was pursuing the business of a broker in giving the information, and Goodwin received it for Burdick in the capacity of a messenger and conveyed it to him."

In the present case the court in its instructions told the jury that they could not give plaintiff a verdict unless they found that the procuring and efficient cause of sale was plaintiff's efforts exerted after July 1, 1917, and before April 3, 1918. During the time intervening between the latter date and the visit of Powell in May there had been no real break in the negotiations, and hence on Powell's arrival there was no independent revival of negotiations. Powell merely took the thread from Robinson's fingers.

We feel convinced that the evidence justified a finding that plaintiff's efforts exerted before April 3d were the procuring cause of sale notwithstanding that the first positive disclosure of the Fleet Corporation's interest

was reserved until Powell's visit. Yet, even if the verdict were not to be rested on that ground, it cannot candidly be gainsaid that the sale originated with plaintiff before April 3d. And a sale so originating with him establishes his rights as fully as one negotiated and closed by his sole efforts during the period of his admitted agency.

[11] Nevertheless, however meritorious plaintiff's accomplishment, defendants advance the objection that the statute of frauds opposes an insuperable barrier because there was no written authorization to Morse to sign the letter of June 21, 1917. The jury, under adequate instructions, has impliedly found Morse to have been acting as general manager of both corporations, and there is ample support for that finding in the evidence. The signature of Morse as general manager, unattended by the subscription of any corporate name, made evidence admissible to show his relation to the parties and to assist in the application of the context of the letter to the subject-matter in litigation. Union Oil Co. v. Purissima Oil Co., 181 Cal. 479, 185 Pac. 381. Additional authorities are collated by Justice Sloane in *Swartz v. Burr*, 43 Cal. App. 442, 185 Pac. 411.

In *Brown v. Crown G. M. Co.*, 150 Cal. 376, 386, 89 Pac. 86, 91, the court said:

"It is conceded * * * that in order to bind a corporation by his acts it is not necessary that any resolution should be passed appointing a general manager. It will be sufficient for it to be shown that he was manager *de facto*."

And in *Hoffman v. Guy M. Rush Co.*, 27 Cal. App. 167, 149 Pac. 177, it was held that the president in his capacity of actual manager of defendant's real estate business had authority to employ a broker and bind the corporation to pay for the services rendered. In like manner in *Norton v. Genesee Association*, 57 App. Div. 520, 68 N. Y. Supp. 32, the rule is laid down that the general manager of a corporation engaged in the business of buying and selling land is vested with general authority to employ a broker in furtherance of such business.

So in *Cal. & Ariz. L. Co. v. Cuddeback*, 27 Cal. App. 450, 150 Pac. 379, it was decided that plaintiff's president, who was also the acting general manager, had power in this latter capacity to enter into a contract in the company's behalf for the purchase of a tract of land.

Again, in *Betts v. So. Cal. Fruit Exch.*, 144 Cal. 402, 77 Pac. 993, where the secretary discharged in addition the functions of a general manager, a contract for the sale of fruit was held binding on the defendant, though signed only by the secretary as such, and though he himself acted without written authority from the corporation. See, also, *Newhall v. Jos. Levy Bag Co.*, 19 Cal. App. 9, 124 Pac. 875.

Likewise, in *Woods Lumber Co. v. Moore*,

183 Cal. 497, 191 Pac. 905, 11 A. L. R. 549, a contract of guaranty, signed by the secretary by verbal direction of the president and business manager of the corporation, was held binding.

In *Arnold v. La Belle Oil Co.* (Cal. App.) 190 Pac. 815, which was an action involving a broker's claim for commissions, it was held on the authority of *McCartney v. Clover V. L. Co.*, 232 Fed. 697, 146 C. C. A. 623, 1 A. L. R. 1127, construing section 2309 of our Civil Code, that executive officers are not merely agents, but are the true bodily representatives of the corporation, and hence may bind it without having express written authority.

That either a *de jure* or *de facto* general manager is such an executive officer is established beyond cavil by the cases already cited. For present purposes, however, the most apt citation is, perhaps, *Pacific Impt. Co. v. Jones*, 164 Cal. 260, 128 Pac. 404, where one of the defendants here was suing as plaintiff to recover rent for the Arcadia Hotel at Santa Monica under a lease purporting on its face to be that of the Pacific Improvement Company, but signed individually by A. D. Shepard (who was shown in the evidence here to have been Morse's predecessor as general manager). The objection was raised by the defendant Jones that Shepard as an individual was a stranger to the lease, and, further, was not shown to have had written authority from the Pacific Improvement Company. The company suing had judgment for the rent, and on appeal the Supreme Court said (164 Cal. 263, 128 Pac. 406):

"The circumstances in evidence thus conclusively show that Shepard in attaching his signature to the paper did so for and on behalf of the corporation whose general manager he was, and that defendant was fully cognizant that he so acted. The document was shown to be that of the corporation."

It is idle to pursue the discussion. Morse, as formally constituted general manager of the Pacific Improvement Company and as *de facto* manager of the Oakland Water Front Company, had full power to engage plaintiff in writing.

We come now to a consideration of the second count of the complaint cast in the form of *indebitatus assumpsit*.

It is contended that there is no sufficient statement of a cause of action in the second count, in that the averment is merely of an indebtedness of \$30,000 for plaintiff's services performed at defendants' request, without any statement that the amount represents either the reasonable value or the sum agreed.

The count is predicated on the theory that the defendants prevented complete performance of the contract of June 21, 1917.

[12-14] A state of facts showing prevention of performance justifies an action in

assumpsit; and, while the broker's contract cannot be set up to defeat the implied *assumpsit*, it is admissible in evidence to show how the cause arose, and to supply a measure of damages. *Breen v. Roy*, 8 Cal. App. 475, 97 Pac. 170; *Boyd v. Bargagliotti*, 12 Cal. App. 228, 107 Pac. 150; *Reynolds v. Jourdan*, 6 Cal. 108; 5 C. J. 1388, § 20.

[15] The evidence here justified the plaintiff as a precautionary measure in going to the jury on a count based on the theory of prevention of performance. The price had been named to Robinson by plaintiff and confirmed by Morse in March, 1918. Soon thereafter Christy made a counter offer to Hammond, against the acceptance of which plaintiff advised. Then came the ugly days of the war between March 21st and April 1st, succeeded by the announcement of the government's change of policy and its intention to speed the transport of troops. And on the heels of these occurrences, and when the extension of existing shipyards was seen to be immediately impending, supervened the defendants' letter of April 3d, which, instead of giving plaintiff the prescribed notice of one month, declared that the arrangement in the letter of June 21, 1917, "is terminated." Then followed in May Powell's hurried visit, with the dealings thereat kept secret from plaintiff, and plaintiff's efficient preparatory work, made almost instantaneously to redound to the benefit of defendants.

[16] It was not essential to aver that the sum demanded was the reasonable value of the service. *Abadie v. Carrillo*, 32 Cal. 172; *Wilkins v. Stidger*, 22 Cal. 231, 83 Am. Dec. 64; *Jan Wai v. Smith-Riddell Co.* (Cal. App.) 202 Pac. 952.

It follows that the general demurrer was properly overruled; and there was no special demurrer to the second count.

Nor was plaintiff required to offer any evidence concerning the amount of damages other than the contract itself, on which he was entitled to rely as a standard of value. Defendants had the opportunity to introduce countervailing evidence, but there was no attempt to proffer any. The rules applicable in such cases are declared in *Blumenthal v. Goodall*, 89 Cal. 251, 26 Pac. 906; *Alderson v. Houston*, 154 Cal. 1, 96 Pac. 884; *Realty B. & F. Co. v. Pt. Richmond C. & L. Co.*, 171 Cal. 238, 152 Pac. 433. See, also, *Burchell v. Gowrie, etc., Collieries, L. R.* (1910) A. C. 614, 626.

[17] The plaintiff was under no compulsion to elect between his two counts. He was entitled to submit his entire case to the jury for determination upon the facts, and it was the province of the jury to decide which count was supported by the evidence. *Tanforan v. Tanforan*, 173 Cal. 270, 274, 159 Pac. 709; *Estrella V. Co. v. Butler*, 125 Cal. 232, 234, 57 Pac. 980; *Van Lue v. Wahrlich, etc., Co.*, 12 Cal. App. 749, 108 Pac. 717.

[18] The jury rendered a general verdict; and, if the evidence adduced on the whole case supports a verdict on either count, the verdict and the judgment entered thereon must stand. *Merrill v. Kohlberg*, 29 Cal. App. 382, 384, 155 Pac. 824; *Schudel v. Helbing*, 26 Cal. App. 410, 412, 147 Pac. 89; *Est. Hellier*, 169 Cal. 77, 83, 145 Pac. 1008; *Verdelli v. Grays Harbor Co.*, 115 Cal. 517, 525, 47 Pac. 364, 778; *Crosett v. Whelan*, 44 Cal. 200, 203.

[19] It is finally urged, however, by counsel for defendants that all possible right to his commission was forfeited by plaintiff when he took employment with the government's engineers. Their theory is that this service involved duties possibly adverse to the interest of defendants as sellers, in that information of subsurface conditions imparted by plaintiff might have disclosed disadvantageous as well as advantageous attributes of the property.

The contention is without merit. At Robinson's request plaintiff met the engineers on certain occasions in June; and with them and Robinson he spent several hours in examining the tract and explaining the character and extent of the reclamation work. It was after this that the Fleet Corporation took the formal option dated July 1, 1918; and it was not until about the middle of July that plaintiff accepted employment from the engineers to aid in the reclamation, and, as "ancient historian," to advise in engineering problems. There was in this no double-dealing on plaintiff's part; and his employment involved no service in conflict with a due regard to the interest of the defendants. The employment continued about three months, and the sale was closed by the Fleet Corporation before plaintiff's employment ceased. Though the option ran for 60 days from July 1st, the Fleet Corporation declared its election on July 31st.

It would thus appear that plaintiff's assistance furthered rather than dissuaded action; and there is nothing in the evidence to indicate the slightest breach of plaintiff's duty. On the contrary, he seems at all times to have been zealous in advancing the true interests of defendants. And in justice to defendants it should be said that there is nothing on their part suggestive of even a remote desire to conceal anything affecting the suitability of the property for the intended use.

If there were known disadvantages of which the government had not been apprised, then fairness and good faith counseled full disclosure. At no time can a broker with a due sense of the ethics of his calling justify himself in deliberately withholding from a purchaser material facts known to the broker and not known or visible to the purchaser; nor would he rightly serve his principal in so doing. There is no

breach of trust toward his employer in revealing the truth; and the law will not penalize commendable candor by forfeiting the broker's commission. The broker is employed to deal honestly. Evidence of "honesty, truthfulness, and good reputation" is a prerequisite to the issuance of a real estate license, and dishonest dealing furnishes a ground for revocation of a license. Willful concealment or suppression of material facts is sheer dishonesty; and every broker owes it to the seller as well as to the buyer, and none the less to himself, to oppose and shun everything smacking of fraud, sharp practice, or bad faith.

It is fitting to add that in the record before us there is nothing whatever impugning the good faith of any one in the negotiations with either the Bethlehem Shipbuilding Corporation or the Emergency Fleet Corporation.

It remains but to speak of defendants' exceptions to certain instructions given and to the refusal to give others proposed. The discussion already had renders a brief reference sufficient.

Defendants complain of the refusal to give a set of proposed instructions which were framed on the theory that no acts done by the plaintiff after April 3d, or at most more than 30 days thereafter, could be considered by the jury, and that defendants were not liable for anything done by plaintiff if it had not reached the knowledge of, or commenced its influence on, the Fleet Corporation within 30 days after April 3d at the latest; and that plaintiff could base no claim on any negotiations had with the Bethlehem Shipbuilding Corporation which led that company, without request from plaintiff, to impart information to the Fleet Corporation with the result that the latter became the purchaser.

The instructions which the court did give were to the effect that the jurors should confine their attention to the acts and negotiations of plaintiff prior to April 3d, and, if those acts were found to be the procuring cause of the sale, then plaintiff was entitled to recover, though the sale was actually effected under the circumstances shown in the evidence more than 30 days after April 3d, and was made to the Fleet Corporation without direct contact between it and plaintiff. For reasons already stated, we hold that the instructions requested were properly refused, and that in those given on the subject there was no prejudice to defendants.

[20] Other instructions requested purported to define the terms used in the contract, and were designed to declare to the jury that a sale could not be held to have originated with plaintiff, or to have been made through his negotiations or efforts because, after he had brought the matter to the attention of the Bethlehem Shipbuilding Corporation, its officers then, without request from him, im-

parted the information to the Fleet Corporation and influenced it to buy. The evidence was not of a character to give a foundation for such instructions, and the refusal was therefore justified.

[21] In the same connection complaint is made that in defining the meaning of the words used in the contract, the court used the phrase "may be construed as meaning," without positively declaring the meaning. That is a stricture directed at form rather than substance, and needs no further comment.

[22] So also criticism is directed to language stating that a verdict might be given in plaintiff's favor, if the sale resulted from negotiations conducted by him "in pursuance of said letter of June 21, 1917," without specifying in that particular instruction what would constitute service pursuant to the letter. But the court elsewhere set forth quite fully what in the way of performance was demanded of plaintiff as a basis of recovery.

In respect to the second count, the defendants complain because the instruction given on the subject of prevention of performance left it to the jury to determine whether the letter of April 3d was executed in bad faith, in order to prevent plaintiff from bringing about a sale then in course of completion, and so to deprive plaintiff of his commission. It is insisted that there was no evidence justifying an instruction on the subject. Our views regarding this matter have already been expressed; and we believe that the occasion did furnish good reason for the court's action.

It is also urged that it was error to refuse to instruct that the plaintiff could not recover without proof by him of full performance, and that the contract itself was not evidence of value. This instruction also was properly refused.

Error is further charged in the refusal of the court to give an instruction that plaintiff could not recover, if his employment by the government's engineers placed him under duty to disclose the true conditions of the land, unfavorable as well as favorable. There is no breach of trust in disclosing true conditions, and the evidence afforded no justification for the instruction requested.

On the subject of the legal sufficiency of the contract, it would have been error to adopt the instruction proposed by defendants to the effect that the contract was obnoxious to the statute of frauds.

The instructions read as a whole gave an exposition of the law which subjected defendants to no prejudice, and placed the case before the jury in a manner which left to the defendants no just ground of complaint.

Viewing the case in its entirety, we con-

clude that plaintiff was both legally and morally entitled to the compensation awarded him. It was through him as the moving cause that the interest which induced the purchase was awakened and sustained without break in continuity until the final consummation. He it was who shook the tree, and it would be a miscarriage of justice if he were to be deprived of the fruit of his labor.

The judgment is affirmed.

We concur: LANGDON, P. J.; STURTEVANT, J.

57 Cal. App. 105

ASSOCIATED THEATERS, Inc., et al. v. INDUSTRIAL ACCIDENT COMMISSION et al. (Civ. 3712.)

(District Court of Appeal, Second District, Division 1, California. March 16, 1922. Rehearing Denied April 15, 1922. Hearing Denied by Supreme Court May 15, 1922.)

1. Master and servant §417(1) — Original award held "final order" within Compensation Act.

Where compensation for injuries to an employee was awarded against the employer by the Industrial Accident Commission, which made a supplemental award to a physician in accordance with a petition filed by the employee, the original award was the "final order" within Workmen's Compensation Insurance and Safety Act 1917, § 65, subd. a, alleging 20 days for the filing of an application for a rehearing to sustain a writ of review, and the employee's application filed on the twentieth day after he had knowledge of the order was in time.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Final Order.]

2. Master and servant §417(3½)—Employee held "party aggrieved" within Compensation Act.

Where compensation for injuries to an employee was awarded against his employer by an order relieving the insurer from liability, the employee was a "party aggrieved" within Workmen's Compensation Insurance and Safety Act 1917, § 64, subd. a, and entitled to apply for a rehearing and to a writ of review on denial of the rehearing, though his employer was not entitled to the writ because of failure to make timely application for rehearing.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Aggrieved Party.]

3. Insurance §435—Master and servant §361—Compensation insurance held to cover injury to moving picture theater employee repairing garage; "employee."

Where one employed as a carpenter and handy man in a moving picture theater of a corporation was injured while widening the door of a garage at the private residence of the controlling stockholder who kept his automo-

bile, chiefly used in the business, at the garage, the injury was received while doing work as an employee within Workmen's Compensation Insurance and Safety Act 1917, § 8, and the terms of a policy of insurance covering work incident to the operation of theater.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Employee.]

Proceeding by A. H. Houston against the Associated Theaters, Incorporated, employer, and the Western Indemnity Company, insurance carrier, before the Industrial Accident Commission, for an award. From an award against the employer and relieving the insurance carrier from liability, the employer and A. H. Houston bring certiorari. Order annulled.

John C. Miles, of Los Angeles, for petitioners.

A. E. Graupner, of San Francisco, and Fletcher Bowron, of Los Angeles, for respondents.

CONREY, P. J. Petitioner, A. H. Houston, filed an application to the Industrial Accident Commission for compensation on account of injuries received by him while employed by the Associated Theaters, Inc. Both the employer and the insurance carrier, Western Indemnity Company, were made respondents to that application. After a hearing by the Commission, compensation was awarded in favor of the applicant and against the employer, and it was ordered that the Western Indemnity Company be relieved from liability upon the claim. The Commission found that the applicant, while employed "as a janitor and handy man" in the motion picture theater of the employer, "sustained injury occurring in the course of and arising out of his employment as follows: While repairing a door of a garage, under orders of the employer." The Commission further found:

"At said time the employer was insured against liability for compensating its injured employees with defendant Western Indemnity Company, but the policy of insurance covered injuries only for operations in connection with and upon the premises of a motion picture theater, and the work being performed by applicant at the time of the injury was not connected with such operations but was repair work upon the private premises of the controlling stockholder of the employing corporation, and was not covered by said policy; said Western Indemnity Company is therefore not liable by reason of said injury."

Respondent Western Indemnity Company claims that the proceeding should be dismissed because the petitioners did not, nor did either of them, apply to the Commission for a rehearing within 20 days after service of the order of award. Workmen's Compensation Insurance and Safety Act of 1917 (St. 1917, p. 831) § 65,

The return fails to show the date of service of notice of the award, except as herein stated, upon any of the parties to the proceeding. The findings and award were filed May 13, 1921. On June 23d the Commission made a supplemental award of \$58.25, payable to one Dr. MacFarlane, in accordance with a petition filed by Houston on May 24th. On June 13th the Associated Theaters, Inc., filed an application for rehearing, referring to the award of May 13th. In that application it was admitted that notice of the award was received by the Associated Theaters, Inc., on the 16th day of May. On July 13th the Associated Theaters, Inc., filed a second application for rehearing.

[1, 2] The application of Houston for rehearing was filed on June 13th. There being no evidence of service of notice of award upon Houston, the record does not show that he had knowledge thereof prior to May 24th, when he filed his petition for supplemental award. As June 13th was the twentieth day after May 24th, his application for rehearing was filed within the time limited by law. It is our opinion that the findings and award filed May 13th were the final order of the Commission within the meaning of section 65, subd. a, of the governing statute. We are also of the opinion that Houston was a party aggrieved within the meaning of section 64, subd. a, of the same statute, which authorizes a party aggrieved by any final order, decision, or award, to apply for a rehearing. If, as he contends, the liability was that of the insurance carrier, he was entitled to have that liability correctly determined. Our conclusion is that the writ of review properly issued herein on the petition of Houston, notwithstanding the fact that the Associated Theaters, Inc., was not entitled to maintain this proceeding. On July 13, 1921, the Commission by order extended for 30 days from and after that date its time for acting upon the petitions for rehearing filed June 13th. On August 11th it was ordered that said petitions be denied. The petition for writ of review was filed on September 10th, and therefore was within the 30 days' time allowed by law for that purpose.

[3] Petitioner contends that the finding of the Commission that the policy of insurance covered injuries only for "operations in connection with and upon the premises of a motion picture theater" is without support in the evidence. An examination of the policy convinces us that if the employment of the applicant at the time of the accident was connected with and in the course of the business of the employer, and was not casual, then the liability existed and was covered by the policy, notwithstanding the fact that the work was being done on premises other than the premises of the motion picture theater of the employer.

Paragraph 6 of the policy reads as follows:

"This agreement shall apply to such injuries so sustained by reason of the business operations described in said declarations which, for the purpose of this insurance, shall include all operations necessary, incident or appurtenant thereto, or connected therewith, whether such operations are conducted at the work places defined and described in said declarations or elsewhere in connection with, or in relation to, such work places."

Item 3 of the declarations referred to in the policy, after describing the location of the place of business of the employer contains the following:

"All business operations, including the operative management and superintendence thereof, conducted at or from the locations and premises defined above as declared in each instance by a disclosure of estimated remuneration of employees under such of the following divisions as are undertaken by this employer, viz.: (1) All industrial operations upon the premises; (2) all office forces; (3) all repairs or alterations to premises; (4) specially rated operations on the premises; and (5) operations not on the premises."

Item 5 of the declarations states:

"This employer is conducting no other business operations at this or any other other location not herein disclosed—except as herein stated. No exceptions."

Under the head "Classification of Operations," the declarations contain the following: "No. 9152—Motion Picture Theater—rate to apply to all employees of the theater." Counsel inform us that the figures "9152" refer to a number designating a classification in the manual of rates established by the insurance commissioner of the state of California; No. 9152 being the classification relating to the occupation of conducting a motion picture theater.

It remains only to determine whether the employee, at the time of receiving his injury, was acting as an employee of the Associated Theaters, Inc., within the meaning of section 8 of the Compensation Act. The evidence, without conflict, establishes the following facts: The Associated Theaters, Inc., is a corporation, which, at the time in question, was operating a motion picture theater at 612 South Broadway, in the city of Los Angeles. All of its stock was owned by Dr. H. B. Breckwedel. In order to comply in form with the law relating to corporations, he caused one share of stock to be placed in the name of his wife and the other in the name of his attorney. He then held those two shares indorsed to himself; "so I hold all the stock." Dr. Breckwedel owned an auto-

mobile, and also owned a garage located at his private residence. He used this automobile more extensively in the business of the theater than for his personal convenience. He kept the automobile in his garage, and did not go through the form of claiming rent therefor from the corporation. Houston was employed by the Associated Theaters, Inc., as a janitor and also as a carpenter and general handy man about the theater premises. The door of the garage at Dr. Breckwedel's residence was so narrow that there was some difficulty in getting the automobile in and out. In order to relieve that difficulty, Dr. Breckwedel sent Houston to the garage with instructions to make some changes in the garage door. While making those changes, the accident occurred, and Houston suffered the injuries for which he seeks to obtain compensation.

The work, which was being done by Houston at the garage, being carpenter work, was of the same kind as a part of the work for which he was employed at the theater. The change which he was ordered to make in the door of the garage had direct relation to the automobile which, as we have seen, was used in the theater business. Under these circumstances, we think that the work was in fact connected with the business of the theater. The ownership of the garage is not a material factor in the case. The decisions in *La Grande Laundry Co. v. Pillsbury*, 173 Cal. 777, 161 Pac. 988, and *Western Indemnity Co. v. Industrial Accident Commission*, 43 Cal. App. 487, 185 Pac. 306, which are particularly relied upon by counsel for Western Indemnity Company, are not in conflict with the views above stated. In the *La Grande Laundry Co. Case*, the accident which caused the death of the employee occurred while he was employed on the premises of one of the stockholders of the corporation in doing repair work on those premises which in their use had no relation whatever to the business of the corporation. Moreover, the owner of those premises was one of many stockholders and not, as in the present instance, the sole owner of the corporation. In *Western Indemnity Company v. Industrial Accident Commission*, supra, the work which was being done by the employee at the time of the accident was work being done at the direction of the employer for the personal convenience of one of his friends and had no relation whatever to the business of the employer.

The order is annulled.

We concur: SHAW, J.; JAMES, J.

57 Cal. App. 160

In re STEVENS' ESTATE.**STEVENS et al. v. HENDRICKS et al.**

(Civ. 4119.)

(District Court of Appeal, First District, Division 2, California. March 23, 1922.)

Continuance ⇨ **12—Refusal of continuance for sickness of parties held error.**

Where two contestants of a will were out of the jurisdiction and could not be present because of sickness, which was unknown to their counsel until six days before trial, on which three days later he started proceedings for a continuance, refusal to grant a continuance was error.

Appeal from Superior Court, Lake County; M. S. Sayre, Judge.

In the matter of the estate of John D. Stevens, deceased. Action by Leta Stevens and others against Joseph B. Hendricks and others to contest the will. From judgment dismissing the action, contestants appeal. Reversed.

Lovett K. Fraser, of San Francisco, and Benj. C. Jones, of Lakeport, for appellants.

Herbert V. Keeling and C. M. Crawford, both of Lakeport, for respondents.

PER CURIAM. This is an appeal from a judgment of dismissal after denial of a motion for continuance of the trial of the contest of the will of John D. Stevens, after probate. The motion for a continuance was made on the ground that two of the three contestants were ill at their homes in the state of New York, and that their mother, a material witness, was also residing in the same state. The request for a continuance was made for the purpose of enabling contestants' counsel to take the depositions of these three witnesses. The contest was filed on February 10, 1921, the proponents answered on February 25, 1921, and on March 11, 1921, the cause was set for trial on the 18th of April, 1921. On April 15th the contestants filed their notice of motion for a continuance. The motion was heard on April 18th at a time when proponents' witnesses and a jury were in attendance for the trial of the contest. The trial court denied the motion, and, on appellants' refusal to proceed, dismissed the contest.

The affidavits filed on behalf of the contestants were not controverted, and it cannot be successfully urged at this time that the contestants moved in bad faith or that the grounds given for the motion were not sufficient to have justified the trial court in granting the continuance prayed for. Appellants' counsel stated in his affidavit that he had not had an opportunity to interview his clients who lived in New York and that

they had requested him to procure a continuance to enable them and their mother to be present at the trial. It was shown without contradiction that Edna Stevens Barrett and Marquita Stevens Treat, two of the contestants, were ill in the state of New York, and that knowledge of said illness had not come to their counsel until April 12th. Within three days thereafter their counsel started the proceedings to request a continuance, and it cannot be said from all that appears in the record that there was a lack of due diligence.

The case is controlled by such authorities as *Jaffe v. Lilienthal*, 101 Cal. 175, 35 Pac. 636; *Morehouse v. Morehouse*, 136 Cal. 332, 68 Pac. 976; *Betts Spring Co. v. Jardine M. Co.*, 23 Cal. App. 705, 139 Pac. 657; and *Pac. Gas & Elec. Co. v. Taylor* (Cal. App.) 198 Pac. 651.

Judgment reversed.

We concur: **LANGDON, P. J.**; **NOURSE, J.**; **STURTEVANT, J.**

56 Cal. App. 777

PEOPLE v. BRADY. (Cr. 983.)

(District Court of Appeal, First District, Division 1, California. March 9, 1922. Rehearing Denied April 6, 1922. Hearing Denied by Supreme Court May 8, 1922.)

1. Criminal law ⇨ **1170(1)—Exclusion of evidence to impeach witness prejudicial when testimony sharply conflicting.**

Where there was a sharp conflict between defendant's testimony and that of the two principal witnesses for the prosecution, the erroneous exclusion of evidence tending to discredit one of such witnesses by showing that part of her testimony was willfully false was prejudicial.

2. Criminal law ⇨ **671—Defendant not required to propound questions out of hearing of jury.**

The jury is a co-ordinate part of the court, and every trial for felony must take place in its presence, and there is no law authorizing the judge to require a defendant to propound questions out of the hearing of the jury.

3. Criminal law ⇨ **1170(1)—Witnesses** ⇨ **379(2)—Question whether witness had not said defendant was innocent held proper, and its exclusion prejudicial.**

Where it was not claimed that defendant directly committed the crime charged, but only that he was a party to a conspiracy to commit it, a question asked one of the witnesses for the prosecution, without whose testimony no case would have been established, whether she had not said that she hoped defendant would be acquitted because he was innocent, was proper, and its exclusion was prejudicial, especially where, to the knowledge of the judge, she had made other contradictory statements, of which defendant's counsel was ignorant, but

which would probably have been brought out, if the cross-examination had not been curtailed.

4. Witnesses $\S$ 388(10)—Time, place, persons present, and contradictory statements must be called to witness' attention before she can be impeached.

Before a witness may be impeached on account of contradictory statements, her attention must be called to the time, place, and persons in the presence of whom the statement is claimed to have been made, and the statement itself must be related to her, so that she may be given full opportunity to admit or deny making it.

5. Witnesses $\S$ 389—Error to exclude question as to contradictory statement because witness did not remember occasion when it was claimed to have been made.

It was error to exclude a question asked a witness for the prosecution as to whether she had not said that defendant was innocent merely because she answered a question calling her attention to the occasion when such statement was claimed to have been made by stating that she did not remember.

6. Witnesses $\S$ 379(3) — Cross-examination as to contradictory statement held not to call for opinion.

Where defendant was not charged with directly committing the crime, but only with being a party to a conspiracy to commit it, a question asked one of the principal witnesses for the prosecution on cross-examination whether she had not said that she hoped defendant would be acquitted because he was innocent did not call for an opinion but for a fact.

7. Witnesses $\S$ 387 — Duty of judge as to cross-examination of witness he knows to have made contradictory statements stated.

Where a defendant is charged with a serious offense not because it is claimed he directly committed it, but because of his association with the actual offenders, and the trial judge learns from a source he believes to be reliable that the chief witness for the prosecution has admitted that she lied in material parts of her testimony on the trial of one of the other offenders, it is his duty, upon recalling her for cross-examination, to either go into the cross-examination thoroughly or allow defendant to take it up where he left off, so that the true situation may be placed before the jury.

8. Criminal law $\S$ 633(1)—Defendant, condemned by public sentiment, should be given every opportunity to prove his innocence.

Defendant's constitutional right to a fair and impartial trial is no different where public sentiment has been aroused by the crime and there is an apparent inclination to condemn all persons connected with the affair before they have been tried than in other cases, and the court should exercise the utmost care to see that he is accorded the full measure of his constitutional rights and given every opportunity recognized by the law to prove his innocence.

Appeal from Superior Court, City and County of San Francisco; Louis H. Ward, Judge.

Thomas Brady was convicted of assault with intent to commit rape, and he appeals from the judgment and an order denying a new trial. Reversed.

William F. Herron, of San Francisco, for appellant.

U. S. Webb, Atty. Gen., John H. Riordan, Deputy Atty. Gen., Matthew Brady, Dist. Atty., and Stanislaus A. Riley, Asst. Dist. Atty., both of San Francisco, for the People.

KNIGHT, Justice pro tem. The defendant, Thomas Brady, was convicted of an assault with intent to commit rape upon the person of one Jean Stanley. He has appealed from the judgment of conviction and from the order denying his motion for a new trial.

On the night of November 25, 1920, the prosecutrix, Jean Stanley, and a companion, Jessie Montgomery were persuaded to enter a house at No. 1256½ Howard street, San Francisco, where they were subjected to most brutal treatment and vile indignity. As a result of those outrages, four men were separately tried and convicted, and their convictions have recently been sustained on appeal. *People v. Murphy* (Cal. App.) 200 Pac. 484; *People v. Kruvosky* (Cal. App.) 200 Pac. 831; *People v. MacDonald* (Cal. App.) 200 Pac. 491; *People v. Carey* (Cal. App.) 200 Pac. 835.

It was held on those appeals that the evidence established a conspiracy, on the part of those involved, to engage in acts of sexual intercourse with these young women either with or without their consent, and that, therefore, each conspirator was deemed guilty of every such crime committed in the furtherance of the conspiracy by any of the conspirators. The opinions rendered in the *Murphy*, *MacDonald*, and *Kruvosky* Cases, supra, set forth quite fully the circumstances attending the commission of the various crimes, and for that reason it will not be necessary to again review the evidence here. It is revealed by the record in this case that all of the brutal treatment inflicted upon these young women and the immoral practices to which they were subjected were actually committed by *Murphy*, *Kruvosky*, and *MacDonald*, and by a man named *Boyd*. *Murphy* and *Kruvosky* were prize fighters. *Carey* was convicted upon evidence showing that he was a party to the conspiracy, and that it was he who was primarily responsible for the presence of the young women in the house that night, and because, further, it was proved by the testimony of the *Montgomery* girl that after she had been rendered helpless by the other men *Carey* committed an act of sexual intercourse with her.

Brady was prosecuted upon a different theory. There is no claim made by the prosecution that he made an assault, of any kind upon the prosecutrix. His conviction was sought and obtained upon the theory that he was a party to the conspiracy to ravish these young women, and that he did, in fact, aid, abet, and encourage the other conspirators in the numerous assaults made by them upon the prosecutrix. Brady was first charged with and tried for an alleged rape upon the Montgomery girl. The jury acquitted him. He was then charged with an assault with intent to commit rape upon the Stanley girl, and the jury disagreed. Upon a second trial he was convicted.

Several points are urged by the defendant on this appeal, but we shall address ourselves only to the vital one, which in our opinion demands a reversal of the judgment upon the ground that the trial court committed error in a manner prejudicial to the substantial rights of the defendant, as the result of which he was prevented from having a fair trial. The point of reversal relates to the refusal of the trial court to allow the defendant the right to pursue a course of cross-examination of the prosecutrix, whereby it was sought to impeach her testimony by showing that she had previously made statements inconsistent with and contradictory to the testimony she was then giving, and by withholding from the jury, and from the defendant, certain knowledge possessed by the trial judge to the effect that the prosecutrix had made statements to an officer of the court flatly contradicting the testimony she was then giving, which, if true, would tend strongly to discredit her as a witness in the case.

The essential features upon which the conviction of Brady was obtained were that he was a party to the whispered conversation in the Stroller's Café, which conversation was afterwards held on appeal in the other cases to be the foundation of the conspiracy; that he assisted that night in forcing the Montgomery girl to drink liquor; that he encouraged the young women victims to enter the Howard street house, and afterwards actually aided in separating them so that they might be separately attacked; that he refused to assist them when they were being cruelly beaten by Murphy and Kruvosky, and that instead of going to their assistance he stood there and "only laughed" at them.

All of these facts were established by the testimony of the two young women. The Stanley girl testified, however, that Brady made no indecent proposal to her that night, and there is no evidence to the effect that while efforts were being made by the other men to violate her that Brady knew anything about it. She further testified that after she had been struck by Kruvosky and Murphy while in the kitchen, in the presence of Brady, she was taken to another room by

Carey and MacDonald, and that she did not afterwards see Brady that night. It was subsequent to that time that all of the unsuccessful attacks were made to violate her by Murphy, Boyd, Kruvosky, and MacDonald, and which now constitute the crime of an assault with intent to commit rape for which Brady was convicted.

Brady denied that he was a party to the whispered conversation in the Stroller's Café or to any conspiracy of any kind, and claims that: He was much annoyed at the intrusion in the Stroller's Café of Kruvosky, Murphy, and Boyd, all of whom were more or less intoxicated, and that he did everything possible to get out of the place without causing a disturbance with them; that the subsequent actions of these three men in jumping into the automobile of Carey as it was being driven away from the Stroller's Café was against his will. That when the stop was made in front of the Howard street house he did not know of the purpose of it, unless it was as stated by Carey to drop off the three men. That he had never been in the Howard street house before, and that he consented to go in then with the rest of his party merely in response to an invitation to take a drink. That after they had entered the house he saw that the Montgomery girl was apparently becoming very friendly with Kruvosky, and was proceeding voluntarily to get under the influence of liquor; that he tried to prevent her from doing both. That she finally followed Kruvosky out of the front room into the kitchen, and he went in after her to induce her to leave the place, but that when she entered the kitchen she started to sing and dance for the several strange men present, including Kruvosky, Murphy, and Boyd, and that while she was singing and dancing some one of the men shouted to her to take off her clothes. That he then saw there was going to be trouble, and he went back to the front room where Carey and the Stanley girl had remained; that he said to them:

"I am going to get out of here; I have asked that girl to go out in the machine, and she is out there dancing for Kruvosky and that bunch, and there is going to be trouble. I am going to leave."

To which Carey replied: "If you will wait just a minute we will all go." That just then there was a scream emanating from the Montgomery girl in the kitchen, and Jean Stanley ran to the assistance of her companion, followed by Carey. That he (Brady) thereupon told Carey that he was going to get out, and that he went to the front door, and Carey said, "Just a minute, and I will be with you." That he waited at the front door for a few minutes, and Carey then joined him, and they both left the house, got into the machine, and drove away. Brady also denied that he saw either of the girls

struck that night, or that he at any time laughed at them.

The evidence shows without conflict that, when Jean Stanley ran to the kitchen for the purpose of assisting the Montgomery girl and was struck by Kruvosky and by Murphy and then taken into an adjoining room by Carey, the latter left shortly afterwards and was not again seen by the Stanley girl that night. The only testimony tending to prove that either Brady or Carey remained upon the premises after the Stanley girl was taken into the adjoining room was that given by the Montgomery girl, who testified that later, when she found herself lying nude on the mattress in the front room, Brady was there with the others, and at that time had sexual intercourse with her. But bearing upon that testimony it should be stated that Brady was tried for rape on that charge and was acquitted. The Montgomery girl also testified that Carey looked in and said, "The cops are coming." There was also the testimony of Jean Stanley to the effect that when she made her escape from the house that night there was a machine standing in front of the house that looked like Carey's machine.

[1] From the evidence above narrated it will be seen that so far as Brady is concerned the record shows a sharp conflict between his testimony and that given by the two young women. The jury doubtless accepted the stories of the young women, and rendered its verdict accordingly. That being so, it is plain that if the trial court erroneously excluded any evidence which may have tended to discredit either of the young women as witnesses it was prejudicial to the rights of this defendant, because it would follow as a natural sequence that if testimony of the young women was shown to be willfully false on any material point the jury would then have had the right to reject the entire testimony of such witnesses and its verdict may have been different.

This brings us to the ruling of the trial court curtailing the cross-examination of the prosecutrix, Jean Stanley, but in order to fully understand and discuss the point it will be necessary to advert first to a phase of the case which developed on the hearing of the motion for a new trial. The first trial of Brady on this charge, which, as before stated, resulted in a disagreement of the jury, ended on January 29, 1921. His next trial on this charge commenced on January 31, 1921, and on February 5, 1921, the jury brought in a verdict of guilty. During all of the trials of this and the other defendants the young women in question were by the order of the trial judge placed in the custody of Mrs. Kate O'Connor, a member of the San Francisco police department. On the hearing of the motion for a new trial Kate O'Connor testified that on the night of December 24, 1920 (that was prior to any of the Brady

trials), she had a conversation with Jean Stanley, in which it was said:

"I said, 'Jean, what's bothering you?' She said, 'Mrs. O'Connor, I haven't slept for two nights.' She said, 'I am worried to death.' I said, 'Well, what's wrong?' and she didn't answer me directly. I kept on asking her, and she said to me, 'Well, I lied in the Kruvosky Case; so did Jessie.' She said, 'I lied to save Jessie's character.' She said, 'Jessie went willingly into the bathroom with Kruvosky; she also drank that evening.' * * * She said that evening when they were in the Stroller's Café that Jessie had sat on the chair with Kruvosky, and that she had kissed him and made love to him; that she had nothing more to do with Mr. Brady; that when they were over to the house at Howard street she had drank and got under the influence of liquor; that she had her dresses, * * * that she was dancing, and had her dresses lifted above her knees; that she was sitting on the mattress making love to Kruvosky before she went out into the kitchen; that Kruvosky went out into the kitchen, and that she followed him. * * * She said that she had heard the scream, and she went out into the kitchen; that at that time Jessie was going into the bathroom with Kruvosky; that she tried to stop her going in, and Kruvosky told her Jessie was old enough to know what she was doing, or old enough to know what she was about; that she still tried to stop her; that Kruvosky punched her in the nose when she tried; and that was really the last that she had seen of Jessie that evening and that time."

Mrs. O'Connor also testified at said hearing that she immediately notified Capt. Matheson, her superior officer, and the trial judge of what the Stanley girl had said, and that Capt. Matheson had notified the district attorney's office, who immediately sent a representative to interview the Stanley girl, but that no one so far as she knew had ever notified any one connected with the defendant's side of the case. During the hearing of said motion the trial judge on several occasions stated that Mrs. O'Connor had informed him of these contradictory statements, and that he "knew all about it." He further stated: "I have a lot of respect for Mrs. O'Connor. Anything she says I believe." In fact, it is shown by the record that he had that much confidence in the veracity of Mrs. O'Connor that when she was called upon to testify at the hearing of said motion he announced that she need not be sworn, but that he would accept as the truth anything that she might say. However, at her own request, Mrs. O'Connor's testimony was taken under oath.

Now, reverting back to the last trial of Brady, and after Jean Stanley had been fully examined and cross-examined as a witness for the prosecution in its case in chief, but before the prosecution had rested its case, the trial judge, doubtless having in mind the information imparted to him by Mrs. O'Connor, asked that Miss Stanley be re-

called as a witness, and he then questioned the witness as follows:

"The Court: Q. Miss Stanley, in the testimony that you have given is there anything that you can think of that would be of benefit to this defendant that you have kept back? A. No, sir. Q. Is there anything that you have kept back that would be of benefit to the people? A. No, sir. Q. Have you told the whole truth about the matter, Miss Stanley? A. Why shouldn't I? Q. But have you? A. Why, certainly. Q. Is there anything that you can think of now that you have been mistaken about? A. No, sir. Q. Nothing that you want to correct? A. Not a thing. Q. Has any one told you to make any statements in this case that was untrue? A. No, sir.

"The Court: That is all. Thank you."

Bearing in mind the expression of confidence by the trial judge in the truthfulness of Mrs. O'Connor, it must have occurred to him at the time the witness was giving this testimony that she was not telling the truth. Nevertheless he took no further steps to ascertain the truth or to lay before the jury the knowledge he then possessed in reference to the contradictory statements. On the contrary, as soon as the court had finished with its questioning and the defendant took up the examination of the witness for the purpose of further developing the matter of contradictory statements and for the purpose of laying a foundation for impeachment, the trial judge excluded, on the objection of the prosecution, the very line of examination which seemed certain to develop these contradictory statements. In this respect the record shows that the defendant asked the witness if she remembered a certain conversation held at a point on Kearny street, between the Hall of Justice and the Sutter Hotel, on the night of January 6, 1921, the same night on which the jury in the first Brady trial (wherein he was charged with rape upon the Montgomery girl and acquitted) had retired, and before it had brought in its verdict, at which conversation were present herself, Miss Montgomery, Mrs. O'Connor, and a newspaper reporter, to which the witness replied that she did not remember. Thereupon the following proceedings took place:

"Mr. Herron: Just to refresh your recollection, was not this conversation in substance—

"The Court: Have you laid the foundation?

"Mr. Herron: Yes; the persons present, the time, and the place.

"Mr. Riley: And got the answer, that she doesn't remember the conversation.

"Mr. Herron: Well, I can go a little further.

"The Court: You cannot.

"Mr. Herron: And refresh her recollection.

"The Court: You cannot.

"Mr. Herron: I will reframe the question.

"The Court: You submit to me in writing the question you want to ask.

"Mr. Herron: May we let the witness step down, and may I ask—

"The Court: Yes, you may interview the witness off the stand, but you submit that question to me in writing. Step down, Miss Stanley. (The witness is thereupon excused.) * * * (Counsel thereupon drafts question.)

"Mr. Herron: Do you want to see the question, Mr. Riley, before I pass it up to his honor? (Handing draft to counsel, who thereupon reads the same.) And I might also say, your honor, that this question will be asked in the highest good faith, and I believe I am prepared to prove that the statement was made. (Handing draft referred to to the court.)

"The Court: Let the record show a piece of paper, handed to the court and which was submitted to the district attorney, is handed to the reporter, and he is directed to make it a part of the record.

"Mr. Riley: And we object—

"The Court: That question will not be propounded in the presence of the jury—the objection, Mr. Riley?

"Mr. Riley: On the ground that it is incompetent, irrelevant, and immaterial, not proper cross-examination, not proper recross-examination, and in any event would call for the opinion and conclusion of the witness, and in no wise bidding upon the people.

"The Court: Sustained. (Thereupon handing draft referred to to the reporter. The question referred to and ordered made a part of the record is in words as follows: 'Did you not say at that time and place that you hoped that Brady would be acquitted because he was innocent?')"

[2-6] The trial of every person charged with felony must take place in the presence of the jury. The jury is a co-ordinate part of the court. The purpose of the examination of the witness is to elicit the facts and the jury are the exclusive judges of those facts. There is no law requiring a defendant to propound his questions out of the hearing of the jury; but, passing over this unwarranted direction of the court and taking up the matter of the propriety of the excluded question itself, it is clear to us that the question was a proper one, and should have been put to and answered by the witness. It is too well established to admit of argument that before a witness may be impeached on account of having made contradictory statements, the attention of the witness, in all fairness to the witness, must not only be called to the time and place, and the persons, in the presence of whom the contradictory statement is claimed to have been made, but the statement itself must be related to the witness so that full opportunity may be given the witness to admit or deny making such statement. Here the court allowed the defendant to call the attention of the witness to the time, place, and persons present, and then, merely because the witness stated that she did not remember the occasion, refused to allow the defendant to pursue the matter further by calling the attention of the witness to the statement itself. It was impossible for the witness to either admit or deny making the statement unless

the statement itself was first related to her. The question did not call for an opinion, as ruled by the court. It called for a fact, that is the fact of whether or not the witness had made such a statement. The defendant was on trial for a crime which no one claimed he committed directly, but whose conviction as above stated was sought upon the ground that he was a party to a conspiracy, in the furtherance of which an attack was made by others upon the prosecutrix. The impeachment question ruled out by the court was asked for the purpose of proving that the prosecutrix had declared to others that the defendant was innocent. If she had admitted making the statement certainly the jury would then have been entitled to know what she meant by it. That is, whether she meant by it that she had falsified her testimony when she stated that the defendant was a party to the whispered conversation, which formed the basis of the conspiracy, or whether she failed to tell the truth when she stated the defendant refused to respond to the call for assistance from herself and companion, or whether it was untrue, as testified to by her, that the defendant stood in the doorway, laughing at them during their unfortunate predicament, while in the kitchen of the Howard street house. The truth of all of these elements was vital in determining the guilt of the defendant in view of the theory upon which he was tried.

On the other hand, if the witness had denied making the statement, the defendant would then have been in a position to contradict her by placing on the stand the other parties to the conversation, including Mrs. O'Connor, and the jury would then have been called upon to say which of them was telling the truth. It is only a fair inference to indulge in that, if Mrs. O'Connor had been called to contradict the prosecutrix, the whole mass of contradictory statements, which Mrs. O'Connor claims were made to her on the night of December 24, 1920, and of which the trial judge had full knowledge at the time of the examination of the witness, would have been brought to the surface. By denying the defendant the right to cross-examine the prosecutrix on this important matter the defendant was deprived of the very key to the whole situation, which in all fairness should have been laid before the jury in order that the jury, as the sole judge of the credibility of the witnesses and other evidence in the case, might determine whether or not the prosecutrix had testified falsely as to material facts. If she had, it was the duty of the jury to treat all of her testimony with distrust and to reject it unless they believed that in other respects she had told the truth. Without the testimony of Jean Stanley, no case in law so far as the record discloses would have been established against the defendant. Her evidence was the very foundation upon which the whole

structure of the prosecution rested, and under those circumstances it is our opinion that the trial court should have allowed the defendant a reasonable cross-examination in order to ascertain whether or not she was telling the truth.

[7] Moreover, the effect of the limitations placed upon the cross-examination of the prosecutrix appears to be all the more prejudicial to the rights of this defendant in view of the knowledge of the contradictory statements imparted to the trial judge by Mrs. O'Connor. We are not to be understood as stating it as the law that, when a trial judge hears public rumors or reads statements in public journals or learns through the medium of anonymous letters or the like that a witness in a criminal case has testified falsely, he should take any cognizance of it. But, where, as in this case, a defendant is charged with a dastardly offense not because it is claimed he directly committed it, but because of his association with those who did commit it, and the trial judge learns from a source he firmly believes to be reliable, in this case from a sworn officer of the law and of the court, in whose keeping the court had intrusted the protection of these girl victims, and in whose veracity the court had unlimited faith, that the chief witness for the prosecution has admitted that she lied in material parts of her testimony, it was his duty, in our opinion, in the interest of justice and of fair dealing with the defendant, to have gone into the cross-examination of the witness thoroughly, since he recalled the witness at all, or else have allowed the defendant to take up the cross-examination of the witness where he had left off, so that the true situation as he knew it to be might be placed before the jury. In no other way could the jury fairly and fully judge of the guilt of the defendant, and in no other way could the defendant be given a fair trial.

[8] In conclusion, it may be stated that this was the fifth defendant and the seventh trial, on charges growing out of this moral outrage, to be brought before the trial judge who presided here. The evidence of the brutality and indignity visited upon these girls by Murphy, Kruvosky, MacDonald, and Boyd were such as to shock the sensibilities of the judge and of the community. Under such strained circumstances it is only consistent with human feelings that there should be a sincere desire to promptly and adequately impose the law's penalties upon those who have been the law's violators, but, even under those circumstances, the constitutional right of the accused to a fair and impartial trial is no different than in any other case, and where, as seems to be the situation here, public sentiment has been righteously aroused and there is an apparent inclination to condemn all persons connected with the affair before they have been tried, the courts should exercise the utmost care in seeing to

it that the accused is accorded the full measure of his constitutional rights, and that every opportunity recognized by the law is given him to prove his innocence.

In view of what has been said it is our opinion that the judgment and the order appealed from should be reversed; and it is so ordered.

We concur: TYLER, P. J.; KERRIGAN, J.

(56 Cal. App. 723)

BLODGETT v. RHEINSCHILD et al.
(Civ. 3525.)

(District Court of Appeal, Second District, Division 2. California. March 6, 1922.)

1. Usury §52—Commission payable to lender held device to evade statute.

Where money was loaned directly by the lender to the borrower, without any intermediary, a charge for a commission for making the loan in addition to the maximum rate of interest allowed by the usury law was a device to evade the law.

2. Usury §146—Lender cannot recover any interest even after maturity of debt.

Under the usury law approved at the general election of November 5, 1918 (St. 1919, p. lxxxiii), § 2, providing that a contract to pay more than the interest therein permitted is void as to any agreement to pay interest, and that no action at law to recover interest in any sum shall be maintained, an agreement to pay interest at a usurious rate prevents the recovery of interest after the maturity of the debt as well as before its maturity.

3. Chattel mortgages §6—Bill of sale with lease back held a "mortgage."

A bill of sale by the owner of an automobile with a lease back from the buyer, which required the payment of a sum loaned to the seller with interest in installments and gave the seller the option to repurchase the automobile for \$1 after making the payments, was but a mortgage of the automobile under Civ. Code, § 2924, since the documents were given to secure the repayment of the loan, and the possession remained in the owner of the property.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Mortgage.]

4. Chattel mortgages §162—Mortgagee's possession after maturity does not cut off redemption.

A chattel mortgage is but an incident of the indebtedness impressing the property with a lien only, and the legal title remains in the mortgagor under Civ. Code, § 2927, and taking of possession of property on the mortgagor's default does not enlarge the mortgagee's interest, nor cut off the mortgagor's right of redemption, but only enhances the security by giving possession for the purpose of sale.

5. Chattel mortgages §26—Agreement in advance to waive equity of redemption is void; "once a mortgage, always a mortgage."

The established doctrine that once a mortgage, always a mortgage, means that no agreement in advance to waive the equity of redemption is valid, and that a transaction once impressed with the character of a chattel mortgage establishes the right to redeem until the equity of redemption is foreclosed or barred or duly released under Civ. Code, § 2889.

6. Chattel mortgages §26—Cannot be made to operate as conveyance on default.

The parties cannot make a conveyance of a chattel absolute in form a security for the payment of money by a given day with the further agreement that if payment is not made, the instrument shall be treated as an absolute sale, so that a provision in a so-called lease, which was in effect a chattel mortgage, that the title should vest absolutely in the lessor on the lessee's default was invalid.

7. Chattel mortgages §74—Clause authorizing seizure held indivisible from that cutting off redemption.

In a so-called lease, which was in effect a chattel mortgage, and which gave the mortgagee the right to possession and absolute title on the mortgagor's default in making any payment, the provision giving absolute title was inseparable from that giving right to possession, and both were invalidated by the invalidity of the former.

8. Chattel mortgages §136—"Wrongful conversion" by mortgagee after seizure extinguishes the lien.

Where the mortgagee, after seizing the chattel under his mortgage, converted it to his own use by making a private conditional sale thereof to another, such a conversion was inconsistent with the continued existence of the mortgage lien, and effected an extinguishment thereof, under Civ. Code, § 2910, as to extinction of lien by wrongful conversion by lienholder.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Conversion.]

9. Replevin §83—Use value of automobile may be recovered.

Where the property replevied and delivered to plaintiff has a value on account of the use to which it may be put, as distinguished from its value for sale or consumption, as in the case of an automobile, the successful defendant may recover the value of the use of the property during the time it was unlawfully withheld from him under the writ.

10. Replevin §83—Use value may be recovered, notwithstanding alternative judgment for value.

Where the replevied automobile was delivered to plaintiff under the writ, and defendant succeeded at the trial, it was proper to allow defendant the value of the use of the automobile during the time it was withheld from him, even though the judgment allowed him the market value of the automobile in the alterna-

tive if plaintiff could not deliver the chattel itself.

Appeal from Superior Court, Los Angeles County; Leslie R. Hewitt, Judge.

Action by J. L. Blodgett against George W. Rheinschild and others to recover possession of an automobile. Judgment for defendants, and plaintiff appeals. Affirmed.

Charles Robert McCarty, of Los Angeles, for appellant.

Davis & Thorne, of Los Angeles, for respondents.

FINLAYSON, P. J. This is an appeal by plaintiff from the judgment in an action brought by him to recover possession of an automobile. The case comes to us on the judgment roll only. The action, commenced on May 6, 1919, was originally brought in the name of J. L. Blodgett; subsequently, as shown by a supplemental complaint, the J. L. Blodgett Company, a corporation, succeeded to all of the rights of the original plaintiff; but, this notwithstanding, it will conduce to brevity if we discuss the case as though there had been no such change of interest.

The complaint alleges that on February 18, 1919, plaintiff was and ever since has been the owner of and entitled to the possession of the automobile, that it is of the value of \$500, and that defendants unlawfully withhold it. The defendant George W. Rheinschild answered, denying the allegations of the complaint, and in a cross-complaint alleges facts showing that on February 18, 1919, he executed to plaintiff a bill of sale of the automobile to secure a sum of money loaned to him by plaintiff at a usurious rate of interest; that the full amount of the loan did not become due until August 18, 1919, which was more than three months after plaintiff brought this action; and that immediately after commencing the action plaintiff obtained possession of the car from the sheriff, by whom it had been seized pursuant to proceedings had under sections 509 et seq. of the Code of Civil Procedure; wherefore the answering defendant, the respondent here, prayed that, upon his repaying the loan that had been made to him by plaintiff, he recover possession of the car, or its value, with damages for its detention.

The findings of the court disclose a situation substantially as follows: The answering defendant, George W. Rheinschild—the party alluded to when, hereafter, we refer simply to the defendant—had purchased the automobile prior to February 18, 1919, from a third party whose name is not disclosed by the record. On the date last mentioned defendant owed his vendor, on account of the purchase price of the automobile, a balance of \$276.50. On February 18, 1919, plaintiff loaned to defendant the sum of \$400, a part

of which was used by defendant in paying the latter's vendor the balance due on the purchase price of the car. As security for the \$400 thus loaned by plaintiff to defendant, the latter executed to plaintiff a bill of sale of the automobile. Contemporaneously with the execution of the bill of sale, and as a part of the same transaction, plaintiff and defendant executed an instrument in writing, in form a lease, which, after reciting that the defendant, as lessee, has hired and received from the plaintiff, as lessor, the automobile in question for the term of six months, provides that the "lessee" (defendant) shall pay the "lessor" (plaintiff), as rental for the hire of said automobile during said term of six months, the sum of \$434.70, payable in six monthly installments of \$72.45 each, commencing on March 18, 1919, and ending on August 18, 1919, with interest at the rate of 1 per cent. per month after the termination of the "lease" until the whole amount of the "rent" shall be paid. The document contains the following provisions respecting plaintiff's right to take possession:

"If the lessee defaults in any of the above payments, when due, or breaches any provision of this lease, * * * the lessor may, at his option, without previous demand or notice, * * * retake possession of said automobile * * * with or without process of law; and all payments theretofore paid hereunder shall thereupon be forfeited to the lessor, and this lease shall thereupon terminate, and all rights of lessee in this contract and said automobile shall thereupon cease and are hereby waived; * * * or the lessor may declare the whole of the sums then remaining unpaid to be immediately due and payable, and sue therefor."

The document further provides that if the "lessee" shall make all payments when due, then he shall have the right to purchase the automobile by paying the "lessor" one dollar, and thereupon the latter shall execute to the "lessee" a good and sufficient bill of sale.

There were no writings of any kind other than the so-called "lease" and the bill of sale to plaintiff. Defendant had acquired possession of the automobile from his vendor prior to the time when he secured the loan from plaintiff. This possession he retained, undisturbed, until May 7, 1919, when, as we have stated, the automobile was taken from him by the sheriff and delivered to plaintiff pursuant to proceedings had under sections 509 et seq. of the Code of Civil Procedure.

From the foregoing it is obvious that if plaintiff ever had any right to the possession of the automobile it was only because he had a mortgage lien on the car, created by defendant's execution of the bill of sale and the so-called "lease."

The \$400 that plaintiff loaned to defendant was applied and paid out as follows: \$276.50 was paid to the former owner of the automobile, defendant's vendor, to satisfy the unpaid balance of the purchase price then

owing to him by defendant; \$16.50 was retained by plaintiff to pay for insuring the car during the life of the so-called "lease"; and the balance, \$107, was paid to defendant.

The \$434.70 mentioned in the "lease"—the total amount that defendant agreed to repay to plaintiff in six monthly installments of \$72.45 each—is made up of the following: The \$400 that was actually loaned to defendant, and which was paid to him or applied to his use as aforesaid; the sum of \$14.70 which represents "interest" charged defendant for loaning him the sum of \$400 for the term of six months; and the sum of \$20, exacted by plaintiff "as a commission for making the loan." The interest charge of \$14.70, bearing in mind that one-sixth of the principal was repaid to plaintiff every month, and making due allowance therefor, exceeds by 70 cents interest at the rate of 12 per cent. per annum on the loan of \$400 for six months.

[1] The \$400 actually loaned to defendant was the property of plaintiff; the latter himself negotiated the loan directly with defendant—that is, there was no agent or intermediary in the transaction. There was, therefore, no occasion for the payment of a "commission" by either the borrower or the lender. Designating the \$20 as a "commission" did not make it such. This word "commission" was but a euphemism, employed in an attempt to justify the exaction of a greater sum for the loan than at the rate of \$12 upon one \$100 for one year—the maximum amount that a lender is entitled to ask or receive since the present usury law was adopted at the general election held November 5, 1918. The device of a "commission" has therefore the characteristics of a shift to circumvent and avoid the usury law. "As a general rule, any benefit or advantage exacted by the lender from the borrower, whatever be its name or form, which, added to the interest taken or reserved, would yield to the lender a greater profit upon his loan than is allowed by law is deemed usury." 39 Cyc. 971.

The automobile having been seized by the sheriff and delivered to plaintiff on May 7, 1919, defendant, to secure its return, gave the necessary redelivery bond, and the car was immediately returned to him, remaining in his possession until October 2, 1919, when it again was seized by the sheriff under a default judgment entered against defendant on September 25, 1919. That judgment was subsequently set aside, but only on condition that the automobile should remain in plaintiff's possession as security for the loan. It continued in plaintiff's possession until March 12, 1920, when the latter delivered it to a third party under a conditional sale contract.

Defendant has made no payment on account of the money loaned to him by plain-

tiff. While the automobile was in plaintiff's possession, subsequent to its seizure by the sheriff, plaintiff caused needed repairs to be made, amounting in the aggregate to the sum of \$138.12. The court found the value of the car to be \$550, and its usable value, during the time that defendant was deprived of its possession, to be \$210, or at the rate of \$20 per month for 10½ months.

As conclusions of law the lower court found that the charge of \$20 as a "commission" for making the loan of \$400 to defendant was contrary to law, and that by reason thereof plaintiff never acquired any right to the possession of the automobile; that therefore the car was unlawfully seized by plaintiff, and that defendant is entitled to a judgment for the sum of \$210, damages for the detention of the automobile after its seizure in this action, less the sum of \$138.12, the amount expended by plaintiff for necessary repairs while the car was in his possession; also that defendant is entitled to the return of the automobile upon the payment to plaintiff of the sum of \$400, or, if delivery cannot be made, that defendant have judgment for the value of the car, \$550, less said sum of \$400. Judgment was entered accordingly.

Appellant claims that if the contract was usurious, and if for that reason, the provision for installment payments by respondent, the borrower, was void, nevertheless, upon the maturity of the full amount of the debt on August 18, 1919, which was after appellant had commenced this action, he became entitled to take possession of the automobile. And because the property, which, as we have said, had been taken from respondent by the sheriff and delivered to appellant, was in the latter's possession when the judgment was rendered, it is claimed by appellant that, even if he did not have the right to possession at the time when he brought the action, nevertheless, if he subsequently acquired such right, that is, if he acquired the right to possession upon the maturity of the whole amount of the debt, the court should not unconditionally redeliver the property to respondent, but should adjudge that the latter is entitled to redelivery only upon condition that he pay appellant the amount actually due the latter at the date of the judgment. Appellant concedes that the trial court attempted to pursue this course, but contends that the amount adjudged to be due him from the respondent is less than it should be. Without deciding the question, we shall assume, for the purposes of this decision, that, even though appellant may not have had the right to possession when he commenced the action, respondent, nevertheless, will be entitled to redelivery only upon payment of the precise amount due by him to appellant if the latter, at any time before judgment, had become entitled to take possession.

Both parties have argued the case upon

the assumption that the only usury act that can have any possible application is the initiative measure that was approved at the general election held November 5, 1918 (Stats. 1919, p. lxxxiii), section 2 whereof provides:

"No person * * * shall directly or indirectly take or receive * * * any greater sum * * * for the loan * * * of money * * * than at the rate of twelve dollars upon one hundred dollars for one year. * * * Any agreement or contract of any nature in conflict with the provisions of this section shall be null and void as to any agreement or stipulation therein contained to pay interest, and no action at law to recover interest in any sum shall be maintained and the debt cannot be declared due until the full period of time it was contracted for has elapsed."

[2] The first point made by appellant is that even if the charge of a "commission" of \$20 in addition to the sum of \$14.70 charged as interest, be tantamount to the taking and receiving by the lender, the plaintiff in this action, of a sum in excess of 12 per cent. per annum on the amount loaned, contrary to the above-quoted provision of the initiative act, nevertheless appellant, to quote the language of his brief, is "entitled to legal interest (one per cent. per month) allowed by law and provided for in the agreement between plaintiff and defendant," and that such interest should have been added to the amount which the judgment required respondent to pay to appellant as a condition precedent to a redelivery of the automobile. This contention, if upheld, would not only do violence to the express letter of the law, but would frustrate its manifest intent and purpose. Section 2 of the act expressly declares: (1) That any contract of any nature in conflict with its provisions shall be "null and void" as to "any agreement * * * to pay interest"; (2) that in such case "no action at law to recover interest in any sum shall be maintained"; and (3) that the debt cannot be declared due "until the full period of time it was contracted for has elapsed"—which, in this case, was not until the expiration of August 18, 1919, or more than three months after plaintiff brought this action. We think it is clearly the intent of this initiative measure that there shall be no recovery of any interest whatever, and that the loss of all interest, whether accruing before or after the maturity of the debt, is one of the penalties contemplated by the act. When the initiative measure declares that if the contract be usurious "no action at law to recover interest in any sum shall be maintained," it ought to be understood to mean exactly what it says, namely, that if any person shall contract for a usurious rate of interest he shall not recover interest "in any sum." If only interest before the maturity of the debt were intended to be banned, such intent could have been accomplished by that

provision of the act which declares that the usurious contract shall be null and void "as to any agreement * * * therein to pay interest." For if the act contained only that provision, then the usurious contract would have to be read as though it had made no mention of any interest whatever, in which case there might be ground for the claim that the debt should draw interest at the legal rate after its maturity. It obviously was for the purpose of preventing any such benefit to accrue to one who lends money at a usurious rate that the provision which nullifies the agreement as to interest is followed by the other provision which declares that such lender shall not recover "interest in any sum."

[3] It next is contended that the judgment is erroneous in so far as it allows defendant damages in the sum of \$210 for the detention of the automobile by plaintiff for the 10½ months that it was in the latter's possession during the pendency of the action. The greater part of this period of 10½ months accrued after the maturity of the whole amount of defendant's indebtedness. It is argued, therefore, that, at least as early as the full maturity of the debt, plaintiff was entitled to possession under the terms of the written agreement, and that therefore defendant is not entitled to damages for any part of the period during which plaintiff was thus rightfully in possession of the property. The vice of this argument lies in the assumption that, under the terms of the written contract—the "lease," so called—plaintiff became entitled to possession upon defendant's default in the payment of his debt at maturity. We think that the provision in the "lease" purporting to give to plaintiff the right to take possession of the property upon any default by defendant in the payment of his debt does violence to the doctrine that "what is once a mortgage is always a mortgage," and that therefore it is wholly nugatory. The transaction evidenced by the "lease" and by defendant's bill of sale to plaintiff was but a mortgage. The two documents were executed for the purpose of securing a debt. They were given to secure the repayment of the loan that plaintiff made to defendant. The possession remained in defendant, the owner of the property. As between the parties, therefore, the transaction was a mortgage. Civ. Code, § 2924.

[4] In this state the mortgage is but an incident of the indebtedness, the property is impressed with only a lien for the benefit of the mortgagee, the legal title remains in the mortgagor, and the mortgagee is not entitled to possession unless authorized by the express terms of the mortgage (Civ. Code, § 2927); and if, upon the mortgagor's default in the payment of his debt, the mortgagee does take possession under an express stipulation therefor in the mortgage, his inter-

est in the property is not enlarged or affected thereby, nor is the mortgagor's right of redemption cut off. *Harper v. Gordon*, 128 Cal. 492, 61 Pac. 84. If a mortgagee take possession under the terms of his mortgage, he does so only for the purpose of increasing his security—his security being enhanced by the fact that if he has possession the property will naturally bring a higher price at a foreclosure sale, or at a public sale made as in the case of a "pledge," since the validity of the sale, whether the property be sold as a pledge or under a decree of foreclosure, depends upon the presence of the property at the place of sale. *Ely v. Williams*, 6 Cal. App. 455, 92 Pac. 393. So much for the purpose for which a mortgagee may take possession of the mortgaged property.

[5] Turning now to a consideration of certain contracts which the law forbids a mortgagee to make with his mortgagor: It is an established doctrine that "what is once a mortgage is always a mortgage," which means that no agreement in advance to waive the equity of redemption is valid, and that when once it is established that a transaction is impressed with the character of a mortgage the right to redeem will continue until the debt is paid or until the equity of redemption is foreclosed or barred, or duly and sufficiently released. Civ. Code, § 2889; *Bradbury v. Davenport*, 114 Cal. 593, 46 Pac. 1062, 55 Am. St. Rep. 92.

[6] For the same reason it is not competent for the parties to make a conveyance of property, absolute in form, a security for the payment of money by a given day, with the further agreement that if payment is not made the instrument shall be treated as an absolute sale. If the instrument is a mortgage when delivered, it will so continue until the right of redemption is cut off in some of the modes recognized by law. *Bearss v. Ford*, 108 Ill. 16, 26; 27 Cyc. 975.

[7] The provision in the "lease" under which plaintiff claims the right to take possession if defendant defaults in any payment is more than a mere contract for the transfer of possession to the mortgagee as further security for his loan to the mortgagor. It is, in effect, a contract whereby the parties undertook to provide that if payment be not made when due the mortgagor's right of redemption shall be cut off and the title vest absolutely and unconditionally in the mortgagee. Under the doctrine "once a mortgage always a mortgage," such an agreement is wholly void. This particular provision of the "lease" is not severable; it is indivisible. The clause which purports to give to plaintiff, the mortgagee, the right to take possession is indissolubly connected with the clauses which purport to cut off defendant's right of redemption. The provision is therefore void in toto, and does not give to plaintiff any right whatever to possess the mortgaged property. From this it

follows that plaintiff's possession, acquired after the sheriff had seized the property and delivered it to him, was without right, and that therefore he is liable to damages for its detention.

[8] Moreover, according to the findings of the trial court plaintiff converted the property to his own use during the pendency of the action, thus extinguishing his lien and any right to possession. It is expressly found by the lower court that on March 20, 1920, and while the automobile was in plaintiff's possession, he delivered it to a third party under a conditional sale contract, and that such third party is now in possession under that contract. This disposition of the automobile under a private sale thereof was an unlawful assumption of dominion over the property in defiance of defendant's rights, made at a time when, if plaintiff had any right whatever to possession, it was for the purpose, and only for the purpose, of increasing his security. Such unlawful assumption of dominion amounted to a wrongful conversion of the property, inconsistent with the continued existence of plaintiff's mortgage lien, and effected an extinguishment thereof. Civ. Code, § 2910; *Everett v. Buchanan*, 27 Dak. 249, 6 N. W. 439, 8 N. W. 31; *Loughborough v. McNevin*, 74 Cal. 255, 14 Pac. 369, 15 Pac. 773, 5 Am. St. Rep. 435. See, also, *Hudson v. Swan*, 83 N. Y. 552. From this it follows that if any right to possession accrued to plaintiff after the commencement of the action such right was extinguished with the extinguishment of the lien, since it could exist only for the purpose of enhancing the security afforded by the lien.

[9] Where, as here, the property has a value on account of the use to which it may be put, as distinguished from its value for sale or consumption, the successful defendant may recover the value of the use of the property during the time it was unlawfully withheld from him under the writ. *Ann. Cas. 1914A, p. 379*, note to *Thomas v. First Nat. Bank*.

[10] The judgment is in the alternative; that is, it adjudges that, upon the payment to plaintiff of the sum of \$400 owing to him by defendant, the latter shall recover the automobile, or its value if delivery cannot be had. Because of this alternative form of the judgment it is contended that it was error to award to defendant the usable value of the automobile during the time of its detention by plaintiff. There is no merit in this contention. It is expressly provided by section 667 of the Code of Civil Procedure that—

"If the property [involved in a replevin action] has been delivered to the plaintiff, and the defendant claim the return thereof, judgment for the defendant may be for a return of the property or the value thereof, in case a return cannot be had, and damages for taking and withholding the same."

Where the property has a value on account of the use to which it may be put in excess of the legal rate of interest upon its value for sale or consumption, the defendant may recover such usable value notwithstanding the fact that he may be unable to secure a return of the property from the plaintiff, but may have to take in lieu thereof the value of the property. See *Nahhas v. Browning*, 181 Cal. 55, 183 Pac. 442, 6 A. L. R. 476, and *Schrandt v. Young*, 62 Neb. 254, 86 N. W. 1085.

The judgment is affirmed.

We concur: WORKS, J.; CRAIG, J.

183 Cal. 682

PEOPLE v. ELLIS. (Cr. 2379.)

(Supreme Court of California. May 5, 1922.)

- 1. Criminal law** ⚡1159(2), 1160—Weight of testimony for jury, and where verdict is approved, conviction will not be disturbed.

Where there is evidence supporting conviction, the weight to be accorded it was a question for the jury, and, on appeal, it cannot be disturbed upon the ground that it is not sustained by evidence, and the application of this rule is strengthened where the trial court has refused a new trial.

- 2. Homicide** ⚡253(1), 354—Evidence held to support verdict of first degree murder and sentence of death.

In a homicide prosecution, evidence held to support a verdict of first degree murder and sentence of death.

- 3. Criminal law** ⚡370—Evidence throwing light upon facts in issue admissible, though showing other offenses.

In a homicide prosecution, where deceased had been in defendant's home during the evening and left, and about 4:30 o'clock in the morning came to the back door, and defendant went out the front door and around the house to the rear, where the killing took place, evidence that defendant had sold liquor to deceased during the evening was admissible as tending to establish knowledge of deceased that liquor could be purchased at defendant's home, and in determining whether defendant was justified in believing that the person knocking at the rear intended to assail his home, or was desirous of purchasing liquor, even though showing another offense.

- 4. Criminal law** ⚡351(9)—Defendant's escape from jail admissible as circumstance of guilt.

Where defendant was arrested on March 17th and on April 9th escaped from jail, admission of evidence as to his escape was not reversible error, there being no difference between flight before and after arrest.

- 5. Criminal law** ⚡470, 478(1), 479, 494—Opinion of firearms and medical experts, as to point of entrance of bullet, admissible, and weight of testimony was for jury.

In a homicide prosecution, testimony of medical experts and firearms experts, that the bullet went into the back and came out through the abdomen of deceased, was admissible over objection that this was a question for the jury, its value and weight being for the jury, and such witnesses were competent.

- 6. Criminal law** ⚡494—Change of expert's opinion as to point of entrance of bullet affected weight only.

In a homicide prosecution, where an expert witness testified, in preliminary examination, that, in his opinion, the bullet entered the abdomen of deceased, but upon trial stated he believed the bullet entered the back, stating his reasons for such change, the fact that the expert had changed his mind was not a ground for excluding his testimony, as it merely affected its weight.

- 7. Criminal law** ⚡485(1)—Direct testimony of facts by experts rather than by answer to hypothetical question not objectionable.

Where it was urged that the experts should have been asked a formal hypothetical question rather than permitted to base their opinion on examination of the body and clothing of deceased, there can be no substantial exception, where the testimony was based upon actual examination.

- 8. Homicide** ⚡348—Verdict carrying death penalty not result of passion and prejudice.

Where the record disclosed a fair trial, the mere fact that defendant was a colored man charged with killing a white man falls short of establishing prejudice and passion, warranting setting aside a verdict of guilty of first degree murder, carrying a death penalty.

- 9. Homicide** ⚡332(2)—Jury determines punishment in first degree murder and, if justified by evidence, not reviewable.

Under Pen. Code, § 190, making first degree murder punishable by death or imprisonment for life, at the jury's discretion, and where, in review, the appellate court is satisfied that there was sufficient evidence to justify a verdict of murder in the first degree, its inquiry upon that point is ended.

In Bank.

Appeal from Superior Court, Ventura County; Merle J. Rogers, Judge.

Alfred Ellis was convicted of first degree murder, and sentenced to death, and he appeals. Affirmed.

Charles F. Blackstock, of Oxnard, for appellant.

U. S. Webb, Atty. Gen., Arthur Keetch, Deputy Atty. Gen., John W. Maltman, of Los Angeles, and Don G. Bowker, Dist. Atty., of Ventura, for the People.

SHURTLEFF, J. Defendant and appellant was accused, in an information filed by the district attorney of Ventura county, with the crime of murder, and, upon the trial, the jury found him guilty of murder in the first degree, attaching the death penalty. Prior to judgment, defendant moved for a new trial, which was denied, and thereupon sentence of death was pronounced. Defendant appeals from this judgment and the order denying his motion for a new trial.

[1, 2] One of the contentions of defendant is that the verdict is not sustained by the evidence. The facts are as follows: Carlton E. Stannard (a white man) with two companions left a restaurant, where they had met by chance, in the city of Oxnard, Ventura county, this state, at about 1:30 o'clock on the morning of March 16, 1921, and walked in a southerly direction down Saviers road and thence in a westerly direction down Seventh street in said city. As they were proceeding on Seventh street, they heard music coming from the home of defendant,

located on the corner of Seventh and B streets; Stannard, who is frequently herein-after referred to as the "deceased," went to the back door of his house and inquired of the defendant, who is a colored man, if he, deceased, and his companions could come in, and, receiving an affirmative answer, they entered the house. The defendant was giving a dance for the entertainment of certain members of a theatrical company, composed of colored people, which was then playing in Oxnard. The deceased and others present were served with intoxicating liquor by the defendant, for which he was paid. The companions of deceased left in a short time, but deceased remained. At the conclusion of the dance, at an early hour in the morning, all of the guests, including the deceased, excepting a colored musician named Carr, belonging to said theatrical company, left the defendant's home. The defendant's wife was present at the dance, but became intoxicated to an extent which incapacitated her, and, during the happening of the events immediately connected with and leading up to the shooting which resulted in the death of Stannard, was lying stupefied and asleep upon the bed in the house.

At about a quarter to 4 o'clock in the morning, and apparently after the departure of deceased, the defendant accompanied Carr to a rooming house across the street from defendant's dwelling, where he secured Carr a lodging for the night. Having thus provided for Carr, the defendant left this rooming house, presumably returning to his home, and Carr retired. The proprietress of this lodging house testified that, at about 4:30 or 25 minutes to 5 o'clock in the morning (March 16, 1921) she heard a shot "and it sounded awful close and muffled like." Helen Lee, another witness, present at the dance, stated that she left the defendant's home about 4 o'clock of the same morning for her house, which was in the rear of the home of defendant; that, shortly after reaching her house, she heard some one knocking at the back door of the defendant's house, and heard the defendant come out in the yard and say: "Why in the hell don't you go home, everybody has gone"; that about five minutes after that she heard something more like a door slamming and got up and looked out the door of her home and, not seeing anything, returned to her bed; that after she got back in bed she heard some one groan; that, at about 5 o'clock in the afternoon of the 16th of March, she noticed a bullet lodged in the back door of the defendant's home; that, after seeing the bullet, she went to her home for supper, and, after finishing it, returned to the defendant's house and found that, during her absence, the bullet had been removed and the door covered with "white stuff." She described the sound she heard as something like a boom, "it didn't sound so much like a gun, it

sounded like it was muffled," and she further testified that she heard the screen door at the back of defendant's house shut after she heard this muffled noise.

At half past 6 o'clock or thereabouts, on the morning of said 16th of March, the body of deceased was found in an alley some 100 feet distant from the back door of the defendant's home. An examination showed that deceased had been shot straight through the body. The peace officers investigating the case found a Colt's .45 revolver, fully loaded, between the mattresses of defendant's bed. It further appeared that the deceased, who was about 34 or 35 years of age, had at one time served in the U. S. army, the date of such service not being given.

On being questioned, the defendant at first denied any knowledge of the affair, but subsequently stated the deceased had been accidentally shot by Carr with his (defendant's) gun; that he had given his gun to Carr with the request that he (Carr) look after "matters" for him during his temporary absence from the house, and that deceased had been killed accidentally while he (defendant) was away. He also stated that he had reloaded the revolver after Carr had shot the deceased with it. Finally, however, defendant admitted that he shot deceased with his (defendant's) gun, but asserted it was an accident. His story, told upon the witness stand is substantially as follows: That, after he returned from the lodging house after leaving Carr, he went to bed, and was just getting off to sleep when some one knocked, and he asked, "Who is there?" no one answered, but knocked again; that he then got out of bed, put on his slippers and, without dressing, took his revolver, a single action gun, cocked it, and went out the front door of the house, and thence around the house to the rear and "called out" to know who was there; and that deceased answered, "It is Stub," it appearing that deceased was also known by that name; that he said to deceased, "What the hell are you doing here? everybody has gone to bed;" that deceased said that he wanted another drink; that he told deceased he had no more liquor; that deceased insisted, and that they talked back and forth; that deceased was standing on the top step of the steps leading to the back door, with his back against the door and between the door and screen door and holding the screen door open; that he (defendant) stood on the ground with his revolver in his right hand hanging by his side; that deceased insisted on being given liquor and asked him what he had in his hand; that he (defendant) raised the gun to show deceased that it was a gun and not a bottle, and that deceased kicked the gun and it was discharged; that he (defendant) ran around the house and into the front door and deceased also ran. That he went through the house from the front door to the back door,

stopping only a moment to look at his wife, who was lying intoxicated on the bed, and that when he got to the back door, deceased had entirely disappeared. That he did not know that deceased was killed, or that he had hit him, until he heard it after the body was found.

All of the evidence produced at the trial upon the point, except that of defendant, and which testimony, aside from that of defendant, was that of experts, was to the effect that the bullet, which passed through the body of deceased, entered at the back and came out the abdomen, which is a very important circumstance, and in which, as we will subsequently point out, the defendant was vitally concerned. It should be stated, however, that one of the witnesses so testifying at the trial, declared, at the preliminary hearing, that, in his opinion, the bullet had entered the abdomen and came out the back of the deceased. Defendant attaches considerable importance to this change of opinion, which we will presently consider.

Counsel for defendant, in the discussion of his contention that the verdict is not supported by the evidence and, in any event, that the facts do not justify the imposition of the death penalty, forcefully urges that the shooting occurred at the defendant's own home, where the defendant had a right to be and where the deceased had no right to be at so early an hour in the morning, hammering on the side of the defendant's house and upon the rear door thereof; that the most natural thing in the world for the defendant to do was to take his pistol and go out the front door, just as he did do, and then go cautiously around to the back of the house for the purpose of discovering who was disturbing the peace and quiet of his home at that "unseemly hour of the morning," and why it was being done; that the defendant and the deceased had not quarreled, and, so far as the record discloses, there had been no difference or ill feeling between them; and that there was present "no reason * * * why Ellis (defendant) would want to shoot Stannard (deceased)"; that they were, as claimed, on friendly terms, is indicated by the fact that defendant loaned the deceased money with which to get his breakfast. To these considerations might be added that the statement that the defendant's account of the shooting and the incidents occurring in connection therewith is corroborated by other witnesses in the following important particulars, the knocking at the back door of defendant's house, the defendant going out of his house by the front door, the words addressed by defendant to the deceased when he first saw him at the kitchen door; the slamming of the screen door, between which and the entrance or inner door, as we have seen, the defendant states the deceased was standing. But, aside from these facts and circumstances, there was evidence

tending to support the verdict, and this court has uniformly held that, where that is so, we cannot disturb the verdict upon the ground that it is not sustained by the evidence, and the application of this rule is strengthened in a case where, as here, the trial court has refused a new trial. It is settled beyond controversy that the weight to be accorded the evidence is a question for the jury. *People v. Wilson*, 66 Cal. 370, 5 Pac. 624; *People v. McCurdy*, 68 Cal. 576, 10 Pac. 207; *People v. Mayes*, 66 Cal. 597, 6 Pac. 691, 56 Am. Rep. 126; *People v. Curry*, 103 Cal. 548, 37 Pac. 503; *People v. Musumeci* (Cal. App.) 197 Pac. 129. In *People v. McCurdy*, supra, a case wherein the extreme penalty of the law was imposed upon the defendant, who had been convicted of murder in the first degree, this court said:

"The situation of the parties, the surrounding circumstances, the incentives to the crime, and all of the probabilities, were questions peculiarly within the province of the jury to determine. There being evidence sufficient to support the verdict, we are not at liberty, under the well-established rules of this court, to interfere with such verdict upon the ground that it is contrary to the evidence."

[3] Defendant's next contention is that the trial court—

"committed reversible error in permitting the prosecution, over the objection of the defendant, to introduce testimony tending to prove defendant guilty of a crime other than that with which he was charged."

It was proven that alcoholic drinks were served by the defendant during the evening and that the deceased had partaken thereof, and that he paid the defendant for the same, and it is the admission of this testimony, particularly as to payment, that defendant claims was error. The question arose in this wise: A witness for the people was asked by the district attorney if the defendant took pay for the liquor which he furnished deceased, and the witness answered that he did. No objection was then made to the question. Some little time after the attorney for the defendant stated that the question was asked and answered so quickly that he did not have an opportunity to object, and asked the permission of the court to make an objection at that time and to move to strike out the answer—

"on the ground that it was incompetent, irrelevant, and immaterial, and had nothing to do with the issues of the case."

The motion to strike out was granted, and the jury instructed to disregard the testimony of the witness "to the effect that the defendant took pay for the liquor which was furnished by him." After further discussion, the court announced it would change its ruling, and permit the testimony to stand "at the present time," subject to the right of the

defendant to renew his motion to strike at the close of the prosecution's case, the court further stating:

"The jury will understand that it (said testimony touching payment for the liquor) is not admitted for the purpose, and it is not to be considered by the jury for the purpose of tending to show a separate offense, the defendant is charged here with murder and not being charged with any other offense."

The motion to strike out was not renewed by defendant, but we regard this as of little consequence, for in our opinion the motion as made and denied sufficiently raises the question. We can discover no reversible error in this ruling. It is the law that, where the proffered evidence directly throws light upon the facts of the issue being tried, it is admissible, although it proves another offense as well. *People v. Suesser*, 142 Cal. 354, 75 Pac. 1093; *People v. Craig*, 111 Cal. 460, 44 Pac. 186; *People v. Rogers*, 71 Cal. 565, 12 Pac. 679; *People v. Miller*, 121 Cal. 343, 53 Pac. 816; *People v. Smith*, 9 Cal. App. 644, 99 Pac. 1111. In *People v. Suesser*, supra, 142 Cal. 363, 75 Pac. 1096, this court said:

"It is of course true that evidence * * * as to other offenses, is not admissible against a defendant unless there is a sufficient connection between the facts sought to be proved and the particular act under investigation. Where the proffered evidence is relevant to the issue being tried, the mere fact that it shows * * * the commission of other offenses by the defendant, is no legal objection to its admission. This is recognized by all the authorities."

In *People v. Smith*, supra, 9 Cal. App. 647, 99 Pac. 1112, it is declared:

"Where the proffered evidence directly throws light upon the facts of the issue being tried, it is admissible, although it proves another offense as well."

In *People v. Sanders*, 114 Cal. 216, 230, 46 Pac. 153, 157, this court gave expression to the following:

"If the evidence of another crime is necessary or pertinent to the proof of the one charged, the law will not thwart justice by excluding that evidence, simply because it involves the commission of another crime. *People v. Tucker*, 104 Cal. 440. The general tests of the admissibility of evidence in a criminal case are: 1. Is it a part of the *res gestæ*? 2. If not, does it tend logically, naturally, and by reasonable inference, to establish any fact material for the people, or to overcome any material matter sought to be proved by the defense? If it does, then it is admissible, whether it embraces the commission of another crime or does not, whether the other crime be similar in kind or not, whether it be part of a single design or not."

Applying these principles to the present case, we have the following: Evidence had been introduced showing that defendant was

serving liquor during the evening, and hence, proof that the deceased paid for the liquor served him and did not receive it as a gratuity would tend to establish knowledge on the part of deceased that liquor could be purchased at the defendant's home, which would be a circumstance in finally determining whether the defendant was justified in believing that the person knocking on the side of his house and on the rear door thereof, intended to assail his home and commit a felony, and was not desirous of purchasing more liquor, as well as to explain Stannard's presence there. In fact, as the defendant subsequently testified the deceased said before the shooting, he wanted more liquor, "another drink," and the evidence furnishes no other reason for the presence of the deceased at defendant's kitchen door on the morning of the day of the shooting. In our opinion, the circumstances appearing in the record show a relevant connection between the selling of the liquor, the cause of the deceased's return to the house, and the shooting. Furthermore, the jury was entitled to know all that transpired between the deceased and the defendant, from the time that the former entered the house of the latter until and including the shooting.

Defendant in his brief cites a large number of cases, most of which are from this court, which he affirms support his contention that the evidence objected to was inadmissible. We have carefully examined these authorities, and, in our opinion, none of them is in conflict with the rule above announced, or applicable to the facts of the instant case. They do, however, uphold and apply to the facts with which they respectively dealt, that other rule, equally well grounded in the law, that evidence of another and distinct criminal charge, in no way connected with the one before the court, is not admissible. Such was the ruling in *People v. Vidal*, 121 Cal. 221, 53 Pac. 558; *People v. Hartman*, 62 Cal. 562; *People v. Glass*, 158 Cal. 650, 112 Pac. 281; *People v. Arlington*, 123 Cal. 356, 55 Pac. 1003—which cases are illustrative of all the authorities upon the point to which defendant refers us. Moreover, in the case at bar, the court expressly told the jury that the evidence in question was not admitted for the purpose of showing a separate offense. Counsel for defendant, in his very able brief, declares that the "defendant did not claim that he shot the deceased because he demanded entrance to his home, or because he was attempting to effect an entrance. The only defense he made was that the shooting was wholly accidental"—but even so, it is clear that defendant went around to the rear of his home to ascertain who was knocking at his door. He testifies:

"Some one knocked, and I says who is there, no one answered and they knocked again, I got up and picked up a pair of house shoes and picked a pistol up and went out around the

front door and I went around the corner, I says who in hell is out there, * * * and he called, he said it was Stubby [deceased]"

—in connection with which testimony the jury was entitled to consider all that had transpired that night between the deceased and defendant when determining the truth of said claim that the shooting was accidental, which their verdict indicates they did not believe. Furthermore, while the defendant did not testify that he received pay for the drinks he served the deceased on that fatal night, he did, upon his direct examination, state that when, after reaching the back of his house, he inquired, "Who in hell is out there?" the deceased replied, "I want something to drink." The following is the defendant's statement of what occurred:

"I says I haven't got nothing, he says let me have a drink, and I says everybody has gone, I says go home and go to bed, he says give me another drink, he was standing between the screen and the door, I pulled the screen back and I says I haven't anything to drink, he says give me just one more, I says if I had it you would be welcome."

Upon cross-examination the defendant testified:

"He [deceased] says I want something to drink. I says I haven't got any more."

From the defendant's own statement it clearly appears he was serving intoxicating liquors, and so intimately connected is that circumstance with the appearance of the deceased at defendant's rear door, that we think it was competent to prove whether such serving to the deceased was an act of hospitality or for compensation. If for compensation, the defendant might reasonably expect that those whom he had thus served would assume it could be purchased at any time and might return for that purpose. Anything so connected with the alleged killing, in point of time and character, as to explain how and why it was committed, was admissible, and for that reason the prosecution was entitled to introduce evidence tending to show that it was because the deceased was demanding more liquor, intimately connected with which demand was the fact that the defendant had a few hours previously furnished him (deceased) liquor, for which he had paid defendant, and which in itself tended to justify deceased's request, that the defendant shot the deceased.

[4] Defendant further affirms that the trial court committed reversible error in permitting the prosecution, over his objection, to introduce testimony showing that he escaped from the county jail after he had been confined therein for a considerable time, the purpose of the testimony being to prove flight, and in giving the following instruction:

"The court instructs the jury that, if you believe from the evidence beyond a reasonable

doubt that the defendant was arrested for the crime charged in the information, and that, after being informed of the cause of his arrest, escaped or attempted to escape from the person having him under arrest, it is a circumstance that the jury may consider in determining his guilt or innocence."

Defendant made no attempt to escape at the time of the shooting, but remained in Oxnard until his arrest on the evening of March 17, 1921, but, after such arrest and on April 9, 1921, he made his escape from the county jail of Ventura county. The testimony concerning such escape is rather meager. The record discloses the following: The undersheriff of Ventura county, a witness on behalf of the prosecution, was asked by the district attorney if the defendant escaped from the county jail, which question was objected to on the ground that it was leading, incompetent, irrelevant, and immaterial; the court, in ruling, said: "It is leading, * * * however the objection will be overruled." The answer, which defendant moved to strike out, and which motion was denied, was, in substance, that the defendant escaped on April 9, 1921, and that he was recaptured on April 14, 1921, at San Bernardino.

Defendant correctly concedes that the "proof of flight is generally admissible upon the theory that it has a tendency to show consciousness of guilt," but contends that the proof must be confined to "flight immediately or soon after the commission of the crime and before the defendant has been apprehended and taken into custody, or at least before he has been confined for some time in jail," but refers us to no authority sustaining this position. The contention cannot be upheld. In *People v. Cole*, 141 Cal. 88, 74 Pac. 547, the following was quoted from the opinion of Judge Cooley, in *People v. Arnold*, 43 Mich. 303, 5 N. W. 385, 38 Am. St. Rep. 182:

"It was never doubted that the conduct of a suspected party, when charged with a crime may be put in evidence against him when it is such as an innocent man would not be likely to resort to. * * * It may be shown that the accused fled to escape arrest, or broke jail or attempted to do so, or offered a bribe for his liberty to his keeper."

In *People v. Crowley*, 13 Cal. App. 322, 325, 109 Pac. 493, 495, it is said:

"That an attempt to escape is a circumstance proper to be shown and considered by the jury is put beyond controversy by the authorities."

There can be no well-grounded difference, so far as the act evidences consciousness of guilt, between flight before and after arrest. *People v. Welsh*, 63 Cal. 167; *People v. Bushton*, 80 Cal. 160, 22 Pac. 127, 549; *People v. Flannelly*, 128 Cal. 83, 87, 60 Pac. 670.

We do not think the instruction, touching

the evidentiary effect of the escape of defendant after his arrest, is open to the criticism which defendant directs against it. The jury was correctly told that it was "a circumstance" which it might consider "in determining his [defendant's] guilt or innocence," and it was in no wise misleading or uncertain or ambiguous, and substantially conformed to the law, as above stated.

[5] Defendant strenuously insists that the trial court erred in permitting two witnesses for the people, Shilling and Kemper, claimed to be experts in the use of firearms, over his (defendant's) objection, to respectively give their opinion as to the point of entrance and exit of the bullet which killed deceased, and in permitting Drs. Homer, Swift, and Lewis, also witnesses produced by the prosecution, to give their opinions touching the same matter. It is contended by defendant that the entrance and exit of the bullet was not a question for expert testimony, but one of fact, to be solely determined by the jury upon the evidence adduced. We are unable to give our approval to this contention. It is obvious that it is a pivotal point in the case, in that it directly bears upon the question whether the shooting admitted by the defendant was, as he claims, an accident or done with "malice aforethought." If deceased was shot in the back, it would tend to disprove and contradict the defendant's account of what occurred between him and the deceased at the time of the shooting, and, upon the other hand, if the bullet entered the abdomen, it would strongly support the claim of the defendant that the shooting was accidental.

We have given the authorities cited by defendant as sustaining this contention a careful examination, and none of them, in our opinion, is analogous to the one at bar, or controlling here. The rule of evidence that they announce and correctly apply to the facts they severally presented is not applicable to the facts of the instant case. Moreover, the point advanced is definitely determined adversely to defendant, in *People v. Phelan*, 123 Cal. 551, 566, 56 Pac. 424, 430, where it is said:

"It is claimed that the superior court erred in allowing Dr. Iglick to give his opinion as an expert, upon the question of exit and entrance of the bullet. The doctor had been a practicing physician and surgeon for 15 years, but had never had but one case of gunshot wound, and in that case there was only a wound of entrance; but he had taken a regular course of lectures on medical jurisprudence, had studied the standard authorities on the subject of gunshot wounds, had read the reports of our army surgeons on the subject, and had himself conducted the autopsy in this case, so that he was not only able to express a general opinion in answer to a hypothetical question, but was able to state the particular grounds upon which his opinion in this case was founded. There was, we think, a sufficient foundation laid to war-

rant the court in admitting his testimony. *Its value was a question for the jury.*" (The italics are ours.)

The qualifications, as experts, of each of the witnesses produced were sufficiently established. Dr. Homer, who made the post mortem examination, had been a practicing physician for about 9 years, had had considerable experience with wounds, and, during the World War, was a member of the expeditionary forces in Scotland. He examined the body of the deceased, and, in stating the result of such examination, said:

"I went over the body externally first, and found nothing of any wound excepting a puncture wound, which I took to be a gunshot wound in the abdomen and an inch and a half below the lower border of ribs, an inch to the left of the mid line through the abdomen. Another hole in the back, slightly to the right of the vertebra between the first and second lumbar vertebrae. * * * I would judge that it [course of the bullet] was almost straight through [the body]."

After giving a detailed description of the wound, and the condition of the clothing worn by the deceased at the time of the shooting, so far as its condition might indicate the point of entry and exit of the bullet, he stated that, in his opinion, it entered the back. Dr. Smith, another expert, said he had been a practicing physician for 11 years and served in his professional capacity in our army in France, and, while in that service, saw from 60 to 120 gunshot wounds a day. He also examined the body of the deceased and, in his opinion, "undoubtedly the bullet went in the back and came out through the abdomen," giving his reason for such opinion. Dr. Lewis, a physician and surgeon of 14 years' experience, and who was a major in the medical corps of the American Army in France, testified that he had made a careful examination of the clothing of deceased, which had been received in evidence, and gave as his opinion, which was based entirely upon such examination of the clothing, that "the point of entrance of the bullet was in the back, and the exit in the front." Dr. Lewis stated further, that when in the service he drew his conclusions as to the point of entrance of a bullet "more often from the clothing" the wounded man wore than from the condition of the wound.

C. J. Shilling, called by the prosecution, testified that, for 12 years, he had been special representative of the Remington Arms Company, and prior to that time his profession was that of an "expert shot"—"an exhibition shot"—and that he had handled all lines of small firearms, revolvers, shotguns, rifles, and pistols, including a .45 Colt's revolver, and had occasion to observe the effect of firearms on clothing, and had been an expert witness in a murder case in San Francisco, in connection with which he saw ex-

perimental work performed with a pistol. He had seen experimental work with a pistol, rifle, and shotgun at "close range," as close as within 6 inches, practically at the muzzle; that the pistol used in such experimental work was a .38 Smith and Wesson Special and 150 grain lead ball; that he did not know what kind of a bullet the deceased was shot with. After further testimony tending to qualify the witness as an expert, he stated: "To my mind there is no doubt but what the bullet entered at the back, the smaller hole, and came out at the front of the coat, or the larger hole," giving his reason for his opinion, which need not be repeated here. William T. Kemper, "a cleaner and dyer," also an expert witness for the prosecution, testified that his father taught him to shoot when he was 6 years of age, and from the time he was about 12 years old to the present he did shooting for amusement and exhibition purposes; that he had 3 years' experience in the regular army, where he had occasion to shoot almost every day in the week; that he left the army in 1904; that he had cleaned a number of suits since he had been in business, which had been penetrated by bullets, and had "made experiments" on canvas and paper and shooting at cloth "to see how far the charge of powder can be consumed"; that he then had two guns in his possession similar to the one placed in evidence by the prosecution and with which it is claimed the defendant shot deceased; that he had shot with them, using lead bullets; that, in the experiments, which he testified he had made, where pistols were used "they were fired from 20 to 75 yards," and his opinion was that the bullet entered the coat of deceased from the back.

As we have said, in our opinion all of this evidence was admissible, its value and weight being a matter for the jury. The experts in the use of firearms, and the doctor who examined the clothing only, were as competent to give their opinion as to the point of entrance and exit of the bullet, which passed through the body of deceased, based upon their experience and observations, the character and extent of which has already been herein stated, as Drs. Homer and Smith, whose opinions as experts were admissible, under the authority of *People v. Phelan*, supra. *People v. Wong Chuey*, 117 Cal. 624, 629, 49 Pac. 833, is also in point. There the surgeon who attended the deceased prior to his death testified that he had examined the gunshot wound which caused his death, and had examined gunshot wounds in the past, and taken bullets therefrom, and knew the size of the bullets making these various wounds. Under objection, he then testified that, in his opinion, the wound upon deceased was inflicted by a .41 or .44 caliber bullet, and this court held there was "no substantial objection to this evidence." It is obvious that the witness in the *Wong Chuey*

Case testified primarily not as a surgeon but because he was an expert in determining from an examination of a gunshot wound the size of the bullet with which it was made, just as the firearms experts and doctors in this case, from an inspection of the holes in the wearing apparel of deceased produced by the fatal bullet, were able to and did give an opinion touching the point of entry and exit of such bullet.

[6] Defendant, as already noted, complains that Dr. Homer testified, at the preliminary examination, that, in his opinion, the bullet entered the abdomen of deceased, but, upon the trial, changed such opinion and stated that he believed the bullet entered the back of the deceased, stating his reasons for such change. The fact that the doctor had, between the date of the preliminary examination and his testifying at the trial, changed his mind as above stated, was not a ground for excluding his testimony, and defendant does not so contend; at most, it merely affected the weight of his evidence, which it was the province of the jury to determine.

[7] It is further urged that the experts should have been asked a formal hypothetical question rather than permitted, as they were, to base their opinion upon what they gathered from an examination, where that was done, of the body and clothing of deceased, or from an inspection of the clothing, without an examination of the remains. We can see no substantial objection to the method pursued, inasmuch as such expert testimony was of necessity based either upon an actual examination of the body of the deceased or of the clothing he wore at the time of the shooting, or both. From some viewpoints, under the circumstances appearing here, the method followed as a means of placing the court and jury in the possession of the facts, which is the object of all trials, was more effectual than the response to a hypothetical question would have been. Defendant correctly affirms that all the expert testimony touching the point at which the ball from defendant's weapon entered the body of deceased, which alone rested upon an examination of his wearing apparel, was based upon an inspection of such apparel, made for the first time at the trial, and that the time which had elapsed between that date and the shooting had wrought a material change in the condition of such clothing, especially the parts pierced by the bullet. This was also a matter involving the weight of the evidence, which was for the jury to consider and decide. In this connection it should be said, the person who removed the clothes from the body of deceased testified that, at the time of the trial, they were in the same general condition, except as to dryness, as they were when he removed them, and there is no testimony to the contrary.

People v. Le Doux, 155 Cal. 535, 555, 102 Pac. 517, is not in conflict with the preced-

ing views, and is not an authority disapproving the method of presenting the expert testimony, under the circumstances appearing in the instant case. In the *Le Doux* Case, the prosecution addressed to the physicians, called as expert witnesses, the preliminary question whether they had heard the testimony of certain other witnesses at the trial. Upon giving an affirmative answer, they were then asked the following question:

"Now, doctor, assuming each and all of the facts and circumstances testified to by these gentlemen I have named as true, what in your opinion was the cause of the death of A. N. McVicar, the deceased person mentioned in this case?"

And this court held that the trial court erred in overruling an objection to such question. It is obvious that this method of presenting expert testimony was essentially different from the one adopted here. In the present case, the facts upon which the opinions were based were in some instances testified to by the witness expressing the opinion, and, in any event, were simple and many of them not a matter of memory or description but actually in plain sight of the jury—as open to their inspection as they were to the expert. In the *Le Doux* Case the court said (155 Cal. 555, 102 Pac. 525):

"In thus pointing out what we conceive to be the best method for obtaining the expert opinion of a witness, we would not be understood as saying that every departure from that method involves error, necessitating the reversal of a case. Cases may arise where the facts upon which the opinion is sought are simple, salient, and few. If it be made to appear that the expert has heard the testimony by which those facts have been presented, it would not necessarily be held ground for reversal that he was asked to express his opinion upon those facts, without a restatement of them."

[8] Defendant presses upon our consideration his claim that the verdict—

"carrying with it, as it did, the death penalty, must have been the result of mental excitement, passion, and prejudice, * * * materially aided by a deep-seated, subconscious prejudice against a negro defendant."

We are unable to find anything in the record supporting such contention; to the contrary, every indication is that the defendant had a fair trial. The mere fact that the defendant is a colored man, charged with having killed a white man, falls far short of establishing prejudice and passion of a character warranting setting aside the verdict upon those grounds. Moreover, the jury was, at defendant's request, instructed "that the law knows no creed or condition, no color, no nationality, every defendant, whatever his race, color, or condition, * * * stands equal before the law and should be tried with perfect impartiality," and there

is present here no circumstance indicating that the jury disregarded this admonition of the court.

[9] Defendant earnestly protests that the facts and circumstances of this case, as revealed by the record, disclose and show that the penalty imposed is severe. Every person guilty of murder in the first degree is punishable, either by death, or imprisonment for life, at the discretion of the jury trying the same. Pen. Code, § 190. The question which punishment shall be inflicted, is not to be decided by the jury until after it has become satisfied that the defendant is guilty of murder in the first degree. If the evidence supports that conclusion, it will support either punishment by death or imprisonment for life. The appellate courts cannot review the decision of the jury in the matter, nor consider whether or not the lighter punishment should have been inflicted. If the reviewing court is satisfied that there is sufficient evidence to justify a verdict of murder of the first degree, its inquiry on that point is ended.

The gravity of the case has moved us to give painstaking consideration to the points advanced by the defendant. The instructions of the court to the jury were full and clear and in all respects, so far as we can discover, fair to defendant.

Failing to find any reversible error in the record, and there being sufficient evidence to sustain the verdict of the jury, the judgment and order denying defendant's motion for a new trial, must be, and each of them is, affirmed.

We concur: SHAW, C. J.; LENNON, J.; LAWLOR, J.; WILBUR, J.

57 Cal. App. 133

PEOPLE v. SANCHEZ. (Cr. 597.)

(District Court of Appeal, Third District, California. March 20, 1922.)

Criminal law ⇨ 1182—In absence of brief or oral argument, conviction will be affirmed where no fundamental rights have been violated.

Where appellant filed no brief and made no application for leave to file one, and his attorneys of record made no appearance for hearing and argument, though notified thereof, and none of defendant's fundamental rights appear to have been violated, the conviction will be affirmed.

Appeal from Superior Court, Sacramento County; C. P. Vicini, Judge.

Ramon L. Sanchez was convicted of criminal syndicalism, and he appeals. Affirmed.

J. G. Lawlor, of San Francisco, and J. R. Connelly, of Sacramento, for appellant.

U. S. Webb, Atty. Gen., and J. Chas. Jones, Deputy Atty. Gen., for the People.

HART, J. The indictment charged the defendant with the crime of "criminal syndicalism" as defined by an act of the Legislature of 1919 (Stats. 1919, p. 281). The indictment is in the general language of the statute.

The defendant was convicted by a jury, and the case was brought to this court by him on an appeal from the judgment.

[1] No brief was filed by the defendant in support of the appeal. The case was regularly placed upon the calendar of the March, 1922, term of this court for hearing and argument, and the attorneys of record for the defendant duly notified thereof. When the case was in the regular order called for argument, no appearance was made on behalf of the accused. The Attorney General thereupon submitted the case upon the record, and no oral argument was therefore made in his behalf. No brief has since been filed by the defendant, nor has any application been made in his behalf for leave to file one.

[2] No showing having been made in support of the appeal, it is not incumbent upon this court to search the record for the purpose of ascertaining whether or not errors warranting a reversal occurred in the trial of the case. We have, nevertheless, as is our usual custom in such cases, examined the record with some care, and have failed to find any substantial errors or such errors as may justly be held to have operated prejudicially against the rights of the accused. Indeed, the fact of the failure of counsel of record for the defendant to make any attempt to support the appeal involves a tacit concession that any errors upon which in the first instance they might have based any hope for a reversal were without prejudice to the rights of the defendant.

[3] At any rate, under the state of the record as it is submitted, an examination of the record not having disclosed the violation of any of the fundamental rights of the accused, there is no other alternative left to this court but to affirm the judgment; and it is so ordered.

We concur: FINCH, P. J.; BURNETT, J.

57 Cal. App. 165

WILKINSON v. FISHERMAN'S & CANNER'S SUPPLY CO. et al. (Civ. 3698.)

(District Court of Appeal, Second District, Division 2, California. March 24, 1922.)

1. Sales $\S$ 477(5)—Exact date of tender held immaterial, in view of extension of time for payment.

Under a conditional sale contract, where the time for final payment was extended to either of two successive days, it was immaterial on which of such days tender was made, the provi-

sion that time was of the essence of the contract having been waived.

2. Appeal and error $\S$ 1011(1) — Appellate court will not weigh conflicting evidence.

If there is substantial evidence to support the essential facts contained in a finding, the appellate court will not weigh such evidence against evidence to the contrary.

3. Sales $\S$ 479(7)—Evidence held sufficient to support findings that assignor knew of payment before assigning contract.

In an action in claim and delivery of an auto truck conditionally sold to defendants, evidence held to justify findings that defendants offered to pay the balance when due, and deposited it on the same day to the credit of the seller, who accepted and retained it, and thereafter, with notice of the deposit, assigned the contract to plaintiff's assignor.

4. Tender $\S$ 12(1)—Offer to pay principal and interest held sufficient without tender of attorney's fees.

Under a conditional sale contract, providing for \$100 attorney's fees if suit were brought to recover the property or the unpaid balance of the purchase price, where suit had not been begun when demand was made for such fees, the buyer's offer to pay the principal and interest was sufficient.

5. Appeal and error $\S$ 173(2)—Illegality of tender not available on appeal, in absence of objection on such ground at time of offer.

Objection to a tender on the ground that gold coin was not offered or exhibited cannot be taken on appeal, where not made at the time of the offer (Civ. Code, § 1500).

6. Sales $\S$ 476—Deposit of sufficient amount with notice to creditor and subsequent assignee held sufficient.

Under a conditional sale contract, where the buyer, with notice from the seller that he still owned the contract, made a sufficient offer of payment, which was refused, his deposit to seller's credit of such amount with enough to pay the seller's legal claims, accompanied by notice thereof to the seller and his subsequent assignee extinguished the obligation (Civ. Code, § 1500), where seller used part of the money.

7. Tender $\S$ 7—Tender to seller's assignee held sufficient whether he acted as attorney for seller or as owner of contract.

Where a legal tender of the balance due under a conditional contract of sale was made to the seller's assignee on the date due, it was immaterial whether the latter acted only as attorney for the seller, or was himself the owner of the contract.

8. Sales $\S$ 475—Assignee acquires rights of assignor only.

An assignee of a conditional sale contract, payment of the balance due under which had been tendered to his assignor, acquired no rights thereunder against the buyer, his rights being such only as his assignor possessed.

Appeal from Superior Court, Los Angeles County; J. P. Wood, Judge.

Action by R. S. Wilkinson against Fisherman's & Canner's Supply Company and others. Judgment for defendants, and plaintiff appeals. Affirmed.

S. C. Schaefer, of San Pedro, for appellant.

Edward H. Bautzer, of San Pedro, and Kemp & Clewett, of Los Angeles, for respondents.

CRAIG, J. The action is one in claim and delivery of a Buick auto truck. The pleadings joined issue upon ownership and the right of possession. It appears without conflict that one J. A. Phillips, doing business under the name of San Pedro Garage sold the truck to defendants under a conditional contract of sale. This contract provided for the final payment to become due on demand, which was made on the 17th day of April, 1920. The defendants then entered into an agreement with Phillips, whereby they paid him part of this final payment, and the time for payment of the balance was extended to the 17th or 18th of May, 1920. The court found that on the 18th of May defendants were ready, willing, and able to pay, and then offered the amount remaining due to Phillips, and later, on the same day, deposited the said sum to the credit of Phillips in the First National Bank of San Pedro; that Phillips retained this deposit; that subsequent to the deposit having been made and notice thereof to Phillips the contract of sale was assigned by Phillips to Schaefer for collection, and then assigned by Schaefer to Wilkinson. The court further found the value of the use of the truck to be \$350 and the value of the truck itself to be \$750, and that the defendant was entitled to receive the return of the truck or its value, and rendered judgment accordingly.

[1] Appellant's brief fails to point out except in the most indefinite manner the issues involved or to indicate grounds relied upon for a reversal. It does appear, however, that the claim is made that from the evidence presented the trial court should not have found that the defendant made a legal tender of the balance due under the contract. It is unnecessary to give space to a consideration as to whether or not the tender should have been made on the 17th or the 18th of May.

On April 17th Phillips extended the time for payment of the balance then due and thus waived the provision that time was of the essence of the contract. *Muncy v. Brain*, 158 Cal. 300, 110 Pac. 945. The single question, therefore, to be decided is: Did the evidence justify the finding of the court that—

"On said 18th day of May, 1920, the said defendant, Fisherman's & Canner's Supply Company, offered to pay to said J. A. Phillips the balance of the purchase price of said automobile, and did on said 18th day of May, 1920,

deposit the balance of the purchase price of said automobile as provided for in said contract in the First National Bank of San Pedro to the credit of the said J. A. Phillips doing business under the name of said San Pedro Garage, and that said money so deposited by said defendant was accepted and retained by the said J. A. Phillips doing business under said name, and that after the offer by said defendant to pay the balance of said purchase price and after the deposit of said money in the bank to the credit of the said J. A. Phillips doing business under said name, and after he had received notice of said deposit, the said J. A. Phillips attempted to assign said contract to S. C. Schaefer, who thereafter purported and attempted to assign the same to plaintiff, but that at the time of said attempted assignment by the said Phillips all payments provided for in said contract had been fully paid."

[2-4] If there is substantial evidence to support the essential facts contained in the above finding, we will not concern ourselves with weighing it as against other evidence to the contrary. It was amply established that on May 18, 1920, the defendant offered to both Phillips and Schaefer, who was then acting as Phillips' attorney, a check for the principal and interest and the additional sum of \$25. There was testimony that both refused and demanded \$100 in addition to principal and interest. No money was exhibited at the time the offers were made, but in refusing the check Schaefer said the truck was his, and defendant would have to buy it. The refusal to take the check as payment was not placed upon the ground that it was not legal tender. Immediately following this conversation, and on the 18th of May, 1920, the defendant deposited \$191.28 to the credit of J. A. Phillips in the First National Bank of San Pedro, and informed him that the money had been placed there to his credit. Phillips assigned his interest in the contract to Schaefer. The court's finding that this assignment took place after the deposit of the money in the bank and notice thereof to Phillips is sustained by the testimony of Phillips that the contract was assigned on the same day the deposit in the bank was made of Schaefer's check and the testimony of an official of the bank and its records introduced in evidence which showed that this deposit may have been made as late as the 20th of May, 1920, two days after the offer of payment and the deposit of the check and notice of its deposit to Phillips. At least it cannot be said that the trial court did not have the right to make such an inference from this witness' testimony which established that Schaefer had an account in the First National Bank of San Pedro; that his check was drawn on this bank; that it did not go through the clearing house; that it would be stamped paid on the date that it was deposited; that it was stamped paid on the 20th of May. And Phillips testified that he

deposited it on the date which he received it. One provision of the contract of sale was:

"In case suit is brought to recover either the property or any unpaid balance due on this agreement, the second party promises to pay the additional sum of \$100.00 as and for attorney's fees."

[5] Suit not having been begun at the time plaintiff's predecessor in interest demanded the \$100 attorney's fees thus stipulated to be paid should suit be brought, the offer of defendant to pay principal and interest and \$25 was more than sufficient as to the amount. It was made in time. Objection cannot now be taken to it because gold coin was not offered or exhibited, as the failure to object on that ground was waived by the fact that such objection was not made at the time of the offer of payment. Civ. Code, § 1500; In re Estate of Pearson, 102 Cal. 569, 36 Pac. 934; Green v. Barney, 4 Cal. Unrep. 665, 36 Pac. 1026.

[6-8] The testimony was conflicting as to when defendant received notice of the assignment to Schaefer, but, as we have shown, it amply supports the court's finding that it was subsequent to the deposit in the bank to Phillips' credit. Having made a sufficient offer of payment and having affirmative notice from Phillips as late as the evening of the 18th that he still owned the contract, defendant's deposit in the First National Bank of San Pedro of an amount large enough to pay plaintiff's legal claims, accompanied by notice to Phillips and Schaefer of the fact of the deposit, extinguished the obligation. Civ. Code, § 1500. Appellant cites Owen v. Herzihoff, 2 Cal. App. 622, 84 Pac. 274, as holding to the contrary of this last proposition. But in that case there was no evidence that the payee was given notice that the deposit had been made, or that he availed himself thereof. In the instant case the testimony is undisputed that notice of the deposit was immediately given to Phillips and Schaefer, and the witness Anderson, testifying from the records of the bank, showed that the deposit was made by defendant to the credit of Phillips, and that his balance had subsequently twice been less than \$191.28; hence he had used some of this money and accepted the deposit. A legal tender was made to Schaefer on the 18th, and it is of no moment whether he then acted only as attorney for Phillips, or was himself the owner of the contract by assignment. Schaefer admittedly did not assign to plaintiff, Wilkinson, until the 19th so that his rights are only such as Schaefer possessed.

Judgment affirmed.

We concur: FINLAYSON, P. J.; WORKS, J.

57 Cal. App. 150

GINOCHIO et al. v. CITY AND COUNTY OF SAN FRANCISCO. (Civ. 4123.)

(District Court of Appeal, First District, Division 2, California. March 22, 1922. Hearing Denied by Supreme Court May 18, 1922.)

1. Carriers $\Rightarrow$ 321(23)—Evidence held not to warrant instruction injury to passenger raised presumption of negligence.

In an action for the death of a man while trying to board a street car, where the allegation he was a passenger was not denied, uncontradicted evidence of all the eyewitnesses that the car did not stop before he attempted to board it, not having yet reached its regular stopping place, though some witnesses testified it slowed up for an intersecting track, does not justify the giving of an instruction that, when a passenger is injured by an instrumentality under the control of the carriers, it is presumed he was injured by the carrier's negligence.

2. Carriers $\Rightarrow$ 316(1)—No inference or presumption of negligence obtains against testimony of all eyewitnesses.

No inference or presumption as to the negligence of a carrier obtains against the uncontradicted sworn testimony of all the eyewitnesses to the accident.

Appeal from Superior Court, City and County of San Francisco; Franklin A. Griffin, Judge.

Action by Ida M. Ginochio and others against the City and County of San Francisco, to recover damages for death. Judgment for plaintiffs, and defendant appeals. Reversed.

Hearing denied; Lawlor, J., dissenting.

George Lull, City Atty., and R. T. Ainsworth and Charles S. Peery, Asst. City Attys., all of San Francisco, for appellant.

Daniel A. Ryan and Vincent W. Hallinan, both of San Francisco, for respondents.

STURTEVANT, J. Angelo Ginochio was injured while attempting to board one of the street cars operated by the defendant. Later he died of the injury so sustained. The plaintiffs sued the defendant for damages, judgment went for the plaintiffs, and the defendant has appealed.

For some time prior to his death the decedent had been residing near the corner of Jones and Vallejo streets, in San Francisco. Early in the afternoon on Sunday, the 18th day of April, 1920, he was seen on, and was seen to get off from, a south-bound Van Ness avenue car, operated by the defendant, and to take a position at a stopping place on the easterly side of the track known as the Van Ness-Eleventh street line. Whether the decedent was on the sidewalk, or was out in the street nearer the car track, is not certain. Some of the witnesses placed him in one of those spots, and other witness-

es placed him in the other. The decedent and other persons, five or six in number, waited in that locality for several minutes, some of the witnesses stating that they had waited as long as ten minutes. The decedent stood at the extreme eastern side of the group, some of the others standing further to the west, and in the immediate vicinity of the monument which stands at the intersection of Van Ness and Market. Between the stopping place first mentioned and the monument the tracks of the Van Ness line cross over Market street in a southeasterly direction, making an acute angle with the north line of Market street. When the persons above mentioned were in the positions we have described, a west-bound car came up Market street. As the car approached the intersecting tracks it slowed down, but did not stop. The witness Kelly testified that the car slowed down to two miles an hour, and after it had nearly crossed the intersecting tracks that it started up suddenly. He stated that the decedent approached the car, put one foot on the car, took a hold of it, and immediately fell. He says that the car slowed down at the first stopping place, but that it did not stop at all. Mr. King, the only other eyewitness called by the plaintiff, testified that the decedent attempted to get on the car when it was slowing down; at the same time the car fed up, and the decedent was thrown to the pavement.

The defendant called five witnesses, including the conductor and the motorman. All five of those witnesses stated that the car did not stop until it reached a place in front of the monument. All five were of the opinion that the car approached the intersecting street car tracks at a speed, variously estimated, at from four to ten miles an hour, and crossed over those tracks at a greater speed than testified to by the plaintiff's witnesses. The motorman testified that he did not see the decedent, and did not know of the accident until his car came to a stop. The other witnesses testified that they saw the decedent, and that he either jumped for, ran for, or ran after the moving car. The conductor testified that as the car approached the intersecting tracks he saw the group apparently waiting to board the car; that, as his platform was opposite the group, he motioned to the people to go to the stopping place at the monument; that a little later he saw the decedent run up from the rear, attempt to board the car, fail in the attempt, and fall to the ground. He says he gave a signal of three bells to stop, but the car did not stop until it reached the monument. It was the theory of the plaintiffs that the decedent was a passenger by reason of (1) having become such on the Van Ness avenue car, and being transferred to a west-bound car; and (2), although the decedent had not entered the west-bound

car, that the surrounding circumstances were such as to show an intent on his part to become a passenger, and an acceptance of him by the carrier as a passenger. *Nilson v. Oakland Traction Co.*, 10 Cal. App. 103, 101 Pac. 413. By its failure to deny the amended complaint, the defendant admitted both of these theories. But it was also the theory of the plaintiffs that the accident was caused by the negligence of the defendant. This theory was traversed by the defendant, and it was the sole issue in the case.

In instructing the jury, acting upon the request of the plaintiff, the trial court gave, and the defendant now objects to, three several instructions worded as follows:

"It is the law that a person riding upon the defendant's car, who is entitled to transfer to a connecting line of the defendant's railway, and who leaves said car for the purpose of transferring to said connecting line, is, while taking the direct and usual route from one line of cars to the other, and while waiting to board the second car for the purpose of continuing his journey, a passenger of the defendant's railway, and that the defendant owes to him the obligation due from a carrier of persons to its passengers; that is, the highest degree of care.

"A passenger so transferring from one line of defendant's cars to another is entitled to assume that defendant will exercise toward him the duty that it owes him, namely, to provide him with the highest degree of care.

"When a passenger is injured and such injury is shown to have been occasioned by some instrumentality which the carrier had under his control or by the manner in which the carrier uses said instrumentality, then it is presumed that he was injured through the negligence of the carrier, and the burden is cast upon the carrier to show that such is not the case."

[1] The respondents rely upon the rule stated in *Hart v. Fresno Traction Co.*, 175 Cal. 489, 167 Pac. 885, as showing that the defendant was negligent, but the agents of the defendant in that case were guilty of active negligence; they held out an invitation to the plaintiff, Hart, to board the car, and as he did so, they so manipulated the car as to throw him off of it. Assuming that the decedent held a transfer, and that he was in the act of transferring, or that he was an intending passenger, the evidence does not show that the defendant violated any duty which it owed to the decedent. It did not appear from the evidence that the ground work of the defendant's right of way was defective, nor that the ground work immediately adjacent was defective, nor that there was any kind of a trap created by the defendant. It did not appear that the instrumentality being operated by the defendant was in any respect defective, or that in any respect it was operated in a negligent manner.

[2] No inference or presumption obtained as against the uncontradicted sworn testi-

mony of all the eyewitnesses. As addressed to a case involving such an issue as was here involved, we think that the foregoing instructions were not at all pertinent. In *Steele v. Pacific Electric Ry. Co.*, 168 Cal. 375, 381, 143 Pac. 718, 720, the court said:

"Here the essential fact in issue was, How did the accident occur; was it through the act of defendant in starting up the car while plaintiff was attempting to alight, or did it result from an attempt on her part to get off while it was still in motion? and the vice of the instruction was in ignoring any necessity on the part of the jury of finding adversely to the defendant on this issue as a prerequisite to applying the presumption against it, but on the contrary instructing them that such presumption arose and could be applied simply from proof of injury sustained by the plaintiff."

True it is that Mrs. Steele was in the act of leaving the car, whereas the decedent in this case was engaged in boarding a car, but certainly the facts were stronger in the *Steele* Case, where it was never disputed that Mrs. Steele was a passenger. In a case in which the facts were far more favorable to the plaintiff, *Graff v. United Railroads*, 178 Cal. 171, at page 173, 172 Pac. 603, at page 604, the court said:

"In the present case there was a dispute over the question whether the injury arose from the manner of operating the car, or from the plaintiff's carelessness in standing too near the side thereof, and the question as to which was the cause of the injury should have been left to the jury instead of being taken from them by the absolute character of the instruction given."

The judgment is reversed.

We concur: LANGDON, P. J.; NOURSE, J.

57 Cal. App. 57

DIGGS et al. v. PACIFIC GAS & ELECTRIC CO. et al. (Civ. 2423.)

(District Court of Appeal, Third District, California. March 13, 1922. Hearing Denied by Supreme Court May 11, 1922.)

1. Pleading ⚡214(5)—Conclusions of law not admitted on demurrer.

In an action by a mortgagee of crop against an irrigation company for failure to deliver water to the mortgagor's lands, allegation that defendant "willfully and wrongfully, and in violation of the contract" between the mortgagor and company, shut off water, "willfully and wrongfully" involved a conclusion of law not admitted on demurrer.

2. Waters and water courses ⚡263—In action on conditional contract for water, plaintiff must allege obligation absolute.

In an action by a mortgagee against an irrigation company for failure to deliver water to the mortgagor's lands, where the company's

obligation to furnish water was measured by a conditional contract, it was not sufficient to allege that the company failed to deliver water, but it must appear that the company's obligation became absolute, by reason of the non-existence of the condition.

3. Waters and water courses ⚡263—No privity between mortgagee of crop and water company in irrigation contract of mortgagor.

In view of Civ. Code, §§ 2888, 2927, in an action by a mortgagee against an irrigation company for failure to deliver water to the lands of the mortgagor, in accordance with a contract between the mortgagor and the company, where the complaint did not show privity of contract between the mortgagee and the company, nor estoppel within Code Civ. Proc. § 1962, subd. 3, it was not good as against demurrer.

4. Waters and water courses ⚡263—Complaint failing to allege insolvency of cropper, in action by mortgagee of crop against water company, defective.

In an action by mortgagee of crop against a water company for failure to deliver water, in accordance with a contract between the mortgagor and the company, where the only interest of the mortgagee was the right to subject the crop to payment of his obligation against the mortgagor, the failure to allege insolvency of the mortgagor rendered the complaint fatally defective.

Appeal from Superior Court, Sutter County; K. S. Mahon, Judge.

Action by Marshall Diggs and another against the Pacific Gas & Electric Company and another. From a judgment for defendants, plaintiffs appeal. Affirmed.

C. F. Metteer, of Sacramento, and W. H. Carlin, of Marysville, for appellants.

T. J. Straub and W. B. Bosley, both of San Francisco, Richard Belcher, of Marysville, and Robert H. Schwab, of Sacramento, for respondents.

BURNETT, J. The trial court sustained a demurrer to an amended complaint without leave to amend, the demurrer being both general and special, and from the judgment entered thereon, the appeal has been taken. It is not disputed that the basis of the action is found in a certain written contract of January 20, 1919, between respondent and one C. W. Levissee. The complaint is too voluminous to set out in full, but respondent has furnished a fair synopsis of it, which we may adopt substantially. It alleges the execution of said contract, which is set out in *hæc verba*, wherein respondent agreed to sell and deliver not to exceed 600 miner's inches of water to Levissee, for irrigating land owned by or leased to him in the county of Sutter, and to deliver such water at a fixed point designated in said contract, it being expressly provided that said water was to—

"be used only by the consumer upon his said lands for the purpose of raising rice and beans thereon."

No lands were described in the contract further than to be designated as "750 acres of land owned by or leased to the consumer in said county of Sutter." No source of supply of the water was mentioned in the contract, but it provided that Levissee was to pay for it in accordance with respondent's regularly established rates for the sale and delivery for development purposes only, of water in Auburn ravine. The contract provided that—

"the water to be furnished hereunder will first be utilized by the company for the generation of electric energy, which is the primary use to which the same will be put. Therefore anything herein contained to the contrary notwithstanding, it is agreed by and between the parties hereto that the company shall have the right, without incurring any liability to the consumer by reason thereof, to discontinue delivering water hereunder whenever, in the opinion of its engineer in charge, such discontinuance is necessary, in order to conserve the company's stored waters required for the generation of electric energy."

It is also provided that—

"the consumer shall not assign this agreement or any of the rights hereunder without having first obtained the written consent of the company thereto."

It is further alleged that, at the time of the execution of said contract, respondent knew that Levissee had leased the lands described in said complaint and that they were the lands contemplated by the contract; that respondent and Levissee expressly understood and agreed that Levissee was acting as a promoter to enable respondent to sell its water for irrigation of said lands; that, after acquiring said lands, Levissee would assign said contract "to such person or persons as might be available and thereafter, and in accordance with said agreement and understanding had by and between said Levissee and said defendant company, and prior to the commencement of the irrigating season of 1919, said C. W. Levissee did sublet said lands and premises aforesaid and therein and thereby, and at the same time he did assign said contract * * * to defendant W. S. Gause and one A. L. Chambers"; that thereafter Chambers transferred his interest to Gause; that respondent, well knowing of said subletting and said assignment, did furnish and deliver the water in and upon the lands described in the complaint. The said sublease is set out in the complaint, wherein it appears that the lessor was to furnish water for irrigating the rice on said premises, the lease providing:

"Such water to be arranged for, however, by the lessor" and, "the lessor will not be responsible for any failure to supply water at

any time for any cause or for any damage, whether on account of failure of supply, defective ditches, floods or wastage."

It is alleged that said sublease of March 20, 1919, was made with full knowledge by all the parties of the terms and conditions of the said two agreements between Levissee and respondent and in full faith that respondent would furnish the water for irrigation as therein provided; that, relying upon said promise, said Gause "did cause to be prepared, cultivated, and cropped to rice" said lands; that defendant corporation at the proper time began the delivery of water, and, as a result thereof and "of careful cultivation and nurture," the rice crop upon said lands was in a flourishing condition, "gave promise of a bountiful crop; whereupon without notice to said W. S. Gause, defendant corporation on or about the 9th day of July, 1919, willfully and wrongfully and in violation of the terms and provisions of its said contract aforesaid shut off all water from said lands, turned and diverted its water supply in other directions and completely deprived said W. S. Gause and all of said lands from any further water for irrigation thereof"; that in consequence thereof, said rice crop shriveled up and became worthless, and it was impossible to raise any crop on said land for the year 1919; that it was upon the direct assurance of respondent that said water would be furnished in full compliance with the term of said contract and in sufficient amount that said sublease was entered into and that the irrigation mentioned therein was to be done with water to be supplied under the contract between Levissee and respondent, and that Levissee and Gause, in entering into said sublease, treated and regarded the water to be supplied by respondent as a part of or appurtenant to said lands during the term of said sublease; that said Gause had no other means or source of irrigating said lands, which was well known to respondent; that—

"said C. W. Levissee duly performed and caused to be performed all covenants and conditions on his part to be performed, as in said contract and agreement with said defendant corporation is set forth, including the payment of all moneys by him required to be paid hereunder."

It is further alleged that, on or about the 3d day of July, 1919, Gause executed a certain indenture, therein set out in hæc verba, to plaintiffs, wherein said Gause, in consideration of the advancement by plaintiff of certain sums of money to him, undertook to pay to them 50 cents for each sack of rice that he should realize from his crop, and also one-half of all sums realized for all rice sold above 4 cents per pound—

"and by said agreement said W. S. Gause did assign and transfer to plaintiff the specific portions and interest in and to the crop to be

grown upon said lands during the year 1919 in said agreement mentioned and referred to."

It is further alleged that, "on the said 3d day of July, 1919, and at the same time as a part of the transaction concerning the execution of said agreement last aforesaid, said W. S. Gause" executed to plaintiff a crop mortgage on said rice crop, which mortgage is therein set out in full, and it is on that relation that appellants base their alleged cause of action for damages for failure to deliver the water.

[1, 2] Respondents claim that the order of the trial court is justified on several grounds. One of these is that there is no sufficient allegation showing a breach of the water contract. It is true that the complaint alleges that respondent "willfully and wrongfully and in violation of the terms and provisions of its said contract as aforesaid" shut off all water from said lands, but the quoted portion of the foregoing involves a mere conclusion of law and is not deemed admitted by the demurrer. *Fisher v. Fisher*, 23 Cal. App. 310, 137 Pac. 1094; 31 Cyc. 54; 21 R. C. L. 440, § 5. The extent of respondent's obligation to furnish water is measured, of course, by the terms of the contract itself and therein it was expressly provided, as we have seen, that the water "will first be utilized by the company for the generation of electric energy" and that the respondent could, without liability to *Levissee*, discontinue delivering water to him under the contract, whenever respondent's engineer deemed it necessary to do so in order to conserve such water for electric generation. Thereby it appears that respondent's promise was not absolute, but was conditional. It amounted to an engagement to furnish water, provided that, in the opinion of its engineer, it was not needed for the other purpose. It was not therefore sufficient to allege, so it is claimed, that respondent failed to deliver the water, but it must appear that respondent's obligation became absolute, by reason of the nonexistence of the condition therein specified. Respondent construes the contract as though it had been agreed to deliver so much water, if the supply was sufficient, or if it was not needed for electric generation, and therefore concludes that it was incumbent upon the pleader, in order to state a cause of action, to allege that the supply was sufficient, or that it was not needed for electric generation and that the case falls within the principle of such decisions as *Van Buskirk v. Kuhns*, 164 Cal. 472, 129 Pac. 587, 44 L. R. A. (N. S.) 710, Ann. Cas. 1914B, 932, wherein the defendant had agreed to pay, "when able" and plaintiff did not allege ability to pay and wherein the Supreme Court said:

"If the promise is conditional upon such ability, it is, as is said in *Rodgers v. Byers*, 127 Cal. 528, 60 Pac. 42, incumbent upon the

plaintiff to allege and prove that the condition has been complied with. This is not, like the plea of the statute of limitations, matter of defense. It is a substantial part of the cause of action, and the burden of proof with respect to it, is upon the plaintiff." Citing cases.

[3] The theory of appellants is that such consideration involves a matter of defense and that it was unnecessary to anticipate it in the complaint. There would seem to be much force in the claim of respondent in this respect, but, whatever may be the correct view, it is unnecessary to decide, as it seems plain that the action must fail because appellants have not shown any privity with respondent under the water contract.

The principle is admitted by appellants in the following language: "We admit, of course, that there must be a privity shown, otherwise an action could not be maintained. The plaintiff must legally connect himself up with the defendant in the action and plaintiff must allege some right on his part which has been violated and some legal duty which defendant owed him and which was not performed."

There is no pretense that respondent made any contract with appellants or that any contract, made by the former, was for the benefit of the latter or that any such contract was ever assigned to appellants. If it be admitted that the original contract created a water right, which became appurtenant to the land, this interest was not mortgaged or affected in any way by the instrument executed by appellants and Gause. Their engagement amounted to an hypothecation, only, of the growing crop, and did not convey or incur the leasehold interest or any appurtenance to the land. Neither is there any estoppel in favor of appellants. As to that, the authorities justify the statement of defendant company:

"To constitute an estoppel against respondent in this case, in favor of appellants, it must appear that respondent made certain material false representations, either by statement or conduct implying a statement to appellants, with the intention on respondent's part that appellants should act thereon and that appellants, relying upon such representation, did act thereon to their injury."

The principle is indeed embodied in subdivision 3 of section 1962 of the Code of Civil Procedure.

There is no allegation in the complaint that respondent, by any statement or conduct, intended appellant to believe, or to act upon the belief, that respondent was undertaking to supply water directly to Gause, nor is there any allegation that, when the loan was made, appellants relied upon any representation, either of word or conduct, by respondent, or that they even knew that Gause was using water supplied by respondent. There is likewise no allegation that, in

executing the contract with Levisse, respondent contemplated or had any reason to contemplate that persons, not connected with the contract, such as materialmen or money lenders, would act thereon.

In fact, no element of estoppel in favor of appellants is set forth in the complaint, and the only possible ground, as we view it, upon which plaintiffs might recover arises from the relation that, as mortgagees, they sustain to Gause. In reference to this consideration, appellants quote 5 R. C. L. § 109, as follows:

"Besides the right to foreclose on default of the mortgagor, * * * and the right to bring actions of replevin or trover where necessary, generally speaking, the mortgagee has a right of action against any one who interferes with his rights or who damages or destroys the mortgaged property or conceals it with knowledge of the existence of the mortgage or removes it into another state."

It is manifest, however, that the foregoing must be considered in the light of the law as to chattel mortgages, in the states where in the decisions supporting the text are found. In some jurisdictions, as is well known, the mortgagee is vested with the legal title to and right of possession of the crop, but, according to the rule in this state, appellants had no title to any part of the crop (section 2888, Civ. Code), but had merely an unmatrued lien on said crop, for securing the payment to them by Gause of a promissory note that was payable on or before January 1, 1920. *Shoobert v. De Motta*, 112 Cal. 215, 44 Pac. 487, 53 Am. St. Rep. 207; *Alferitz v. Borgwardt*, 126 Cal. 201, 58 Pac. 460.

And, unless the mortgage especially conferred the right therefor, appellants were not entitled to the possession of the growing crops. Section 2927, Civ. Code. There is no allegation that appellants were in possession or were entitled to be in possession under the mortgage at the time of the alleged destruction of the growing crop. Under such circumstances, it may be doubted whether appellants could have maintained against respondent an action at law had the latter, by direct trespass, entered on the premises at the time mentioned and destroyed the crop (5 R. C. L. § 108; *Bank of Ukiah v. Moore*, 106 Cal. 673, 39 Pac. 1071) although, as shown in the latter citation—

"the power of a court of equity to preserve the mortgaged property from destruction, so that it may answer the purpose of the mortgage, is undoubted."

But the foregoing consideration is really not involved herein. We are dealing with the question whether a person not a party to a contract may maintain an action for its violation, because he may have indirectly suffered detriment thereby or would have been benefited if the contract had been observed

by the parties thereto. How can the case be any different in principle, as suggested by respondent, from an action under similar circumstances—

"against a third person who had undertaken to furnish Gause a harvester, a tractor, a threshing outfit, or sacks or other necessary implements for caring for his rice crop, or fertilizer for its proper development or even labor for its proper cultivation"?

In such instances, it could not be successfully contended that the mortgagee of the growing crop could maintain an action against the third party for damages, because he had violated his contract with the mortgagor. We may carry the theory of appellants a step further and suppose that they had borrowed from a bank the money which they advanced to Gause, and, by reason of the inability of appellants to realize upon the crop, they could not repay the bank. Under such circumstances, it would hardly be claimed that their creditor could maintain an action for damages against respondent, for its failure to deliver the water under its contract with Levisse or with Gause.

The rule is that there must be privity and that remote damages to third parties cannot be recovered. The reasons for thus limiting the rule are variously stated in the decisions. For instance:

"To hold that such actions could be maintained would not only lead to endless complications, in following out cause and effect, but would restrict and embarrass the right to make contracts by burdening them with obligations, * * * which parties would not voluntarily assume." *Roddy v. Missouri Pac. Ry.*, 104 Mo. 234, 15 S. W. 1112, 12 L. R. A. 746, 24 Am. St. Rep. 333. "If we were to hold that plaintiff could sue in such a case, there is no point at which such actions would stop. The only safe rule is to confine the right to recover to those who enter into the contract; if we go one step beyond that there is no reason why we should not go 50." *Winterbottom v. Wright*, 10 Mees. & W. 109. "The object of parties in inserting in their contracts specific undertakings with respect to the work to be done is to create an obligation inter sese. These engagements and undertakings must necessarily be subject to modifications and waiver by the contracting parties. If third persons can acquire a right in a contract in the nature of a duty to have it performed as contracted for, the parties will be deprived of control over their own contract." *Marvin Safe Co. v. Ward*, 46 N. J. Law, 19.

Among other instructive cases upon the same subject, cited by respondent, are the following: *Standard Oil Co. v. Murray*, 119 Fed. 572, 57 C. C. A. 1; *Bank v. Ward*, 100 U. S. 195, 25 L. Ed. 621; *Henzis v. Kingsland*, 110 Mo. 605, 19 S. W. 630, 15 L. R. A. 821, 33 Am. St. Rep. 482; *Stockton v. Brown* (Tex. Civ. App.) 106 S. W. 423, *Knuckles v. Leggett*, 7 Colo. App. 265, 43 Pac. 154; *Barstow Irrigation Co. v. Cleghorn* (Tex. Civ.

App.) 93 S. W. 1023; Clancy v. Byrne, 56 N. Y. 129, 15 Am. Rep. 391; Thompson v. Sea Board, etc., Co., 165 N. C. 377, 81 S. E. 315, 52 L. R. A. (N. S.) 97; Chung Kee v. Davidson, 73 Cal. 522, 15 Pac. 100; Buckley v. Gray, 110 Cal. 339, 42 Pac. 900, 31 L. R. A. 862, 52 Am. St. Rep. 88; Kruse v. Wilson, 3 Cal. App. 91, 84 Pac. 442; Wilson v. Shea, 29 Cal. App. 788, 157 Pac. 543; Marin Rock Co. v. Stone Co. (Cal. App.) 194 Pac. 732, 734.

[4] Moreover, since the only interest of appellants in said crop was the right to subject it to the payment of their note against Gause, if the latter is solvent they were not damaged by the failure of respondent to deliver the water. In the absence of any averment to the contrary, we must assume that they can enforce the obligation, notwithstanding the loss of their security. In that respect, we think the complaint is fatally defective.

The judgment, in our opinion, should be affirmed, and it is so ordered.

We concur: FINCH, P. J.; HART, J.

57 Cal. App. 115

NEWHALL LAND & FARMING CO. et al. v. INDUSTRIAL ACC. COMMISSION et al.
(Civ. 4172.)

(District Court of Appeal, First District, Division 2, California. March 18, 1922. Rehearing Denied April 13, 1922. Hearing Denied by Supreme Court May 15, 1922.)

1. Master and servant — 385(16)—Compensation insurer held liable for cost of medical treatment obtained by employé.

Where an injured employé's letter to the insurance carrier explained the necessity of an immediate operation, which its own physician had also reported as necessary, it was its duty under Workmen's Compensation, Insurance and Safety Act, § 9(a), to provide surgical treatment with all possible diligence, and on its failure to do so within a reasonable time it was liable for the reasonable cost of treatment obtained by the employé.

2. Master and servant — 398—Letter to commission from employé held an "application" within Compensation Act.

An injured employé's letter to the Industrial Accident Commission stating that a case of aggravated hernia, developing from injury, required an operation, and asking the Commission to inquire into the matter of his injury, held an "application" within Workmen's Compensation, Insurance and Safety Act, § 17(a), sufficient to avoid the limitation of six months prescribed by section 11, though not served on the insurance carrier, which was fully informed about the case and the application.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Application.]

3. Master and servant — 417(8)—Compensation insurer not prejudiced by informalities.

The Industrial Accident Commission's neglect to hear the matter within 30 days after the filing of the application as required by Workmen's Compensation, Insurance and Safety Act, § 17, held a mere informality within section 60, not prejudicial to the insurance carrier.

Application of the Newhall Land & Farming Company and another against the Industrial Accident Commission and another, for certiorari to review an order awarding compensation for injuries. Award affirmed.

Redman & Alexander, of San Francisco, for petitioners.

A. E. Graupner, of San Francisco, for respondents.

LANGDON, P. J. This matter comes before us upon a petition for a writ of review.

Ysmael Olivera was employed in December, 1919, by Newhall Land & Farming Company at a ranch in San Luis Obispo county. The Continental Casualty Company was the insurance carrier. The parties are subject to the provisions of the Workmen's Compensation, Insurance and Safety Act of 1917 (St. 1917, p. 831), as amended in 1919 (St. 1919, p. 910). Olivera was injured in the course of his employment by being thrown from his horse while trying to overtake a runaway team on the ranch. This accident resulted in an injury designated by the physicians as a right inguinal hernia.

The Industrial Accident Commission found that medical treatment by Dr. Brown was furnished to Olivera by the insurance carrier, which treatment extended from the time of the injury until some time in January, 1920. Olivera testified, as also did Dr. Brown, that a truss was fitted, and it was hoped that the injury might be repaired in time without the necessity of an operation. Dr. Brown testified that at first the truss seemed to give good results, but later, during his treatment of Olivera, it became apparent that an operation was necessary for a permanent cure, and he so informed Olivera. He testified, however, that he had no authority from the insurance carrier to perform the operation, and would not have done it himself, and that he did not tell Olivera who would be engaged to perform this service. From his testimony it is clear that he had no reason to believe that the insurance company would authorize or pay for any operation. He also testified that up until the end of January he considered the truss satisfactory and effective in curing the injury; that he never informed the insurance carrier that a surgical operation was necessary, and was never instructed by them to perform such an operation or to make ar-

rangements to have such an operation performed. Olivera went to his home in Santa Maria after Dr. Brown had done what he could for him without an operation. About May, 1920, he consulted a physician of his own choosing, and was advised by him that an operation was necessary, and that strangulation was likely to result from the injury unless the operation was performed at once.

On May 28, 1920, as found by the Industrial Accident Commission, Olivera wrote to the Continental Casualty Company, demanding further treatment, and stating that it must be had without further delay. The insurance company corresponded with Dr. Brown about the matter, and sent Olivera a check for \$38.38 as payment in full of all claims growing out of his injury and disability. On June 8, 1920, Olivera returned this check, stating that it could not be accepted in full payment because the injury was causing much pain and trouble; that an immediate operation was necessary; and stated that he was inclosing a copy of a letter which he was that day sending to the Industrial Accident Commission. In this letter to the insurance company he demanded payments due him under the provisions of the compensation act.

On the same date he addressed a letter to the Industrial Accident Commission, which has been found by it to be an application within the requirements of section 17(a), Workmen's Compensation, Insurance and Safety Act of 1917. As this matter is the chief point of attack by petitioners herein, and must be disposed of in this proceeding, it is necessary to set out such application in full. It reads as follows:

"San Luis Obispo, Cal., June 8, 1920.

"Industrial Accident Commission, 525 Market Street, San Francisco, California—Gentlemen: On December 18, 1919, I was injured while in the employ of Newhall Land & Farming Company at their Suey Ranch near Santa Maria. I was given medical treatment by Dr. Brown of Santa Maria but without being permanently cured. A bad case of hernia has developed as a result of the injury and it is in such an aggravated state that the doctor who examined me recently (Dr. P. K. Jackson of San Luis Obispo) advises that an operation is necessary and that a cure or relief cannot be expected otherwise.

"The Newhall Land & Farming Company were covered under their policy No. 48564 issued by Continental Casualty Company through their San Francisco office. The matter has been reported to the aforesaid casualty company. Under date of May 5, 1920, their check was transmitted to me for \$38.38 and at the same time they requested my receipt and final receipt. I wrote to them that I could not accept their money under those conditions as my case requires medical treatment but to this letter I have received no reply.

"The doctors advise that an operation be performed without further delay and have arranged to do so on Thursday of this week, June 10th.

I am under the care of Dr. P. K. Jackson and Dr. N. J. Shields of this city.

"I would ask that the matter of my injury be looked into by you and that the aforesaid company be directed to carry out the intent of the Workmen's Compensation Act.

"I forward a certificate signed by Dr. Jackson to the office of the Casualty Company with my recent letter to them.

"Thanking you for prompt attention, I am,
"Very truly yours, Y. Olivera, A."

The Industrial Accident Commission acknowledged receipt of this letter, and stated that the insurance company desired time within which to get a report from Dr. Brown and would communicate with Olivera further after receiving such a report.

After the original award of the Industrial Accident Commission was made, a rehearing was granted at the request of the petitioners here, and additional evidence was submitted and amended findings and award made. It was found that no treatment was tendered to Olivera in response to his demand of May 28, 1920, on the insurance company, and no intimation was made to him that such treatment would be furnished or forthcoming, and applicant, therefore, on the 14th day of June, 1920, obtained such treatment from physicians of his own selection; that the time intervening between said demand and the procuring of such treatment was adequate to give said defendant an opportunity to tender such treatment had it been so disposed. The Industrial Accident Commission, therefore, awarded to Olivera the reasonable cost of such treatment.

It is contended by petitioners that Dr. Brown, the physician for the insurance company, offered to procure for Olivera an operation several months before it was actually performed, and therefore the insurance company is not liable for the cost of medical attention which he procured for himself. It is also contended that the failure of Olivera to accept this offer at the time it was made increased his period of disability before the operation, and also increased the period of disability after the operation, because the injury had increased and required more repair, and the operation was, in consequence, a greater drain on the vital forces. As to this last matter, the commission found that the disability following the operation was not prolonged by the failure to have the operation performed earlier. Section 67, subd. "c," of the Compensation Act provides that the findings and conclusions of the commission on questions of fact shall be conclusive and final, and shall not be subject to review. The objection that Olivera's hesitancy about an operation had increased the period of disability prior to the operation was recognized by the commission, and met by its award and by its findings, which recite that—

"By reason of the injury the applicant was totally disabled from the date thereof until April 25, 1920, a period of $18\frac{3}{7}$ weeks and is entitled by reason thereof to a weekly payment of \$12.83 for $17\frac{3}{7}$ weeks, amounting to the total sum of \$223.43, said weekly payments being based upon monthly earnings of \$90. Said disability also continued after April 25, 1920, but at said time the defendant's physician had tendered to the applicant a surgical operation for the cure of said hernia, and the applicant neglected and refused to submit thereto, or to accept such operation, and the same was not performed until June 14, 1920. Such refusal was unreasonable, and proximately caused disability from said 25th day of April to said 14th day of June, 1920, and applicant is not entitled to compensation for said period."

Allowance of \$93.50 was made to the surgeon performing the operation, which was a substantial reduction of his bill appearing in the record for the sum of \$261. An allowance of \$158.85 was made for hospital bill and \$24 for a nurse. All of these sums seem exceedingly reasonable upon the record before us; indeed, petitioners do not contend that they are unreasonable.

As to the contention that Olivera is not entitled to the reasonable cost of medical attention because Dr. Brown suggested and offered him an operation, which he refused, we think this objection is satisfactorily met by the findings of the Commission regarding the failure of the carrier to furnish Olivera surgical treatment at the time he became convinced of its necessity and demanded such treatment of said insurance company. The record discloses that at first Dr. Brown did hold out hope to Olivera of a recovery without an operation. Olivera is a working man, uneducated, and who speaks little English. He had the usual and natural aversion of such a person to an operation. In addition to this he was a man of the age of about 60 years. He endeavored to effect a cure without surgical treatment. Dr. Brown encouraged him in this at first, according to Dr. Brown's own testimony. When it seemed that an operation was imperative, and Dr. Brown so told Olivera, Dr. Brown was not authorized by the insurance company to perform it, nor to secure any one to perform it. He was not himself practicing major surgery, and he stated that he would not have taken the responsibility of the operation. He did not tell Olivera who would be secured to perform the operation. Olivera was not required to accept the services of the first surgeon offered under the provisions of section 9 of the act. The insurance company was not notified at that time of the necessity of an operation, and never tendered such treatment to Olivera, nor authorized any one to do so on its behalf. Olivera returned to his home at Santa Maria, still hoping to effect a cure, and desirous of avoiding a surgical operation, if possible. He was not

awarded compensation for this period when he cherished the forlorn hope of a cure without an operation, so the insurance company was not injured in any way by his indecision and natural reticence about this matter. When the absolute necessity of an operation became apparent to him, he called upon the insurance carrier for further treatment, explaining the necessity for an operation. Had the insurance company responded at this time with a reasonable offer of proper treatment, its argument on this question would be more convincing; but it did not do so, nor give any intimation that it would allow Olivera more than the \$38 tendered to him at that time. He was in imminent danger, and he had no choice but to select a surgeon and submit to the operation.

[1] Section 9(a) of the Compensation Act provides that, in the event of the neglect or refusal of the employer seasonably to provide medical, surgical, and hospital treatment, he shall be liable for the reasonable expenses incurred by the employee in procuring the same. Olivera's letter to the insurance carrier explained the immediate necessity of an operation. Also the company was in possession of the reports of Dr. Brown, its own physician, sent to it at its request, and showing that such an operation was necessary. We think that under such circumstances it was its duty to provide the surgical treatment with all possible diligence, and it is found by the Commission, and the evidence supports the finding, that it did not do so within a reasonable time.

[2, 3] The only other objection of petitioners is to the "application" hereinbefore set out. It is contended that this is not an application in proper form; that service of same and a hearing thereon were not had as provided in section 17 of the act. It is further contended that the Commission did not regard this letter as an application, and that the hearing was not proceeded with until after a more formal application had been filed by an attorney for Olivera. This formal application was not filed until December 19, 1920, which was too late under the provisions of section 11 of said Compensation Act. Unless, therefore, the letter of June 8, 1920, hereinbefore set forth, can be regarded as an "application," the employee is barred from all relief. Let us examine the facts with reference to the filing of the two applications: On June 8, 1920, Olivera, realizing that he could not recover from his injury without further treatment, went to a friend and had him write a letter to the Industrial Accident Commission, setting forth the facts and Olivera's need for further medical and surgical treatment. This is the letter which has been construed by said Commission, in making its award, as an application. No results having been accomplished by this letter, Olivera, being uninformed as to the nature of

proceedings before the Commission, went to an attorney who had had nothing to do with the earlier letter, and was probably uninformed thereof, and uninformed of the status of the entire matter, and this attorney filed a formal application in December, 1920. Later, when the full facts were disclosed to another attorney, who represented Olivera at the hearing, said attorney insisted, on behalf of his client, that the letter of June 8, 1920, was an application within the meaning of the Compensation Act, and that it should be so regarded, and the Commission agreed with this position. If this letter is sufficient as an application, the objection of petitioners that the claim is barred is without merit.

Section 17 of the Compensation Act, as amended in 1919, provides that:

"Upon the filing with the Commission by any party in interest, his attorney, or other representative authorized in writing, of an application in writing stating the general nature of any dispute or controversy concerning compensation, or concerning any right or liability arising out of, or incidental thereto, jurisdiction over which is vested by this act in the Commission, a time and place shall be fixed for the hearing thereof, which hearing, unless otherwise agreed to by all the parties thereto, must be held not less than ten days nor more than thirty days after the filing of such application."

Section 11 provides that the period within which proceedings for the collection of compensation may be commenced in a case like the present one is six months.

It would seem that the filing of the application in writing stating "the general nature of the dispute or controversy concerning compensation, or concerning any right or liability arising out of, or incidental thereto," would "commence proceedings" within the meaning of section 11, in so far as the applicant is concerned; any action which the Commission might take or not take after that assuredly cannot be chargeable to him, and should not destroy his rights. Most particularly is this true in view of the expressed purposes of the Compensation Act and the spirit in which it has always been construed and applied by our courts. The letter of June 8, 1920, assuredly stated fully the matters required to be stated in an application; the Commission has accepted it as an application within the meaning of the Compensation Act, and we agree with the contention of said Commission that any clerical inadvertence in overlooking this application, as such, for a time, should not be visited upon the injured employee who has no control over the administration of the offices of the Commission, and who has done all that is required of him by an act essentially and primarily enacted for his benefit and protection.

The insurance company argues that it was not officially served with a copy of this "application" if this letter is to be regarded as such. But it was informed of the application, whether formally or informally, and so it was not prejudiced in any way. Olivera's letter to the Commission, written on June 8, 1920, recites that there is inclosed a copy of the letter sent to the Industrial Accident Commission (the application). On June 18, 1920, the insurance company wrote to Dr. Brown in connection with the case, and stated in that letter:

"We understand this matter is being referred to the Industrial Accident Commission."

There were communications between the Industrial Accident Commission and the insurance carrier regarding this application, and there is not the slightest doubt that the insurance carrier was fully informed about the fact of the application having been sent to the Commission, and the contents thereof. While it is true that the matter was not brought to a hearing within 30 days after the filing of this application, the section of the Compensation Act governing this matter provides that it must be brought to a hearing within 30 days after the filing of the application "unless otherwise agreed to by all the parties thereto." As this matter is one in which the Commission, and not the employee, is to act, any neglect or oversight of the Commission should not prejudice the employee, under our view of the general equitable purposes of this act. Furthermore, there is evidence in the record from which it may be inferred that the delay was by agreement of the parties—or at least by agreement of the parties complaining of the same here. For the record contains a letter from the Industrial Accident Commission to Olivera, dated June 14, 1920, acknowledging receipt of the application of June 8, and stating that the insurance company had informed the Commission that it was in communication with Dr. Brown about the case and would take up the matter further upon receipt of a report from Dr. Brown. The inference is certainly permissible that the delay was at the instance of the insurance carrier and for its benefit, to enable it to more thoroughly investigate the case and determine what its attitude in the matter should be.

Under all the circumstances of this case, and after a very full and careful reading of the entire record, we find no errors in the proceedings which would justify us in reversing the award of the Commission. Any informalities which may have occurred would not invalidate the award herein made, in view of the provisions of section 60 of the act we are considering; and, furthermore, as we have stated, if any such infor-

malities occurred we do not see that they were prejudicial to the petitioners here.

The award of the Industrial Accident Commission is affirmed.

We concur: STURTEVANT, J.; NOURSE, J.

57 Cal. App. 155

CHAMBERS v. GLENN-COLUSA IRR. DIST.
et al. (Civ. 2455.)

(District Court of Appeal, Third District, California. March 22, 1922.)

1. Waters and water courses ⚡227—**Determination of qualifications of signers of petitions for recall of directors of irrigation district.**

The secretary of the board of an irrigation district determines the qualifications of signers of a petition for the recall of directors, by an inspection of the petition and of the great register of the county, and is not required to go beyond an examination of these documents, under St. Ex. Sess. 1911, p. 135, § 28½; Pol. Code, § 1083a.

2. Mandamus ⚡10—**Refusal of secretary of board of irrigation district to certify recall petition not arbitrary exercise of power.**

Refusal of secretary of board of directors of irrigation district to certify to the sufficiency of a petition for recall of directors, where none of the signers affixed the date of their signing, as required by St. Ex. Sess. 1911, p. 135, § 28½, was no arbitrary exercise of the power on his part, such as would warrant issue of writ of mandate to compel him to certify, in view of Pol. Code, § 1083a.

3. Mandamus ⚡154(4)—**Proper signing of petition for recall of directors of irrigation district held not alleged.**

On application for writ of mandate to require secretary of board of directors of irrigation district to certify to the sufficiency of a petition for recall of directors, allegation that "said papers, so constituting said petition, were as follows: (a) One was dated December 30, 1921, and all signatures thereon were placed thereon by the registered voters therein named on the same day, and said paper was circulated by G., and the affidavit of said G., attached thereto, was taken by him before H., a notary public in and for the county of C., on December 30, 1921," and an affidavit as to the genuineness of the signatures and qualifications of signers, *held* not to show that the signers affixed the date of their signatures to the petition, as required by St. Ex. Sess. 1911, p. 135, § 28½, in view of Pol. Code, § 1083a.

Application by C. W. Chambers for writ of mandate to require an election to be called in the Glenn-Colusa Irrigation District. Application denied.

Frank Freeman and George R. Freeman, both of Willows, for petitioner.

Hankins & Hankins, of San Francisco, for respondents.

BURNETT, J. By an original application to this court, petitioner seeks a writ of mandate to require the secretary of the board of directors of said district to certify to the sufficiency of a certain alleged petition, filed with him, for the recall of the directors and also to require the board to call an election based on such petition. It may be stated that, of the three directors sought to be recalled, one has died and another has resigned, and their successors have been chosen since the petition was presented to the secretary. A demurrer on various grounds has been filed by the irrigation district and the board of directors, and a separate demurrer and an answer by the secretary, Charles F. Lambert. The answer puts in issue the question of the sufficiency of the alleged petition, both as to form and the necessary signatures, and also denies that the petition referred to in this application is the same as the recall petition which was filed with him. We think, though, that we need go no further than the admitted facts to reach the conclusion that the writ should be denied.

The office of the writ of mandate is well understood, and it is not doubted that the duty of said secretary in the premises is ministerial in its character. If the law imposed upon him the obligation to certify to said petition, manifestly the writ will issue. Whether such was his duty depends upon the question whether said petition complied with the requirements of the law. Section 28½ of the Recall Act, referring specifically to irrigation districts, approved January 2, 1912 (Stats. 1911, extra session, p. 135), provided for the following procedure in such case:

"A petition demanding the election of a successor to the person sought to be removed shall be filed with the secretary of the board of directors of such district, which petition shall be signed by registered voters equal in number to at least 25 per cent. of the highest vote cast within such district for candidates for the office, the incumbent of which is sought to be removed, at the last general election in such district at which an incumbent of such office was elected * * * and said petition shall contain a statement of the grounds on which the removal or recall is sought. * * * Each signer shall add to his signature his place of residence, giving the precinct, and, if within a town having named streets and numbered houses, street and number. Each such separate paper shall have attached thereto an affidavit made by an elector of the district and sworn to before an officer competent to administer oath, stating that the affiant circulated that particular paper and saw written the signatures appended thereto; and, that according to the best information and belief of the affiant, each is the genuine signature of the person whose name purports to be thereunto subscribed and of a qualified elector of the district. Within ten days from the date of filing such petition, the secretary of the board shall examine and from the records of the registration ascertain

whether or not said petition is signed by the requisite number of qualified electors, and he shall attach to said petition his certificate showing the result of said examination."

Subsequent legislation upon the subject, however, is found in section 1083a, of the Political Code. As enacted in 1913, it provided:

"Wherever, by the Constitution or laws of this state, any initiative, referendum, recall or nominating petition is required to be signed by qualified electors, only an elector who is a registered qualified elector at the time he signs such petition, shall be entitled to sign the same."

In 1915 to the foregoing was added the following amendment:

"Wherever, by the Constitution or laws of this state any * * * recall * * * petition * * * is required to be signed, * * * such signer shall at the time of so signing such petition or paper affix thereto the date of such signing."

[1, 2] It is not disputed that the foregoing section of the Political Code is a part of the law applicable to the case herein, and it is admitted that none of the signers to the petition affixed thereto the date of "such signing." The requirement is, of course, plain and unequivocal, within the power of the Legislature to prescribe, and there is no good reason for holding it to be otherwise than mandatory. If it may be disregarded, any other prerequisite in reference to the petition may be ignored. The importance of it is seen in the fact that the signers must be electors at the time their signatures are attached, and the secretary of the board determines their qualifications by an inspection of the petition and of the great register of the county. He is not required to go beyond an examination of these documents to ascertain whether the petitioners were qualified signers.

In *Wright v. Engram*, 201 Pac. 788, the Supreme Court said:

"The law does not require him to go outside for information, but he must determine 'from the records of registration' whether or not the fact exists. Such an examination involves merely ministerial acts and is in no sense judicial."

Therein the law required the clerk to ascertain only "whether or not said petition is signed by the requisite number of qualified voters" and he was to determine this from an examination of "the records of registration." But herein there was the additional requirement that we have mentioned, and the secretary could not determine, by an inspection of the petition, when the signatures were attached. It was not therefore his "plain, ministerial duty" to certify the petition to the board. It is proper to construe liberally this, as well as other provisions of

the law, to effect the intention of the Legislature, but to hold that there was in this case a substantial compliance with the requirement of the statute would be a judicial usurpation of the function of the law-making branch of the government. We may add that the requirement is reasonable and easy to be observed and it was no arbitrary exercise of power on the part of the secretary to refuse to certify such petition.

The answer of petitioner to this contention is that "the petition alleges that all the names to each of the separate papers were subscribed by the signers thereto on the same day" and, moreover, the consideration was decided adversely to respondents' contention by this court, in *Chester v. Hall*, 204 Pac. 237. As to the first of these, the petition herein for a writ of mandate does show to this court the time when the signatures were attached, but the real question is, What did the petition for recall show to the secretary of the board? We are to determine whether the writ should issue, by a consideration of the situation as it was presented to him; and, as we have seen, the showing was not such as to make it his duty to certify the petition.

[3] The allegation that "said papers so constituting said petition were as follows: (a) One was dated December 30, 1921, and all signatures thereon were placed thereon by the registered voters therein named on the same day, and said paper was circulated by George A. McDermott, and the affidavit of said George A. McDermott attached thereto was taken by him before George L. Harden, a notary public in and for the county of Colusa, Cal., on December 30, 1921, and that paper contained 32 signatures" not only fails to show that the signers affixed the date of their signatures, but it does not indicate that there was anything upon the face of the record whereby the secretary could determine when the petition was signed. Even the affidavit of the elector did not state when the signature was made, but only that he "circulated that particular paper and saw written the signatures appended thereto, and that, according to the best information and belief of the affiant, each was the genuine signature of the person whose name purported to be thereunto subscribed and of a qualified elector of said district."

In the *Chester Case*, supra, it was not decided that the provision requiring the signer to affix the date of his signing is merely directory, but it was held to be a rational conclusion from a consideration of the whole record, that a sufficient number of the electors had so affixed the dates. Moreover, in that case it is stated that "the answer admits that more than the required number of qualified electors signed the petition and affixed thereto the dates of their respective signatures." In addition, the clerk had certified that a sufficient number of electors had

signed the petition but he based his refusal to act upon the claim that the petition was fatally defective in respect to the affidavit required to be attached thereto.

Other points are made by respondents, but we think the foregoing is decisive of the controversy.

The application for the writ is denied, and the petition dismissed.

We concur: FINCH, P. J.; HART, J.

37 Cal. App. 230

PEOPLE v. RUEF. (Cr. 1031.)

(District Court of Appeal, First District, Division 1, California. March 31, 1922.)

1. Indictment and information $\S$ 71—Indictment charging "robbery," but alleging facts showing burglary, held demurrable for ambiguity and uncertainty.

Indictment, denominating the offense charged as "robbery," but alleging facts showing burglary, held demurrable for uncertainty and ambiguity.

2. Criminal law $\S$ 1032(7)—Variance not available on appeal, in absence of objection in lower court.

Variance between evidence proving burglary and indictment denominating the offense as "robbery," but alleging facts showing burglary, held not available on appeal from judgment of conviction for burglary, in the absence of objection in lower court.

3. Witnesses $\S$ 268(8)—Refusal to permit cross-examination held improper.

In prosecution for burglary, in which witness had on direct examination testified to a confession made by defendant, refusal to permit cross-examination as to whether he had disclosed confession to the grand jury when he appeared before it as a witness held improper, in view of ambiguity in the record as to the precise time referred to; there having been more than one indictment returned against the defendant and his confederates.

4. Criminal law $\S$ 1170½(5)—Exclusion of testimony held harmless, in view of other testimony on same point.

Where witness had testified on direct examination as to confession by defendant, refusal to permit cross-examination as to whether witness in testifying before the grand jury had disclosed the confession held harmless, in view of testimony as to such confession by two other witnesses.

5. Criminal law $\S$ 534(1)—Extrajudicial confessions alone are insufficient to sustain conviction.

Extrajudicial confessions alone are insufficient to sustain a conviction.

6. Criminal law $\S$ 535(2)—Testimony corroborating confession held sufficient to sustain conviction in view of independent proof of corpus delicti.

In prosecution for burglary, testimony as to confession made by defendant held sufficiently corroborated to sustain conviction, in view of independent proof of the corpus delicti.

Appeal from Superior Court, City and County of San Francisco; Louis H. Ward, Judge.

George Ruef was convicted of burglary in the second degree and from judgment of conviction and order denying motion for new trial, he appeals. Judgment and order affirmed.

William F. Herron, of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and John H. Rioridan, Deputy Atty. Gen., for the People.

KERRIGAN, J. The defendant was convicted of the crime of burglary in the second degree. From the judgment of conviction and from the order denying his motion for a new trial this appeal is prosecuted.

The evidence shows that the defendant with others, on or about the 29th day of April, 1921, burglarized certain premises on First avenue in the city of San Francisco, taking therefrom a large quantity of wine and liquor. One witness testified that he saw three men in front of the premises from which said property was stolen early in the morning of the burglary. Entrance to the premises was effected through a large hole made by the use of a brace and bit and a saw. The property was carried away in an automobile. About the time of the burglary the defendant had rented a house on Rivoli street in said city, in which an insurance business purported to be conducted. Although the defendant negotiated the lease and paid the rent, the insurance business, if carried on at all, was not conducted in his name, but in that of E. G. Walter & Co., as shown by a sign upon the front of the premises. Subsequent to the burglary a detective searched these premises, and found thereon two hack saws, a bolt cutter, a brace, and three bits of uniform size, which bits fitted the holes made at the point where the entry of the burglarized premises was effected. The defendant admitted to three police officers that he participated in the burglary. He stated that he conveyed his confederates to the premises in an automobile; that according to prearrangement they were to effect an entrance into the basement of the premises, he in the meantime keeping the automobile in motion and occasionally passing the house; that upon an agreed signal he rejoined his confederates at the scene of their activity and loaded into the automobile

the wine and liquor as it was delivered to him by them on the sidewalk.

The testimony introduced by the prosecution is uncontradicted; the defendant neither having offered himself as a witness nor called any one in his behalf.

[1, 2] It is first contended by the appellant that there was a fatal variance between the evidence and the indictment, and that it was therefore error on the part of the trial court to deny his motion that the jury be instructed to return a verdict of not guilty. This contention is based upon an evident inadvertence in the indictment, wherein the offense is denominated "robbery" but this general designation is immediately followed by specific allegations showing, with sufficient clearness, that the offense charged was burglary. While the indictment was subject to demurrer upon the grounds of uncertainty and ambiguity, it does not follow that, having gone to trial upon it without objection, and been convicted of burglary, a defendant can upon appeal ignore the language thereof which specifically charged this offense, and affect to believe that he was on trial for robbery, and upon this foundation base a contention that the proof being of burglary there was a variance between it and the indictment.

[3, 4] Defendant also contends that the trial court committed error in restricting the cross-examination of one of the witnesses for the prosecution. This witness, on his direct examination, had testified to a confession made to him by the defendant, and upon cross-examination the court refused to permit him to be asked if, when he appeared as a witness before the grand jury, he had disclosed to that body this alleged confession. The witness had said on his direct examination that the confession had been made to him after the arrest of the defendant on the grand jury indictment. While, therefore, we think, in view of some ambiguity in the record as to the precise time referred to (there having been more than one indictment returned against the defendant or his confederates), the question should have been permitted, still we are unable to perceive wherein the defendant suffered any substantial injury as a result of the ruling of the court, for this confession of the defendant was also testified to by two other witnesses.

[5, 6] Defendant finally contends that the only evidence in the case tending to support the verdict is the confession heretofore referred to. It is, of course, true, as pointed out by the appellant, that extrajudicial confessions alone are insufficient to sustain a conviction; but where, as here, in addition to the confession there is independent proof of the corpus delicti, it is well-established that the verdict is sufficiently supported by the evidence. *People v. Jones*, 31 Cal. 565; *People v. Thrall*, 50 Cal. 415; 6 Am. & Eng.

Ency. of Law, 582. A conviction based on a confession will stand although uncorroborated by any other evidence, if the corpus delicti be proven. 16 C. J. 736; *People v. Ford*, 25 Cal. App. 388, 143 Pac. 1075.

The judgment and order are affirmed.

We concur: TYLER, P. J.; KNIGHT, Justice pro tem.

(57 Cal. App. 251)

SOUTHWEST PAVING CO. v. WILSON,
Street Superintendent.
(Civ. 3793.)

(District Court of Appeal, Second District, Division 2. California. April 3, 1922.)

1. Municipal corporations ⇨304(13)—Resolution of intention to improve street governs as against plans and specifications.

While an immaterial difference between work provided to be done by a resolution of intention to improve a street and that described in the plans and specifications will not render a proceeding under Improvement Act 1911 void, an unambiguous resolution governs.

2. Municipal corporations ⇨304(13)—Where plans and specifications referred to in resolution of intention to pave call for additional work, proceeding is void.

Where the resolution of intention to pave a street clearly described the work to be done, but the plans and specifications, which the resolution referred to for a more particular description and made a part thereof called for additional work, there was an ambiguity created which rendered the proceeding void, the plans and specifications, though not such an integral part of the resolution as to require that they be published, being a part thereof when reference is made to them as such by the resolution, which the statute (Improvement Act 1911) requires "shall describe" the work to be done.

3. Municipal corporations ⇨289(1)—Proceedings for pavement of streets must be strictly pursued.

Proceedings, such as those prescribed by Improvement Act 1911 for street improvements, by which the citizen is divested of his property in invitum, must be strictly pursued, and the court will not use extrinsic aids or other intents to avoid the effect of uncertainty therein; the rule requiring certainty in contracts generally, in order that there may be a meeting of the minds, being applicable.

4. Municipal corporations ⇨304(13)—Variance between resolution of intention and plan as to width of gutters held such as to render proceeding void.

Where a resolution of intention to pave a street called for gutters 36 inches wide, while the plan, to which reference was made, stated that the gutters were 18 inches wide, there was a positive conflict between the two, resulting in an uncertainty which rendered the proceeding void.

Appeal from Superior Court, Ventura County; G. R. Freeman, Judge.

Action by the Southwest Paving Company against L. M. Wilson, as Street Superintendent of the City of Buenaventura. Judgment for plaintiff, and defendant appeals. Reversed.

H. F. Orr and Drapeau, Orr & Gardner, all of Ventura, for appellant.

Arthur M. Ellis, of Los Angeles, for respondent.

CRAIG, J. In this appeal the facts are not in dispute. In so far as it is necessary to state them they are as follows:

The defendant is the street superintendent of the city of San Buenaventura. A proceeding under the Improvement Act of 1911 (St. 1911, p. 730) was instituted, and a resolution of intention to improve certain streets within that city was duly passed and published and notice of its adoption posted according to law. Bids were received, and the petitioner was the lowest bidder. Thereafter and in due time the petitioner duly signed and executed a contract "to do and perform all of the work described in said resolution of intention," etc. The defendant declined to sign this contract, and also refused to approve the petitioner's bond for the faithful performance of the work. The reason assigned for such refusals is the existence of certain alleged defects and irregularities in the proceeding. It is agreed that the petition correctly and completely sets forth the objections of the defendant. They are seven in number.

[1, 2] The first one which we will consider is in substance that the resolution of intention calls for the paving of Fir and Chestnut streets up to the north line of Front street. It is expressly provided in the resolution of intention that the plans and specifications are made a part thereof, and special reference is therein made to plan No. 308. But according to plan No. 308 the streets above mentioned were to be paved for a distance of about eight feet south of Front street. A proceeding for street improvement under the act of 1911 depends for its jurisdictional foundation upon the resolution of intention. *Fay v. Reed*, 128 Cal. 357, 60 Pac. 927. It is true that where an immaterial difference exists between the work provided to be done by the resolution of intention and that described in the plans and specifications the proceeding will not be rendered void, but the clear provision of the resolution of intention will govern. *Wentland v. Clark & Henery Const. Co.*, 37 Cal. App. 34, 173 Pac. 480. This rule, however, does not apply to a case where the resolution of intention is ambiguous and contains contradictory provisions. *Piedmont Paving Co. v. Allman*, 136 Cal. 88, 68 Pac. 493. The case at bar may be differentiated from each of those cited from

this jurisdiction in that here the resolution of intention does describe the work to be done clearly and without ambiguity, but the plans and specifications call for additional work, and it is argued by appellant that an uncertainty and ambiguity results which renders the entire proceeding void. The resolution of intention describes the work to be done as follows:

"All the roadway of Chestnut street from the north line of Front street to a line drawn across said Chestnut street two hundred fifty (250) feet south from and parallel with the south line of Poli street; all the roadway of Fir street from the north line of Front street to the south line of East Main street."

If, in the resolution itself, there were contained a further and separate provision to the effect that the work of paving was to begin, not "from the north line of Front street," but "from a line parallel to and eight feet southerly of said north line of Front street," no doubt could exist that the entire resolution of intention would be void for uncertainty. There would, in that event, be two inconsistent descriptions of the part of Chestnut street which is to be graded and paved. But these contradictory descriptions do occur. The first is in the resolution of intention proper, and the second is in the plans and specifications. If, then, the plans and specifications are to be regarded as a part of the resolution of intention, the uncertainty must invalidate the proceeding, at least as to this particular work. In order that the proceeding may be upheld it must be determined that the plans and specifications are not strictly a part of the resolution of intention. To begin with, the resolution of intention before us expressly declares that—

"Said plans and specifications are hereby referred to for a more particular description of said work and made a part hereof."

In view of this plain provision no doubt can be entertained as to the purpose of the legislative authority which passed the resolution of intention, and that intent must be controlling unless there is some inhibition in the law against making the plans and specifications a part of the resolution of intention.

Our own decisions have not directly passed upon this question, but the situation presented by *City of Stockton v. Whitmore*, 50 Cal. 554, is quite analogous to that in the case at bar. In that case the council proposed to do only a part of the work described in the resolution of intention. Quoting from the opinion, it is said:

"If it is proposed to improve a street for its whole length through several blocks, the property owners may be perfectly content to have the work done, and would have no motive to attend at the hearing. But they might have grave objections to improving the street for only a portion of the distance."

To be sure, this was not a case where the discrepancy was between the resolution of intention and plans and specifications, but the same consideration which led the court to hold that the work called for by the resolution of intention could not be altered by the council at the hearing applies to the situation here involved. The property owners might be perfectly willing to agree that the precise work called for in the resolution of intention should be done, but might object seriously to any additional work or to only a portion of the work being undertaken. If a variance exists they are not informed and cannot know whether to consent or to use the right to object which is safeguarded by the law. In *Wentland v. Clark & Henery Const. Co.*, 37 Cal. App. 34, 173 Pac. 480, the variance was alleged to be between the resolution of intention and the plans and specifications on the one hand and the record of the assessment on the other. The record of assessment showed the frontage of the property of the plaintiff *Wentland* to be less than that indicated by the plan. The opinion states that "The jurisdiction to do the work had its origin in the passage and publication and posting of the resolution of intention;" that the resolution of intention provided that the work was to be done in accordance with the plans and specifications "to which said plans and specifications reference is hereby made for description of said work and further particulars"; that the plans and specifications described the work to be done the same as the resolution of intention; that the "plans attached to the specifications were made a part thereof"; that "the specifications did not call for the improvement of a certain number of feet in front of each lot fronting on Pine street or for any specified number of feet"; that the court could see no reason "why plaintiff *Phillips* should escape payment because of the variance between the statement of an immaterial fact in the specifications and in the final certificate of the engineer of the actual length of the improved line of the street and the actual part of that line which was in front of the *Phillips* lot." By inference, at least, it is clear that the court held the plans and specifications to be a part of the resolution of intention. *Chase v. Trout*, 146 Cal. 350, 80 Pac. 81, goes a step further. The resolution of intention there under consideration merely provided that the work should be done "in accordance with the specifications" and "in accordance with the plans and profiles." The court there said:

"We hold that a resolution of intention sufficiently describes the work if it states the kind of work to be done, as stated in the statute, and refers to plans and specifications on file in the office of the city clerk or engineer, which give the details as to the materials to be used, and that the matters referred to need not be published."

The effect of that decision is to establish the rule that, although the plans and specifications are not such an integral part of the resolution of intention as to require that they be published, nevertheless, when reference is made to them by the resolution of intention they are a part thereof, for "the purpose to be served by the publication of the resolution is, in the first place, to inform interested persons of the general character of the improvement proposed, and, in the second place to make a specific declaration of the particular kind of improvement, as a basis of future action." The statute requires that the resolution of intention "shall describe" the work to be done. In the instant case the resolution of intention expressly states that the plans and specifications are to be looked to for "a more particular description of said work"; that they are "made a part hereof." We hold that such a particular description in the plans and specifications which is at variance with the general description of the resolution of intention creates an ambiguity which renders the proceeding void.

[3] It is obvious that the property owners have no certain basis upon which to rely. If the street superintendent were to sign the contract executed by the petitioner, it would be impossible to tell at what point the paving of the streets in question should begin. Persons desiring to bid have no definite starting point from which to reckon. In order that there may be fair competitive bidding, the bids must be for the construction of the same work, not only as to character, but as to extent as well. The rules requiring certainty and definiteness in contracts generally in order that there may be a meeting of the minds of the contracting parties have the same application to agreements of this character as in others. This is a proceeding by which the citizen is divested of his property in invitum. It must be strictly pursued. *City of Stockton v. Whitmore*, 50 Cal. 554. The court will not use extrinsic aids or other intents to avoid the effect of uncertainty in such a proceeding. *Bay Rock Co. v. Bell*, 133 Cal. 150, 65 Pac. 299, and *Labs v. Cooper*, 107 Cal. 656, 40 Pac. 1042.

[4] Another conflict occurs between the resolution of intention and the plans and specifications. The resolution of intention calls for gutters 36 inches in width to be constructed along both sides of the streets named. The cross section of plan No. 308 to which reference is made in the resolution of intention states that the gutters are 18 inches in width. Thus there is created a positive conflict between the resolution of intention and the plans and specifications, resulting in an uncertainty which must render the proceeding void.

Holding these views, it is unnecessary to pass upon other points raised by the appel-

lant, concerning which it is urged that the proceeding is irregular.

The judgment appealed from is reversed.

We concur: FINLAYSON, P. J.; WORKS,

(56 Cal. App. 489)

LONGSWORTH v. CURSON et al.
(Civ. 4142; L. A. 6871.)

(District Court of Appeal, First District, Division 1. California. Feb. 16, 1922. Hearing Denied by Supreme Court April 17, 1922.)

Opinion of Supreme Court Denying Hearing.

1. Libel and slander §45(2)—Letter written by employees to employers concerning new appointees is privileged.

A letter written by the employees of a tax collector's office to the tax collector concerning a new appointee, in which facts were stated showing that a new appointee would not work harmoniously with the other employees, was from persons interested in the matter to one who was also interested, so as to be privileged within Civ. Code, § 47, subd. 3.

2. Libel and slander §112(2)—Evidence held not to show malice in making privileged communication.

Evidence that plaintiff had made a false claim of dependence to procure a deferred classification in the draft, and that while working as extra help in the tax collector's office he had refused to co-operate with other employees, held to show that a letter written by the other employees to the tax collector protesting against plaintiff's appointment as a report clerk, in which it was stated he had a well-known reputation as a slacker and had demonstrated he could not work harmoniously with the other employees, was not actuated by express malice, so as to be actionable notwithstanding the qualified privilege.

3. Libel and slander §5—Compensatory damages can be recovered for libel without proving malice.

If a publication is libelous on its face or is shown to be so by extrinsic evidence, plaintiff may recover compensatory damages without proof of malice.

4. Libel and slander §101(4)—Plaintiff need not prove actual malice until defendant makes prima facie showing of privilege and absence of malice.

A defendant who pleads that the publication was upon a privileged occasion, as defined by Civ. Code, § 47, subds. 3, 4, or 5, must make a prima facie showing of the absence of malice before plaintiff is required to prove actual malice.

5. Libel and slander §120(2)—Punitive damages cannot be recovered without proof of actual malice.

A plaintiff cannot recover punitive damages for the publication of a libel without pleading and proving actual malice.

Appeal from Superior Court, Los Angeles County; Charles Monroe, Judge.

Action for libel by Floyd R. Longworth against S. T. Curson and others. From a judgment of nonsuit, plaintiff appeals. Affirmed, and hearing denied by the Supreme Court.

John F. Poole and Robert L. Williams, both of Los Angeles, for appellant.

Randall, Bartlett & White, of Los Angeles, for respondents.

KERRIGAN, J. This an appeal from a judgment of nonsuit in an action for damages alleged to have resulted from the publication of a communication charged to be libelous. The communication consisted of a letter, dated May 8, 1919, from the defendants, the employees of the report department of the tax collector's office of the county of Los Angeles, to W. O. Welch, the tax collector, and is in the following terms:

"Dear Mr. Welch: Appreciating the fact that you are as interested in preventing the introduction of any discordant element into the report department, or any other subdivision of the tax office, the undersigned wishes to call your attention to and at the same time enter our protest against the recent appointment of Mr. Longworth.

"Our objection to this person becoming a member of the department in which we are engaged is primarily predicated upon the well-known reputation of the young man as a 'slacker' in evading the draft and in refusing to aid the government in the purchase of a Liberty Bond, and in other ways indicating and expressing lack of patriotism and loyalty.

"Furthermore, Mr. Longworth has given many demonstrations during his service in the tax office that he lacks resiliency in disposition and temperament, and exhibits a spirit of selfishness and unconcern for the welfare and condition of others that alone should deny him association with those who do express and exhibit sentiments of concern and kindness for those who come in contact with each other in the discharge of office or social duties.

"If yourself and the appointing power of associate coworkers in this and other departments of the county service are seeking harmony and the helpful conditions which can only prevail when the spirit of fairness and loyalty animate the attitude of each member of any particular department, you will recall the appointment of Mr. Longworth as an appointee of the report office, and by this act indicate that you are as keenly interested in the harmonious atmosphere of our surroundings as you are in the development of our efficiency and loyalty to duty.

"Should any additional ground be required to sustain our position in this request, we hold ourselves in readiness to submit same when called for.

"For the above consideration of those who have been loyal, faithful, and considerate in their services to you in the past and at the present, we can only expect a favorable action upon this request."

The evidence shows that the plaintiff began working in the tax collector's office as an extra employee under civil service regulations in April, 1914. Five years later he received a letter from the tax collector notifying him that he was permanently appointed report clerk. At that time he was ill. Later in May, 1919, when he announced himself ready, the tax collector called his attention to said letter, and as a result of this letter his appointment was canceled.

The evidence also shows that at the time the letter was written the plaintiff was about 34 years old; he was a member of Standard Camp, G. A. R., Sons of Veterans, the Ohio State Society, and the young men's bible class of the First Methodist church. Concerning his attitude to the draft law, he testified that he had registered, and in his questionnaire he had asked for a deferred classification upon the ground that his father and mother and sister were dependent upon him for support. On his cross-examination it was developed that his father and mother had visited California and stayed about a year, leaving for their home during the month plaintiff registered. While in California he had contributed to their support, but prior thereto and since then they lived on their farm in Ohio, where they made their own living. The plaintiff admitted on cross-examination that he had not contributed to the support of his sister since the year 1915, and that she was at the time he registered 24 years old, regularly employed, and self-supporting. Other evidence introduced by plaintiff tended to show that rumors had been current to the effect that he was a "slacker"; that he was well known as a conscientious objector to the war; that he had a well-known reputation as a slacker and draft evader; and that his parents were not, as declared by him in his questionnaire, dependent upon him for support. It is in the record and uncontradicted that he had stated to two employees of the tax collector's office that he was a conscientious objector and opposed to the war; to another, at the height of the patriotic feeling aroused by the war he asserted that he was personally and religiously opposed to the conflict.

On the subject of his financial support of the war, the plaintiff testified that he purchased Liberty Bonds to the extent of \$250, and war savings stamps in an amount of \$60, but did not make these purchases through the tax collector's office as was the case with his fellow employees; that upon one occasion, when invited by a coemployee to purchase war savings stamps, he replied that he had "better use for his money."

Concerning his conduct in the tax collector's office and the charge that he was selfish and exhibited a spirit of unconcern for the welfare of others, it appears, briefly, that he was controversial, that occasionally he stub-

bornly resisted doing the work as suggested, claiming to have a better method of doing it than the one in operation, and that he was "uniformly disliked." Nor did he contradict the testimony of his own witnesses that he never contributed to funds raised in the office for different purposes, e. g., to purchase flowers for deceased employees of the office, or that on one occasion he refused to contribute 25 cents to a fund raised about Christmas time "for one of our boys that had been crippled during the war" and who "had a wife and two children."

The letter forming the basis of the action was signed by all the regular employees of the report department except one—the head of the department—who for that reason deemed it inexpedient to do so. It was intended originally that a committee of one representing the employees should wait on the tax collector and enter their protest to the confirmation of the appointment, but it was finally decided that the matter should be presented in the form of the foregoing letter, and it was agreed among the subscribers thereto that it should never be spoken of nor referred to. The author of the letter called as a witness for the plaintiff, testified that in writing it he was not actuated by motives of malice or ill-will toward the plaintiff.

Upon the conclusion of the plaintiff's case the defendants moved for a nonsuit, which was granted, and the correctness of this ruling depends upon whether or not, giving the evidence the construction most favorable to the plaintiff, it shows the existence of malice on the part of the defendants or any of them.

It is admitted that the letter was a qualified privileged communication falling within the provisions of subdivision 3 of section 47 of the Civil Code, which reads:

A privileged communication is one made—" (3) In a communication, without malice, to a person interested therein, by one who is also interested, or by one who stands in such relation to the person interested as to afford a reasonable ground for supposing the motive for the communication innocent, or who is requested by the person interested to give the information."

When the plaintiff depends upon such a communication in order to recover, it is incumbent upon him to show: First, that the communication is false; and, second, that the person making it was actuated by express malice, and the burden of proving malice is on the plaintiff.

The privilege defined by subdivision 3 of section 47, Civil Code, above set forth, is not absolute, being in this respect unlike those classified by subdivisions 1 and 2 of the same section as official, legislative, or judicial; but it falls within the class of qualified privileged communications where the occa-

sion of their making rebuts the inference prima facie arising from their character as prejudicial to the reputation of the person concerned, and in which the burden is on the plaintiff to prove that there was malice in fact, that the defendant was actuated by motives of personal spite or ill will.

In the case of *Gatewood v. Garrett*, 106 Va. 552, 56 S. E. 335, one of the questions before the court was whether or not the following instruction given to the jury correctly stated the law:

"If the jury believe from the evidence that the defendant spoke the words, or any of them, as charged in the declaration, of and concerning the plaintiff, yet the presumption of law is that he spoke them honestly, believing in the truth of his statement, although such statements in fact were false or founded upon the most erroneous information; and, in order for the plaintiff to recover in this action, the burden is upon him to prove to your satisfaction that such statements were spoken with actual malice in fact towards the defendant."

In deciding this question the court stated:

"It is not denied that this is a correct statement of the law. The occasion was privileged, and to make the defendant liable he must be shown to have misused the occasion to gratify his malice; the presumption being that he believed the statement to be true."

In the case of *Hayden v. Hasbrouck*, 34 R. I. 556, 84 Atl. 1087, 42 L. R. A. (N. S.) 1109, at the conclusion of the testimony the defendant moved for a directed verdict upon the same grounds as were urged here for a nonsuit. The appeal there was from an order denying the motion. In the course of the opinion the court states:

"The interview in question being a privileged one the defendant cannot be held liable for the words alleged to have been spoken by her, although the same were untrue and in ordinary circumstances would be actionable, unless in uttering them she was moved by malice toward the plaintiff. And the word 'malice' in this connection does not mean malice in law, or the absence of legal excuse, but malice in the popular sense, the motive of personal spite or ill will. This is sometimes called express or actual malice. Unauthorized communications which are actionable carry with them the inference of malice, and the plaintiff, without proof, can rely upon the presumption of malice which arises from the slanderous nature of the words. But in a privileged communication the occasion repels the inference of malice and there arises a presumption of good faith which the plaintiff is required to satisfactorily rebut. The burden of proving express malice is thrown upon the plaintiff by reason of the privilege in the defendant."

Section 48 of the Civil Code provides:

"In the cases provided for in subdivisions 3, 4, and 5 of the preceding section, malice is not inferred from the communication or publication."

See, also *Berot v. Porte*, 144 La. 805, 81 South. 323, 3 A. L. R. 1651.

While the evidence shows that the plaintiff registered under the draft act and purchased government bonds, it is still true that the evidence shows without contradiction that he was regarded and bore the reputation of a man who had not discharged his duty to his country while engaged in war with a foreign enemy. That this reputation was not without foundation was shown by the evidence admitted of the conduct and statements of the plaintiff, and by the inexcusable prevarication through which he claimed a deferred classification. At the date of the letter this country had but recently emerged from armed conflict with an aggressive enemy wherein the patriotic spirit of our citizens had been intensely aroused, and where the burdens imposed by the necessities of the conflict had been great, rendering any evasion of duty by a citizen inexcusable, and calculated to justly arouse the indignation of those whose consciences, while not of that sort which forbade them to take up arms, did interpose an effective barrier to any shirking of duty. Under these conditions it cannot justly be said that the sending of the letter under the facts narrated was of itself evidence of malice, nor that the complaint concerning plaintiff's conduct in the office was not made in good faith. The uncontroverted evidence shows that the defendants were acting, as they conceived it, in furtherance of the welfare of the public office in which they were employed. Certainly no malice can be said to have been shown by the mere writing of the letter, and none was shown independent of the letter. Where, as here, a communication imputing misconduct to another is made in good faith by persons who are interested therein to one who has an interest in the communication and a right to know and act upon the facts stated, no presumption of malice arises from the communication itself. Civ. Code, § 48; 25 Cyc. 385, 388; *Bayliss v. Grand Lodge*, 131 La. 579, 59 South. 996.

It follows that there was no error in granting the motion for nonsuit.

The judgment is therefore affirmed.

We concur: TYLER, P. J.; RICHARDS, J.

Opinion of Supreme Court Denying Hearing.

PER CURIAM. [1] The letter complained of does not show malice on its face. The evidence showed, without substantial contradiction, that it was written and published without malice by certain of the employees in the tax collector's office to the tax collector himself. All of these persons were interested in the matter of the appointment of the plaintiff to an official position in that office. It was therefore published upon a privileged occasion and was a privileged

publication within the meaning of subdivision 3 of section 47 of the Civil Code, and the nonsuit was properly granted on that ground.

[2] The letter does not charge that the plaintiff was in fact a "slacker," but only that he had a "well-known reputation" as such. The evidence shows that he had that reputation among the employees in the office. The question whether or not his conduct justified that reputation is not decisive of the question whether or not such repute existed. The statements in the opinion of the district court as to his conduct are not in all respects supported by the record. The plaintiff denied that he had ever said to any person that he was a conscientious objector and was personally, and religiously opposed to the war. His father and mother did not, as the opinion says, leave California for their home in Ohio, during the month in which plaintiff registered for the draft, that is, in September, 1918, but remained in California until September, 1919. The district court evidently mistook the date as given in the record. It does appear, however, and without contradiction, that neither his father nor mother were dependent on him for support in September, 1918, or at any other time, and that his sister was not dependent on him at that time, nor for the three preceding years.

[3-5] We do not approve of the statement in the opinion of the district court that the plaintiff in an action for libel for the publication of such a letter as that here complained of must show "that the person making it was actuated by express malice, and the burden of proving malice is on the plaintiff." Under our Code, if a publication is libelous on its face, or is shown to be so by extrinsic evidence, the plaintiff may recover compensatory damages without proof of malice. When the defendant pleads that the publication was made without malice and upon a privileged occasion of the character defined in either subdivisions 3, 4, or 5 of section 47, the defendant must first make a prima facie showing of the absence of malice, and then, but not until then, the plaintiff may in rebuttal prove actual malice on the part of defendant. *Snively v. Record Pub. Co.* (Cal. Sup.) 198 Pac. 1, 6. It may be added that the plaintiff cannot recover punitive damage without pleading and proof of actual malice. Actual malice was alleged and punitive damages were claimed in the complaint, but there was no proof to support the allegation. For these reasons we are satisfied with the decision affirming the judgment.

The petition for rehearing is denied.

SHAW, C. J., and WILBUR, LAWLOR, and LENNON, JJ., concur.

Appeal from Superior Court, Los Angeles County; Charles Monroe, Judge.

A. Rivera was convicted of burglary in the second degree, and of grand larceny, and he appeals. Affirmed.

Theodore Gottsdanker, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and John W. Maltman, Deputy Atty. Gen., for the People.

CONREY, P. J. The defendant was charged with the crimes of burglary and grand larceny. He was convicted of burglary in the second degree and of grand larceny.

Three points are relied upon in support of the appeal. They are that the evidence is insufficient to warrant a verdict of guilty on the count of burglary, that the evidence is insufficient to warrant a verdict of guilty on the charge of grand larceny, and that the court erred in failing to include in its proposed forms of verdict a form of verdict relating to petty larceny.

Mrs. Romero owned a house of two rooms. One of these rooms she occupied, and the other she rented to the witness Sosa. The outside doors of the respective rooms were locked with padlocks. There was a connecting door, fastened with a lock and a hook on the side occupied by Mrs. Romero. During the absence of the occupants, personal property of Mrs. Romero and some other personal property in the room of Sosa were taken away. On the return of the occupants, the outside padlocks were found locked, but the connecting door was off, and the hook was pulled off.

[1] Shortly afterwards the defendant was arrested on the street, carrying a sack which contained the missing clothes of Mrs. Romero, and some clothing taken from the other room. The defendant gave explanations concerning his possession of these articles, which explanations were proved to be false. It was proved that no permission had been given to the defendant to enter this house. These facts were sufficient to prove that the defendant was guilty of the crime of burglary.

[2] It is claimed that the evidence fails to prove grand larceny in that it was not established that the value of the property taken exceeded \$50. But the record shows by the testimony of Mrs. Romero that the value of the property taken from her room and belonging to her, exclusive of the property taken from the man's room, was \$103.75. Assuming, without deciding, that the evidence was unsatisfactory as to the value of two of the articles, placed at \$20 and \$25, respectively, there remained a value of more than \$50 of the property stolen from and belonging to Mrs. Romero. This value was proved by the evidence without conflict therein.

[3, 4] The defendant did not request any instruction concerning the crime of petty lar-

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PEOPLE v. RIVERA. (Cr. 865.)

(District Court of Appeal, Second District, Division 1, California. April 25, 1922.)

1. Burglary § 41(1)—Evidence held sufficient to sustain conviction.

Evidence held sufficient to sustain a conviction of burglary.

2. Larceny § 59—Evidence held sufficient to prove value of stolen property exceeded \$50.

In a prosecution for grand larceny, evidence held sufficient to prove that the value of the property taken exceeded \$50.

3. Criminal law § 824(15)—Failure to submit form of verdict as to petit larceny held not error, where instruction was not requested.

In a prosecution for grand larceny, where defendant requested no instruction on petit larceny, the court's failure to include in its proposed forms of verdict a form relating to petit larceny was not erroneous.

4. Criminal law § 798½—Failure to submit alternative form of verdict as to petit larceny, in prosecution for grand larceny, not error.

The court's failure, in a prosecution for grand larceny, to include in its proposed forms of verdict a form relating to petit larceny, is not a ground for complaint; such alternative forms of verdict, while convenient, not being necessary.

ceny. Under the circumstances, this omission did not deprive the defendant of any substantial right. Indeed, such suggested alternative forms of verdict, while convenient, are not necessary, and their omission furnishes no ground of complaint.

The judgment is affirmed.

We concur: SHAW, J.; JAMES, J.

(188 Cal. 664)

TULARE COUNTY v. CITY OF DINUBA
et al. (Sac. 3136.)

(Supreme Court of California. May 4, 1922.)

1. Constitutional law ☞119 — May alter amount of franchise charges.

The power of the state exists to abrogate or alter the nature or amount of any charges for franchises in favor of municipalities or other political agencies of the state for public purposes, whether as taxes, licenses, or tolls.

2. Constitutional law ☞120 — Rights under franchises contractual and not to be impaired.

The vested rights of an individual or corporation under an executed franchise are contractual, and, under Const. U. S. art. 1, § 10, cannot be impaired by any subsequent enactment of the state.

3. Constitutional law ☞113—Contract clause does not extend to waiver by state of rights accruing to state agencies.

The inhibition of the contract clause (Const. U. S. art. 1, § 10) does not extend to the waiver or modification of any rights accruing to the agencies of the state in their governmental capacity, by action of the people through constitutional amendments, or by legislative enactment.

4. Taxation ☞1—Broughton Act providing for a toll, which holder of light and power franchise pays for use of highway, matter of contract, and not a tax.

Const. art. 13, § 14, and laws passed to give it effect (St. 1911, p. 530; St. 1913, p. 3; St. 1915, p. 3, and St. 1917, p. 337 [Pol. Code, § 3664a]), are limited to the regulation of taxes and licenses, and the "gross receipt" charge under the Broughton Act (St. 1905, p. 777), is neither a tax nor a license, but a toll which the holder of the franchise undertakes to pay for the use of the highways, being a matter of contract.

5. Taxation ☞1—Percentage payment under Broughton Act for use of highway is a compensation and not a tax.

The percentage payment under the Broughton Act (St. 1905, p. 777) is not a tax upon property of a corporation, but a compensation for the use of the portions of the highway covered by the franchise easement, and is limited to a percentage of the gross receipts shown to arise from the "use, occupation, or possession" of the highways.

6. Statutes ☞47 — Broughton Act held not void for indefiniteness.

Where by reasonable construction, each county or municipality is entitled to its percentage of gross earnings arising from the use of its highways in the proportion that the receipts arising from the use of such highways bears to the receipts attributable to all rights of way of an entire electric system, Broughton Act (St. 1905, p. 777), providing for payment to a municipality of two per cent. of the gross earnings for a franchise for "use, occupation, or possession" of its streets, is not void for indefiniteness.

In Bank.

Appeal from Superior Court, Tulare County; W. B. Wallace, Judge.

Action by the County of Tulare against the City of Dinuba and another. From judgment for plaintiff, defendant San Joaquin Light & Power Company appeals. Reversed, and remanded for new trial.

Short, Lindsay & Woolley, of Fresno, for appellant.

Fred C. Scott, Dist. Atty., W. W. Middlecoff, Deputy Dist. Atty., and I. H. Ham, all of Visalia, for respondent.

Butler & Van Dyke, of Sacramento, Roy V. Reppy, of Los Angeles, B. F. Woodard, E. W. Cunningham, and George E. Trowbridge, all of Los Angeles, and I. B. Potter, Newman Jones, and Henry W. Coil, all of Riverside, amici curiæ.

SLOANE, J. This action was brought by the county of Tulare to recover from the San Joaquin Light & Power Company, a public service corporation, two per cent. of the annual gross receipts for the use and operation of a franchise, over and upon the public highways of that county, pursuant to the provisions of the act of the Legislature known as the Broughton Act.

This legislation was enacted in 1905 (Stats. 1905, p. 777), and provides for the granting of franchises over streets and highways to the highest bidders, by boards of supervisors and other governing bodies of counties and municipalities. The particular provision subject to construction and interpretation on this appeal is that part of section 3 of the act which declares that the successful bidder shall, after the first five years—

"pay to the county or municipality two per cent. of the gross annual receipts of the person, partnership, or corporation to whom the franchise is awarded *arising from its use, operation, or possession.*"

The controversy arises over the meaning and application of the words we have quoted in italics. It is unnecessary to set out the further terms and provisions of the act, other than may be hereinafter required in the interpretation of the provision quoted above.

It is sufficient to say that, in conformity to the authority of the act, proceedings were had under which the defendant corporation acquired from said county a 50-year franchise authorizing the use of each and all of the public avenues and highways of the county of Tulare, for the purpose of constructing and operating electric lines and other appliances for the conveyance and distribution of electricity for various uses.

In pursuance of the rights so acquired, the defendant corporation constructed, and has since owned and operated, a system of poles and wires for transmitting electric heat, power, and light, and telephone service, along,

upon, and across certain of the public avenues and highways of the county of Tulare, and has ever since been engaged in the business of transmitting and selling such electricity to the general public in Tulare county, and also through similar connecting systems owned and operated by it, in Fresno and Kern counties, to the inhabitants of the counties named.

This action was brought to recover two per cent. of the defendant's gross receipts for the years 1911, 1912, and 1913, not only for all sales of electricity in Tulare county, but likewise from sales of electricity conveyed through the Tulare system to and through the connecting systems in Fresno and Kern counties. Pending the trial, all claim to the percentage from receipts from Fresno and Kern counties was waived by the plaintiff county. As a result of the trial, the plaintiff recovered the judgment appealed from for \$5,066.29 being the full demand of two per cent. of all amounts received from the defendant's distributing system in Tulare county.

It appears without dispute that the defendant's distributing system in Tulare county consists of lines of transmission along 189.08 miles of avenues and highways covered by the franchises under consideration, and 91.07 miles over and upon private rights of way acquired and owned by the defendant and not included in the franchise.

The appellant corporation, and amici curiæ appearing in the same behalf, attack the judgment on the following grounds:

(1) That section 14 of article 13 of the state Constitution, adopted since the Broughton Act, and which provides for a method of taxation of corporations which "shall be in lieu of all other taxes and licenses, state, county and municipal," effected a repeal of the two per cent. gross receipts charge of the Broughton Act.

(2) That the provision for payment of the two per cent. gross annual revenue arising from the "use, operation, or possession" of the franchise is void for indefiniteness and uncertainty.

(3) That, if the gross receipts from any given part of an electric distributing system extending through several counties can be ascertained as arising from the use of the franchise in one of the counties, it should be confined to the part of the system occupying the streets and avenues in use under the franchise from such county, and not include receipts arising from the part of the system over and upon private easements.

The Question of Repeal.—If the payment of a percentage of gross receipts is imposed as a tax or license, there would be much force to appellant's contention of its repeal or abrogation under the tax amendment to the state Constitution. The amendment referred to was adopted in 1910, long after the Broughton Act and the franchise upon which

this action is brought went into effect. It provides an exclusive method of taxation by the state, of corporations and corporate franchises, enumerating as subject to its provisions "telegraph companies; telephone companies; companies engaged in the transmission or sale of gas or electricity, * * * and taxes upon all franchises of every kind and nature," and directs that such revenues "shall be entirely and exclusively for state purposes."

Subsection (a) then provides that all such companies shall—

"annually pay to the state a tax upon their franchises, roadways, roadbeds, rails, rolling stock, poles, wires, pipes, canals, conduits, rights of way, and other property, or any part thereof used exclusively in the operation of their business."

It is next provided that:

"Such taxes shall be in lieu of all other taxes and licenses, state, county and municipal, upon the property above enumerated of such companies except as otherwise in this section provided"

—and the exception is:

"That nothing herein shall be construed to release any such company from the payment of any amount agreed to be paid or required by law to be paid for any special privilege or franchise granted by any of the municipal authorities of this state."

The state Legislature, at the 1911 session passed an act to carry into effect the terms of this constitutional amendment (Stats. 1911, p. 530) in which it repeats the language of the Constitution, above quoted, and further declares that—

"the word 'municipal' as used in this act shall apply to incorporated towns and cities formed under article 11 of the Constitution of this state and to none other." Stats. 1911, p. 530; Stats. 1913, p. 3; Stats. 1915, p. 3.

A similar limitation of the word municipal in practically the same language, was adopted by the amendment of 1917 (Stats. 1917, p. 337; Pol. Code, § 3664a). This declaration of the Legislature limiting the application of the word "municipal" is merely in line with distinctions in the use of the term recognized in many decisions of this court. In re Werner, 129 Cal. 567, 62 Pac. 97; People v. McFadden, 81 Cal. 489, 22 Pac. 851, 15 Am. St. Rep. 66; Sacramento County v. Chambers, 33 Cal. App. 142, 164 Pac. 613; Turlock Irr. Dist. v. White (Cal. Sup.) 198 Pac. 1060.

Appellant argues that this reservation to cities and towns to the exclusion of other political agencies of the state, by the above-quoted provisions of the Constitution, of any payments required by law or contract to be paid for any special privilege or franchise, granted by municipal authority, takes the county from the operation of such reserva-

tion, and terminates the right to such franchise charge by counties.

[1, 2] It can hardly be questioned that the power of the state exists, whether by constitutional amendment or legislative enactment, to abrogate or alter the nature or amount of any charges for franchises in favor of municipalities or other political agencies of the state for public purposes, whether as taxes, licenses, or tolls. It is, of course, established law that the vested rights of an individual or corporation, under an executed franchise, are contractual, and that such rights cannot be impaired by any subsequent enactment of the state, under the contract clause of the federal Constitution, § 10, art. 1, forbidding the enactment by the states of any law impairing the obligation of contracts. *Matter of Russell*, 163 Cal. 688, 126 Pac. 875, Ann. Cas. 1914A, 152; *Russell v. Sebastian*, 233 U. S. 195, 34 Sup. Ct. 517, 58 L. Ed. 912, L. R. A. 1918E, 882, Ann. Cas. 1914C, 1282; *City of Oakland v. Great Western Power Co.*, (Cal. Sup.) 200 Pac. 395.

[3] But the inhibition of this provision of the federal Constitution does not extend to the waiver or modification of any rights accruing to the agencies of the state in their governmental capacity by action of the people through constitutional amendments or by legislative enactment. *Blanding v. Burr*, 13 Cal. 343; 28 Cyc. 310; *Creighton v. San Francisco*, 42 Cal. 446; *Beals v. Amador County*, 35 Cal. 624.

Conceding, then, the power of the state to terminate the right of a county to enforce the collection of a percentage of the corporation's receipts under the franchise in question, and that the right of counties to continue to make such collections is not preserved by such proviso, does the tax amendment to the state Constitution and the legislation under it, effect that result?

[4] The answer is that the tax amendment and legislation thereunder is specifically directed and limited to the regulation of taxes and licenses, and the gross receipt charge under the Broughton Act is neither a tax nor a license, but is obviously a toll or charge, which the holder of the franchise undertakes to pay as part of the consideration, for the privilege of using the avenues and highways occupied by the public utility, just as it obligates itself to pay the amount of its cash offer as the highest bidder for the franchise.

It is purely a matter of contract. While it is true that the payment is required by law as a condition of the franchise grant, it is a matter of option with the applicant whether he will accept the franchise on those terms. His obligation to pay is not imposed by law but by his acceptance of the franchise.

Just why the matter of continuing in force the payment of "any amount agreed to be paid or required by law to be paid for any special privilege or franchise granted by any of the municipal authorities of the state"

should have been incorporated in the tax amendment legislation, if such charge is not a tax or license, is a matter of speculation. But such reference cannot change or establish the nature of such charges. The exclusive right reserved by the state is confined to "taxes and licenses," and cannot be enlarged by a mere proviso referring to other classes of liabilities, and exempting them from the operation of the law. They were already exempted because not included.

It must be conceded that the respondent has apparently dealt with the percentage charge throughout its argument as a tax or license, and appellant contends that it cannot be otherwise considered consistently with respondent's claim to its percentage upon all the revenue collected in the county from defendant's system, whether arising from the use of the public highways or from defendant's private rights of way.

There is nothing, however, in such considerations to justify this court in refusing to determine the true nature of the obligation involved in the action. We are of the opinion that whatever right was acquired by the county of Tulare to a portion of the gross receipts of the defendant corporation by virtue of this franchise remains unimpaired.

Is the Broughton Act Void for Indefiniteness?—We come next to appellant's second point, that the provision for paying to the county of Tulare a percentage of the gross annual receipts "arising from the use, operation, or possession," of the easement in the public highways, is so obscure and uncertain as to be incapable of ascertainment.

[5] Without doubt, the Broughton Act contains inconsistencies and uncertainties, particularly in its enlarged application to counties. Earlier legislation along the same line was confined to strictly municipal corporations, and was enacted at a period when the public utilities in the nature of street railways and gas and electric systems were generally confined in their operations to the single municipal territory.

At the present time, such agencies commonly extend beyond the municipal limits, and frequently cover several counties with their lines and distributing systems. In the case before us, the defendant corporation has several electrical generating plants distributed over three or four counties, and with its lines of poles and wires extending in connecting systems throughout Tulare, Fresno, Kern, and perhaps other counties, with franchises over the public highways of each of said counties, and its electric current passing back and forth indiscriminately from one or the other of its power houses over the entire system.

It may happen that a power house is located many miles, and across intervening counties, from the territory of distribution to the consumer. Its conduit line may extend through an entire county, over a franchise

for the use of a public highway, without delivery to a single customer. On the other hand, such generating plant may be within a few rods of the county line and use only so much of a county franchise as will carry its electric current to the adjoining county. Such generating plant may be just outside a municipal corporation, and distribute its entire product within such corporation. Its lines may extend for miles over private rights of way, not subject to franchise regulations, or may pass at frequent intervals from public highway to private easements and back again to highway, as in the instant case.

It may be readily seen that the adjustment of the payments arising under the various county and municipal franchises will raise serious complications as to what portion of the revenue accrues from any given franchise; and all we have to guide us is the provision of the statute that the payment required shall be two per cent. of the gross annual receipts of the holder of the franchise "arising from its use, operation, or possession."

There are other particulars in which it is extremely difficult to adjust the terms of the act in all cases to the fulfillment of its various purposes, particularly in carrying out the requirement that no condition shall be permitted which shall in any wise favor one person, firm, or corporation, as against another, in bidding for a franchise.

We are not concerned, however, in this case with any feature of the act, other than that which attempts to determine the measure for computing the source and amount of gross receipts from which the two per cent. payment is to be made. The defendant here admittedly holds and uses a franchise over 189.8 miles of the public highways of Tulare county; and is obligated to pay a certain per cent. of its annual gross income to such county, if we can ascertain under the statute what the gross income referred to is, and how it is to be estimated.

The Supreme Court of Missouri, in passing upon the validity of legislation substantially the same as the Broughton Act, which provided for a payment of a percentage of the gross receipts "derived from such occupation and use" of a highway franchise, in the case of *State ex rel. Crow v. West Side State Railway Co.*, 146 Mo. 155, 47 S. W. 959, involving a use of the public roads for a railroad right of way, held that the act was void for uncertainty. The court says, as to the receipts "derived from such use and occupation," that (as under the Broughton Act):

"The provision is made equally applicable to each privilege or franchise mentioned. They are all placed upon the same footing and, under the act must be disposed of in the same way. The Legislature evidently intended to make no discrimination. It will be seen at a glance that it is utterly impossible to give this act any reasonable or sensible construction as applied to railroads. If it means that the company must pay at least two per cent. of its

entire gross earnings * * * to each municipality, over whose streets it may be built, and to each county, whose highways it may cross, the railway company, in many instances, will be compelled to pay more than its total receipts for the right to build its road over the highways and through the cities along its way. If, as some of the counsel suggest, the percentage should be computed only upon the gross receipts of that part of the road located upon the streets of the city, or across the highways, as the case may be, then we are met by the fact that there is no method provided (if it is possible to suggest one), by which the actual gross receipts of that particular part of the road can be ascertained. Such receipts will not necessarily be in the same proportion to the entire earnings, as the length of the road upon the highways or streets may be to the entire length of such railroad. Travel may be greater or less upon one part of the road than upon another. Such a rule would be an arbitrary one, which the act has not prescribed, and which will not comply with its terms."

Other inconsistencies, which the court deems irreconcilable with the spirit and purpose of the act, are pointed out in this opinion, but we do not consider them important to the issue before us. It must be conceded that all these difficulties in fixing the amount to be charged to the holder of the franchise on a given and limited part of the highways used by the public utility, with others not there discussed, exist in this case. The gross receipts of this defendant accrue from two distinct agencies. One is the generating plants or power houses of the company, located in three separate counties; the other is the distributing system, consisting of poles and wires extending throughout the three counties, partly upon and over streets and highways and covered by various county and municipal franchises, and partly over private easements owned by the company.

The corporation's gross receipts, to refer to the language of the act, arise from "the use, operation, or possession," not alone of these franchises over the streets and highways, but likewise from the use, operation, or possession of the power houses and private rights of way. The two last named are not subject to any franchise charges, and the county or municipality is not entitled under the law to any part of the gross receipts attributable to these privately owned parts of the system. The percentage payment is not a tax upon the property of the corporation, nor a license charge for the privilege of operating its business. It is a compensation for the use of the portions of the highway covered by the franchise easement, and it is limited to a percentage of such total gross receipts as can be shown to have arisen from the use of the franchise.

It can no more be said that the receipts from electricity sold in the county of Tulare arise from the possession or use of the highways covered by the county franchise than from the possession or use of the private

rights of way, or from the use of the connecting distributing lines through which the electric current is received from an adjoining county.

The absurdity of the position that any integral part of an electric distributing system like this is entitled to credit for the whole of the earnings from deliveries and sales in a given county or municipality, when a large part of such service is over parts of the system not subject to such franchise permit, may be shown by various illustrations.

Let us suppose that the only part of the system, which is in Tulare county, consists of a main transmission line upon a single highway traversing the entire width of the county, delivering no part of the current in that county, but carrying it for distribution and sale to an adjoining county. On the suggested theory, Tulare county obviously could not collect a cent of gross earnings, because there would be none in that county, yet, all of the electricity would be supplied through this main line. Assuming, again, that the electric supply was brought to the Tulare county border by a transmission line wholly without the county, and the entire current distributed to consumers in Tulare county through a system of wires wholly on private rights of way, clearly neither county could claim any gross receipts, for, in the one county, no revenue would arise from the conduit on the highway, and, in the other, no franchise would be owned or exercised.

If the electric plant is all within the borders of a single municipality and entirely distributed from transmission lines covered by the franchise, no complications can arise. The entire proportion of the earnings attributable to the transmission and delivery of electricity belongs to the gross receipts from which the two per cent. shall be paid. Immediately the operation of the business passes such limitation, the complications begin, if we treat the separate franchises as controlling the income from all electricity passing through the part of the system covered by such franchise. We may have a condition where the transmission line, merely crossing a street from the power house, under a franchise, to connect with privately owned rights of way over the rest of the county, would claim the same revenue from such franchise, as it would where the entire distributing system was maintained and operated over public highways.

A Practical Interpretation Possible.—Notwithstanding the difficulties suggested, we are of the opinion that there is an entirely practicable and consistent interpretation of this provision of the act, which will permit a fair determination and distribution of the prescribed percentage of receipts arising from the use, operation, or possession of each franchise utilized by the distributing system.

[6] It must be conceded that the purpose of the act was to impose only a two per cent.

charge upon the gross receipts arising from the entire franchise rights enjoyed in all the highways covered by the system, whether in one or several counties or municipalities. When the company or corporation has paid two per cent. of all its earnings properly attributable to all its franchises, whether covering one or more counties, it has fulfilled its obligation. It, of course, cannot concern such corporation how this amount is distributed to the various municipalities, so long as it is released from further liability. The real issue is as to the several rights of the municipalities in sharing the payments. The state is at liberty to make this distribution upon any reasonable basis it sees fit to adopt. It will be noticed that the act in question makes no reference to compensation for the franchise over public highways, from the revenues arising within the county by which the franchise was granted. If that had been the intention, the very obvious way of expressing it would have been to say "two per centum of the gross annual receipts within the county," instead of using the expression "two per centum of the gross annual receipts" arising from "the use, operation, or possession" of the franchise. The reasonable construction of the language used, is that each county or municipality is entitled to its percentage of the gross earnings arising from the use of its highway, in the proportion that the receipts arising from the use of such highways bear to the receipts attributable to all the rights of way of the entire system.

We see no reason why this cannot be estimated on a mileage basis. It may be assumed that the distributing system covers 600 miles of easements. The proportion of the gross receipts derived from and chargeable to the use of the distributing system should be credited to this entire mileage. One-third of this mileage may extend over private rights of way, which are not subject to any franchise liability. The remaining two-thirds of the mileage covered by county franchises is entitled to two-thirds of the two per cent. of the gross amount, and each county is entitled to the percentage of this two-thirds, in the proportion that the mileage of its franchises bears to the total mileage covered by all the franchises.

It may be argued that there is no authority under the law for such mileage apportionment. There is at least some analogy for this solution of the difficulty, by the terms of the act under consideration.

Section 4 makes the following provision:

"In case the franchise granted shall be an extension of an existing system of street railroad, then the gross receipts shall be estimated to be one-half of the proportion of the total gross receipts of said system which the mileage of such extension bears to the total mileage of the whole system, and such estimate shall be conclusive as to the amount of the gross receipts of said extension."

The effect of this provision is that, where a new franchise is granted to permit an extension of the lines of the street railway, the percentage to be charged under the new franchise shall be on a mileage basis. We are not concerned with the fact that the section quoted refers only to street railway franchises, and that it provides for a smaller percentage of gross receipts for the extension than for the original franchise. The significant point is that it determines the earning capacity of both franchises in proportion to their respective mileage.

Doubtless the reason that a special provision was made in the matter of an extension for street railways was to permit of a discrimination against the extension as to the proportion of gross receipts chargeable to it. Indeed, no provision at all is made in the act for other extension franchises. Such extensions are practically new franchises, standing on an equal footing, in the absence of such discrimination as is provided by section 4, and imposing an equal burden with the original franchise, proportionate to their mileage. So it may be assumed that, where one system of distribution receives contemporaneous franchise easements in several counties, these must have attributed to them equal earning powers in the matter of gross receipts, according to their respective mileage.

Such a determination of the earning capacity of the variously located franchise rights is doubtless more or less arbitrary, as, in many instances, a much less quantity of the water or gas or electricity is conveyed through one part of the system than another, just as, in the instance of a street railway, some parts of the line have much greater earning capacity than others. But since the state is dealing, in this phase of the matter, with the distribution of a fund among its own political subdivisions, any plan may be adopted consistent with substantial justice, and, when we are confronted with the fact that no other interpretation of the act can be made without unlawfully interfering with private rights of property, it must be assumed that the one method of distribution which could be made, and which is not repugnant to the terms of the act, was the one intended by the Legislature.

"A statute cannot be held void for uncertainty, if any reasonable and practical construction can be given to its language. Mere difficulty in ascertaining its meaning, or the fact that it is susceptible of different interpretations will not render it nugatory. Doubts as to its construction will not justify us in disregarding it." *State v. West Side State Railway Co.*, supra; *People v. Lovren*, 119 Cal. 88, 51 Pac. 22, 638.

The legislation for carrying out the tax amendment of 1910 to the Constitution follows some such method of taxing the gross receipts of corporations, where such corpora-

tions are not operated wholly in this state. It is there provided (Stats. 1911, p. 530, § 2) that:

"When such companies are operating partly within and partly without this state, the gross receipts within this state shall be deemed to be all receipts * * * beginning and ending within this state, and a proportion based, upon the proportion of the mileage within the state to the entire mileage over which such business is done, of * * * all business passing through, into or out of this state."

That is, where all the earnings are attributable to the operation of the business within state lines, the percentage is assessed upon the whole thereof, but where such earnings arise from operation of the system partly without the state, and therefore in another jurisdiction, the tax will be levied in proportion to the amount of mileage of the system in the respective jurisdictions.

Carrying out the analogy, the county of Tulare may collect its two per cent. of all receipts of the electric company arising wholly from franchise easements within the county, and of the receipts contributed to by all other parts of the system, a proportion based upon the relative mileage of such franchises within the county to the entire mileage of the rights of way contributing to such gross receipts.

In other words, the obvious policy of this law is to treat the public utility in the entire territory occupied as a single entity, and to distribute to each franchise wherever situated its two per cent. of whatever portion of the gross receipts can be traced to its exclusive use, and as to all receipts arising from the indistinguishable use of all rights of way in the system, making the division in proportion to the respective mileage of the various parts.

It cannot be the purpose of the act to limit in its percentage receipts a municipality granting a franchise over its roads to such a corporation as this to gross revenue obtained in such municipality, first, because the statute itself does not bear such a construction, and, secondly, because, as has been pointed out, it might frequently occur under such interpretation, that a county granting the use of many miles of its roads would receive no return whatever from such franchise, because all of the gas or water or electricity is conveyed to and distributed and paid for in another county. On the other hand, the statute will not bear the interpretation that all the gross revenue, wherever received, to which the franchise contributes, shall be chargeable with the two per cent. payment under such franchise, for this might result in the collection of several such payments on the same receipts under various franchises.

In none of the cited decisions of this court, for the recovery of a percentage of gross receipts claimed under franchises for use and

occupation of public highways by public utilities, was any question raised as to the method of determining what part of the gross receipts of the utility was attributable to any specified franchise. In *Hanford v. Hanford Gas, etc., Co.*, 169 Cal. 749, 147 Pac. 969, no objection was made that the receipts sought to be recovered were not the product of the use in question. The point at issue was the claim of the corporation that, under its constitutional franchise to maintain its distributing system for light over the public streets, it could also, without further authority, distribute heat and power. In *Town of Suisan City v. Pac. Gas & Elec. Co.*, 35 Cal. App. 380, 170 Pac. 1078, the action was brought by the city to recover a percentage of gross receipts from a franchise for light and power purposes to one Prior, who had theretofore been distributing electricity for lighting purposes under the constitutional franchise. It was held that a grant by the city for lighting purposes was void and in conflict with the constitutional franchise, and that the obligation to pay two per cent. did not arise on the electricity distributed for lighting purposes. In *City of Oakland v. Great Western Power Co.*, supra, the defendant company was operating over streets of the city, a system for the distribution of light, heat, and power. It was occupying the streets under the constitutional franchise for distribution of electricity for lighting. Subsequently, under the Broughton Act, it obtained a franchise for the distribution of heat and power, and still later acquired a blanket franchise from the city giving it the use of all the streets of the city for the distribution of electricity for all purposes. It was held, in the opinion, that the latter franchises did not supersede the preceding ones, and that the city of Oakland could recover nothing for the distribution of light under the constitutional franchise, could recover only the percentage allowed by the Broughton Act for the use of such streets as had been utilized for power and heat under that franchise, and could recover under the charter franchise for power and heat, only from such part of the system as had not been constructed under the Broughton franchise.

The significance of the Oakland Case, so far as it applies, upholds the conclusion we have reached in the instant case, that the rights of the municipality to its percentage under a given franchise are limited to the portion of the gross receipts attributable to that particular franchise.

It is true that the decision also holds that only the receipts from electricity delivered within the city of Oakland can be considered in determining such percentage, but it appears from the opinion that the charter under which the franchise sued on was issued, expressly limits the right of recovery to "the gross annual receipts resulting from the sale

of electric energy delivered within the limits of the city of Oakland."

The Oakland Case suggests complications which do not arise in the case at bar, inasmuch as the charter franchise provides for a four per cent., and later a five per cent., payment to the city upon the gross receipts after the first five years, while the portion of the system operated under the Broughton Act is only liable for two per cent. of such gross receipts as arise from the exercise of that franchise. But one distributing system is in use, covering all of the territory, and whether an apportionment of the gross earnings at the different percentages could be made on a proportionate mileage basis, which would protect the rights of the corporation may be questioned. We fail to see, though, any other method which would be at all feasible. However, we are not confronted with such a contingency in this case. The entire distributing system here is under the Broughton Act, and the only parties concerned in the distribution of the percentage payments are the respective municipalities granting franchises. A distribution of the payments according to the relative mileage can be had within the fair intentment of the act.

The city of Dinuba, within the county of Tulare, was a claimant for a part of the franchise percentage and was made a party defendant. No appeal was taken from the judgment adverse to its claim, so a consideration of its rights in the premises is not involved.

Under the conclusions herein reached, the proper action against the defendant corporation is by way of an accounting, to which the defendant and all municipalities, under whose franchises this distributing system is operated, are necessary parties, in order to determine the entire liability of the defendant, and the proportion of the two per cent. payment to which each franchise is entitled.

The first step in this accounting should be to determine, as a question of fact, what proportion of the total annual gross receipts of the public utility should be justly accredited to its distributing system over various rights of way, as distinguished from its power plants or other producing agencies. This will establish the fund from which the percentage of earnings "arising from the use, operation, or possession" of the various franchise easements shall be ascertained.

The percentage of this fund, to be apportioned to the respective public franchises, will not include the proportion of such gross receipts of the distributing system as are attributable to the use of private rights of way occupied by the utility, as such part of the system is not subject to franchise charge. Each municipal franchise will be entitled to its two per cent. of whatever portion of such fund can be shown to arise wholly from the use of the easements under such franchise, and such portion of the remaining fund, as

the mileage of the given franchise easement bears to the entire mileage of the distributing system contributing to such gross earnings.

We have adopted this appropriation to the various rights of way, according to mileage, not necessarily as an exclusive method of distribution of the gross receipts, but as a practicable one, where the contribution of the various franchise easements to the gross earnings cannot be otherwise determined. There may be portions of the distributing system where the entire transmission from the producing plant to the consumer is supplied through a given franchise, or is entirely supplied over private easements. Such earnings would inure to such specific franchises or easements. There may be instances where the extent or value of the distributing system over a given right of way may indicate its earning capacity; or where the service of lateral lines may be differentiated from that of main conduits in the value of their use of the easements. In such cases these conditions should be taken into account. But where, as will often happen, contribution to the earnings of the various rights of way is general and indistinguishable, we can see no reason why the proportionate mileage basis should not be used in apportioning the statutory percentage of gross receipts.

The judgment is reversed, and the cause remanded for a new trial, in accordance with the conclusions herein stated.

We concur: SHAW, C. J.; SHURTLEFF, J.; WILBUR, J.; LAWLOR, J.; LENNON, J.; RICHARDS, Justice pro tem.

188 Cal. 701

In re COLLINS. (Cr. 1497.)

(Supreme Court of California. May 8, 1922.
Rehearing Denied June 5, 1922.)

1. Attorney and client —39—Legislature may prescribe conviction of crime involving moral turpitude as sufficient for denial or revocation of attorney's license.

The right or privilege of exercising the vocation of attorney and counselor at law is one which the Legislature may bestow or empower the judicial department to bestow, on terms consistent with the nature and purpose of the right or privilege, and the Legislature may prescribe the possession of good moral character as a prerequisite and prescribe that conviction of a crime involving moral turpitude is sufficient ground for denying application or revoking license.

2. Attorney and client —53(2)—Constitutional law —55—Legislature may provide that conviction of a crime involving moral turpitude shall revoke attorney's license and that record of conviction shall be conclusive.

The Legislature may provide that a conviction of a crime shall ipso facto work a

revocation of the right or privilege of such person to continue to act as an attorney and counselor at law, and that the record of conviction of a crime involving moral turpitude shall constitute conclusive evidence thereof for the purpose of striking such attorney's name from the rolls.

3. Constitutional law —306—Provision for disbarment on record of conviction of crime involving moral turpitude does not deprive of right to practice without due process.

A convicted attorney had his day in court when put to trial for the offense, and his disbarment on the record of conviction does not deprive him of his right to practice without due process of law for, while Code Civ. Proc. §§ 287-292, provide for an order for hearing and for notice to the accused of the time and place thereof when the proceeding is under section 287 subds. 2, 3, or 4, no order is required under subdivision 1 relating to disbarment on conviction of a crime involving moral turpitude, and the attorney is bound to know that the legal consequence of his conviction is disbarment.

In Bank.

In the matter of the disbarment of George D. Collins. On application for revocation of order of disbarment on record of conviction of felony. Application denied.

George D. Collins, of San Francisco, in pro. per.

Wm. Denman and C. J. Goodell, both of San Francisco, for Bar Ass'n.

PER CURIAM. The petitioner herein applies for an order vacating and setting aside a former order of this court made on July 19, 1909, striking from the roll of attorneys and counselors the name of said petitioner. It appears, from the face of the moving papers and also of the records of this court, that the action of the court in making said order was taken upon the receipt by it of a certified copy of the record of the conviction of the petitioner of a felony involving moral turpitude; and it also affirmatively appears that said action was taken by the court and said order made by it ex parte and without the service upon the petitioner of any order to show cause, citation, or other process or notice. The present contention of the petitioner, which forms the ground of his said motion, is that the said order thus made was and ever since has been and still is void; that this court did not acquire or have jurisdiction to make said order and that, by the making of the same without notice or other process served upon him, he has been deprived of his liberty and property without due process of law and has been denied the equal protection of the laws, in violation of the federal Constitution.

The provisions of the Code of Civil Procedure, pursuant to which the order thus assailed was made, are sections 287, 288, 289,

and 299 thereof, which, when the order was made, read, in part, as follows:

"Sec. 287. An attorney and counselor may be removed or suspended by the Supreme Court * * * for either of the following causes, arising after his admission to practice: 1. His conviction of a felony or misdemeanor involving moral turpitude, in which case the record of conviction shall be conclusive evidence."

"Sec. 288. In case of the conviction of an attorney or counselor of a felony or misdemeanor, involving moral turpitude, the clerk of the court in which such conviction is had shall, within, thirty days thereafter, transmit to the Supreme Court a certified copy of the record of conviction."

"Sec. 289. The proceedings to remove or suspend an attorney and counselor, under the first subdivision of section two hundred and eighty-seven, must be taken by the court on the receipt of a certified copy of the record of conviction."

"Sec. 299. Upon conviction, of cases arising under the first subdivision of section two hundred and eighty-seven, the judgment of the court must be that the name of the party shall be stricken from the roll of attorneys and counselors of the court, and that he be precluded from practicing as such attorney or counselor in all the courts of this state."

It will be seen from a reading of these sections of the Code that no express provision is made for procedure or for notice or other process to be served upon the person whose record of conviction of a felony involving moral turpitude has been filed in this court, prior to, or as a prerequisite to, the making of such an order as in this case was made. It has been held by this court, in the case of *Barnes v. District Court, etc.*, 178 Cal. 500, 173 Pac. 1100, that the provisions of sections 290 and 291 of the Code of Civil Procedure, requiring a specified procedure in certain proceedings for disbarment, refer only to those provisions of section 289 of said Code which apply exclusively to proceedings to disbar or suspend under the second, third, and fourth subdivisions of section 287 of the said Code, but have no application to subdivision 1 thereof. It would seem to be the clear intentment of that portion of the said provisions of the Code which render the record of conviction conclusive evidence of the fact that no such notice should be required. Said order having been made in strict accordance with the said provisions of the Code above quoted and of this interpretation of their meaning, it follows that the assault which the petitioner makes by this motion upon the order of the court is in effect an attack upon the foregoing provisions of the Code of Civil Procedure as thus interpreted and applied, upon the ground that they are unconstitutional, for the reasons above stated by him. It is contended by the petitioner that the vocation of an attorney and counselor at law and the right or privilege of the exercising the same, like the right to practice

any profession, is property which is protected by the federal Constitution from deprivation without due process of law, citing, in support of said contention, *Hewitt v. Board of Medical Examiners*, 148 Cal. 592, 84 Pac. 39, 3 L. R. A. (N. S.) 896, 113 Am. St. Rep. 315, 7 Ann. Cas. 750; *Suckow v. Alderson*, 182 Cal. 247, 187 Pac. 965; *Shackleton v. McElhinney*, 241 Mo. 592, 145 S. W. 1139; *In re Boone* (C. C.) 83 Fed. 944; *Ex parte Steinman*, 95 Pa. 237, 40 Am. Rep. 637.

[1] It may be admitted that the right or privilege of exercising the vocation of attorney and counselor at law is a valuable right or privilege, but it must also be conceded that it is a right or privilege which the Legislature had the power to bestow, or to empower the judicial department of the state government to bestow, upon such terms as would be consistent with the nature and purpose of the right or privilege to be exercised; and that, this being so, the Legislature had the undoubted right to prescribe the possession of a good moral character in the applicant, for the grant of the right or privilege of entering and of exercising the legal profession, and also, of necessity, to prescribe the continued possession of such good moral character in the individual receiving such grant. It requires no argument to prove that the possession of this prerequisite to the receipt of and continued exercising of the right or privilege of engaging in the practice of the law is a matter of such paramount public interest as to entirely justify the Legislature in prescribing that the commission of crime involving moral turpitude, by one either seeking to obtain this right or privilege or thereafter exercising it, should constitute sufficient ground for its original denial or for its subsequent revocation. In the case of *Hawker v. New York*, 170 U. S. 189, 18 Sup. Ct. 573, 42 L. Ed. 1002, the Supreme Court of the United States, in passing upon the validity of a statute of the state of New York providing that "any person who, * * * after conviction of a felony, shall attempt to practice medicine, or shall so practice, * * * shall be guilty of a misdemeanor," went exhaustively into the subject of the powers of the Legislature in this regard. In sustaining the validity of such a statute, the court said:

"We must look at the substance and not the form, and the statute should be regarded as though it in terms declared that one who had violated the criminal laws of the state should be deemed of such bad character as to be unfit to practice medicine, and that the record of a trial and conviction should be conclusive evidence of such violation. All that is embraced in these propositions is condensed into the single clause of the statute, and it means that and nothing more. The state is not seeking to further punish a criminal, but only to protect its citizens from physicians of bad character. The vital matter is not the conviction

tion, but the violation of law. The former is merely the prescribed evidence of the latter."

It is true that, in the above case, the main assault upon the New York statute was made upon the ground that it was an *ex post facto* law, but, notwithstanding this fact, the broad language and clear reasoning of this high court has application to the general subject of the disbarment from practice of those committing crimes involving moral turpitude. In the course of the foregoing decision, the Supreme Court of the United States quotes approvingly from its earlier decision in the case of *Ex parte Wall*, 107 U. S. 265, 2 Sup. Ct. 569, 27 L. Ed. 552, in which the power of the court to deal with attorneys violating criminal laws was under consideration. The court in this earlier case saying:

"It is laid down in all the books in which the subject is treated, that a court has power to exercise a summary jurisdiction over its attorneys to compel them to act honestly towards their clients, and to punish them by fine and imprisonment for misconduct and contempts, and, in gross cases of misconduct, to strike their names from the roll. If regularly convicted of a felony, an attorney will be struck off the roll, as of course, whatever the felony may be, because he is rendered infamous. If convicted of a misdemeanor which imports fraud or dishonesty, the same course will be taken. He will also be struck off the roll for gross malpractice or dishonesty in his profession. * * * Where an attorney was convicted of theft, and the crime was condoned by burning in the hand, he was nevertheless struck from the roll. 'The question is,' said Lord Mansfield, 'whether, after the conduct of this man, it is proper that he should continue a member of a profession which should stand free from all suspicion. * * * It is not by way of punishment; but the courts in such cases exercise their discretion whether a man whom they have formerly admitted is a proper person to be continued on the roll or not.'"

[2, 3] It will thus appear that the Supreme Court of the United States has, in these cases, definitely held that the Legislature has power to provide that the conviction of a person of a crime, who had prior thereto been given the right or privilege of engaging in the practice of either of said learned professions, should, *ipso facto*, work a revocation of his right or privilege to lawfully continue so to do. If the Legislature thus possesses this plenitude of power in respect to those members of such professions who have been convicted of crimes involving moral turpitude, it may not be contended that the Legislature has not also the power to provide that the record of such conviction shall constitute conclusive evidence of the fact of such conviction, for the purpose of having stricken from the rolls of such profession the name of the person who has been thus convicted of such a crime. "The vital matter," as was aptly said in *Hawker v. New York*, supra, "is not the conviction but the viola-

tion of law. The former is merely the prescribed evidence of the latter." In this view of the matter the essential fact, working a deprivation of the petitioner's right and privilege of continuing in the practice of his profession, was not his conviction of a crime, nor was it the order of this court made automatically upon the receipt of the record of such conviction, but it was his violation of the law in the commission of said crime; and as to that he had his day in court when he was put to trial for and convicted of the commission of such crime. This is the view taken by the New York courts in construing a statute similar to our own and from which the provisions of our own Code were originally taken. As is stated by the Supreme Court of New York, in the case of *In re Lindheim*, 195 App. Div. 827, 187 N. Y. Supp. 211:

"The provisions of our judiciary law above cited are mandatory in case of a conviction for a felony, and upon such conviction the result prescribed follows automatically, and upon presentation of the facts to the court the prescribed order must be made."

A similar view is expressed by this court in the case of *In re Riccardi*, 182 Cal. 675, 189 Pac. 694, wherein the court says:

"It has always been understood that conviction of an attorney of a felony or misdemeanor involving moral turpitude, made disbarment incumbent, without any discretion in this court to give other judgment. And this, we think, must be so, in view of section 299 of the Code of Civil Procedure which prescribes exactly the judgment to be given in such a case, viz., 'that the name of the party shall be stricken from the roll of attorneys and counselors of the court, and that he be precluded from practicing as such attorney or counselor in all the courts of this state,' while in other cases the judgment 'may be according to the gravity of the offense charged; deprivation of the right to practice * * * permanently, or for a limited period.' We do not see how the Legislature could have more clearly expressed its determination that the only penalty in such a case is permanent disbarment. And certainly it would not be a wise rule that would invest the court with discretionary power in a matter where the sole evidence upon which it acts is a certified copy of a record of conviction."

In the case of *In re Shepard*, 35 Cal. App. 492, 170 Pac. 442, the precise question involved in this proceeding arose, and, in passing upon the same the District Court of Appeal said:

"It is insisted that this court had no jurisdiction to remove Shepard's name from the roll of attorneys without notice. * * * Under these sections, proceedings for removal or suspension are divided into two classes. The first of these includes, alone, proceedings based upon convictions of felonies or misdemeanors, involving moral turpitude. The second class includes two subclasses, first, those proceedings to be taken for matters within the knowledge of the court, and, second, those which may be

taken upon the information of another. Certainly it appears to us, whether notice is required in proceedings under both subclasses of the second class or whether it is not, it is clear that no notice is required in proceedings of the first class."

It cannot, therefore, be said that the plaintiff has been deprived of his right to practice without due process of law. Sections 289, 290, 291, and 292 of the Code of Civil Procedure provide for an order for hearing and for a notice to the accused of the time and place thereof, when the proceeding is under the second, third, or fourth subdivisions of section 287. But with regard to a disbarment under subdivision one, no notice or order is required or provided for. The only notice which the accused attorney is to have under that subdivision is that which he receives on the trial of the criminal charge of which he has been convicted. The law informs him that one of the results of his conviction will be his subsequent disbarment, in the manner provided by the Code of Civil Procedure. This answers the constitutional requirement that he shall have due process of law before he can be deprived of his right to practice. The entire matter is involved in the criminal proceeding. The same point arose in the case of *In re Bloor*, 21 Mont. 49, 52 Pac. 779, under a statute taken bodily from our own Code provisions and in which the court said:

"We believe no complaint or accusation in writing is necessary where an attorney and counselor has been convicted of a felony, or a misdemeanor involving moral turpitude, and where the record of conviction has been duly certified to this court. We also think that it is not necessary to issue or serve any citation upon an attorney or counselor, of proceedings to disbar him, where he has been convicted of a felony, or a misdemeanor involving moral turpitude, and where the record of his conviction has been duly certified to this court before this court acts, where such record is the basis of the disbarment proceedings. It is the bounden duty of such attorney, so convicted, to know that the legal consequence of his conviction is his disbarment. There is no discretion in the Supreme Court, for it must proceed, under section 418 of the Code of Civil Procedure, on receipt of a certified copy of the record of conviction; and by section 402, *Id.*, the record of conviction is conclusive evidence."

In the later cases of *In re Sutton*, 50 Mont. 91, 145 Pac. 6, Ann. Cas. 1917A, 1223, and *In re Thresher*, 54 Mont. 475, 170 Pac. 1163, the foregoing language from the earlier decision of that court is cited with approval. It will be noted that, while the petitioner herein has cited copiously cases referring to the right and privilege of an attorney to exercise his vocation as a valuable personal and property right, he has referred us to no case holding that, after conviction of a crime involving moral turpitude, an

attorney is entitled to any further notice or process prior to the entry of an order of court, based upon the record of such conviction, and which record is, by the express terms of the statutes, made conclusive evidence of the fact of the commission of such crime and of his conviction thereof. Such being the state of the authorities and the terms of the statute, we are constrained to hold that there is no merit in the petitioner's contention.

The application is denied.

SHAW, C. J., RICHARDS, Justice pro tem., and LENNON, SHURTLEFF, WILBUR, LAWLOR, and SLOANE, JJ., concur.

188 Cal. 709

CHEESMAN v. HANBY, Justice of the Peace, et al. (L. A. 6862.)

(Supreme Court of California. May 11, 1922.
Rehearing Denied June 8, 1922.)

Justices of the peace ⇨ 163—**Stay bond necessary to supersedeas on appeal on both law and facts.**

Code Civ. Proc. § 978, requiring a bond on appeal from a justice of the peace in double the amount of the judgment to make the appeal operate as a supersedeas, when construed in the light of the history of similar legislation showing that a supersedeas bond was required before any distinction was made between appeal on questions of law only and appeal on questions of law and fact, which requirement was continued without substantial change after that distinction was recognized, requires a supersedeas bond to make an appeal on both the law and the facts operate as a stay of execution, notwithstanding the rule that such an appeal vests jurisdiction of the entire case in the superior court.

In Bank.

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Action by Emmett D. Cheesman against J. Walter Hanby, as Justice of the Peace of Los Angeles Township, and others, to enjoin enforcement of a judgment. Judgment for defendants, and plaintiff appeals. Affirmed.

Fletcher Bowron, of Los Angeles, for appellant.

A. J. Hill, Co. Counsel, Roy W. Dowds, Deputy Co. Counsel, H. G. Bittleston and N. B. Nelson, all of Los Angeles, for respondents.

WILBUR, J. A judgment was rendered against the appellant in the justice's court presided over by the respondent, J. Walter Hanby, for the sum of \$74.67. She gave notice of appeal to the superior court on both the law and the facts, and gave a bond for

costs in the sum of \$100. She gave no bond for a stay of proceedings as required by section 978 of the Code of Civil Procedure, and claims that no such bond is necessary when the appeal is on both the law and the facts. An execution was issued on the judgment by the justice of the peace after the appeal was taken and levied upon a claim of \$20.19 due the appellant. Thereupon the appellant brought this action in the superior court to enjoin the respondent justice of the peace and the respondent constable from enforcing the judgment. The superior court denied the appellant's prayer for an injunction, and she takes this appeal from that judgment.

It is conceded that, if the appeal had been on the questions of law alone the execution of the judgment would not be stayed without a stay bond in double the amount of the judgment. *Rushton v. Reeve*, 178 Cal. 199, 172 Pac. 608. Section 978, Code of Civil Procedure, makes no distinction between the two methods of appeal and the appellant's contention is wholly based upon the theory that by an appeal on the law and the facts, jurisdiction over the entire case is vested in the superior court, and hence the justice of the peace is no longer empowered to issue or enforce an execution. This contention is based in part upon the reasoning of the court in *Bullard v. McArdle*, 98 Cal. 355, 33 Pac. 193, 35 Am. St. Rep. 176, and upon the statement of appellant's contention in the opinion in the case of *Rushton v. Reeve*, supra. With reference to the decision in *Bullard v. McArdle*, supra, it is sufficient to say that the court was dealing with a case in which both a cost bond and a stay bond had been given, and the effect of such an appeal upon the judgment in the justice's court, while the question in *Rushton v. Reeve*, supra, was as to the effect upon the justice's court judgment of an order of the superior court dismissing an appeal where a cost bond only had been given upon the appeal upon a question of law alone. The language of the Code with reference to the giving of bonds on appeal seems too clear to justify any extended discussion. It provides that an appeal "is not effectual for any purpose" unless an undertaking be filed for the payment of costs on the appeal, and (see *McConky v. Superior Court*, 56 Cal. 83), if a stay of proceedings be claimed, in a sum equal to twice the amount of the judgment, including costs, when the judgment is for the payment of money, etc. This language is clearly equivalent to a statement that the enforcement of the judgment is not stayed unless a stay bond as specified is given.

This construction was placed on a similar provision of the Code of Idaho by the Supreme Court of that state. *Wilson v. Doyle*, 12 Idaho, 295, 85 Pac. 928.

The Legislative history of section 978 of the Code of Civil Procedure also points to this construction. In 1850 the Legislature in

"An act to regulate proceedings in courts of justices of the peace in civil cases," passed April 10, 1850 (Stats. 1850, pp. 179, 186), provided for a stay bond upon appeals from the judgment of a justice of the peace in section 74 of such law as follows:

"No appeal shall operate as a supersedeas to any execution issued on the judgment, unless the defendant shall file with the justice a bond, with two sufficient sureties to be approved by such justice, in a penalty double the amount of the judgment, inclusive of interest and costs, payable to the appellee, conditioned that the appellant will prosecute his appeal to effect, or that failing therein, he will pay and satisfy such judgment as may be rendered against him by the county clerk. In the absence of the appellant, such bond may be signed by his sureties alone."

Section 75 of that statute (Stats. 1850, p. 186) provided for a cost bond as follows:

"An appeal may be taken by any party, upon filing with the justice a bond to the appellee, with surety to be approved by the justice, conditioned for the payment of the costs of the appeal; but in such case the appeal shall not have the effect to stay execution."

Such appeals were made upon statements of the case and other papers (Stats. 1850, p. 186, §§ 73, 77) but the case was tried anew in the county court (Stats. 1850, c. 84, pp. 203, 204, § 4) as is now done in appeals upon both law and fact (section 976, Code Civ. Proc.). In 1851 the Legislature revised the laws relating to practice in courts of justice, enacting the Practice Act (Stats. 1851, p. 51), which is the basis of our Code of Civil Procedure. Under this act an appeal from the justice's court was taken by the aggrieved party (Stats. 1851, p. 51, §§ 624, 625, 626, p. 150). Section 628 of this act (Stats. 1851, pp. 51, 150) is substantially the same as section 978 of the Code of Civil Procedure, but prohibited the justice from transmitting the papers to the county court unless a cost bond of \$100 was filed, "or if a stay of proceedings be claimed," a bond in twice the amount of the judgment and costs, instead of providing as in section 978, Code of Civil Procedure, that the appeal should be "ineffectual for any purpose" if such bonds were not given. Upon the appeal the court could reverse, affirm, or modify the judgment of the justice's court, or, "if necessary or proper, order a new trial." Stats. 1851, pp. 51, 110, § 367. In 1853 sections 626, 627, and 628 of the Practice Act were amended so that the justice was required to transmit the papers when an appeal was taken (section 19 amending section 627, Stats. 1853, pp. 276, 280), and section 628 was amended to provide for bonds, and provided in the language of section 978, Code of Civil Procedure, that the appeal should not be effectual for any purpose "unless an undertaking be filed," etc. That amendment repealed the requirement of section 625 for a statement of the case (Stats.

1853, pp. 276, 280, § 17), and section 366 of the Practice Act was amended to read "There may be tried anew in the county court, judgments in all civil cases rendered by justices', recorders' and mayors' courts." Stats. 1853, pp. 276, 277, § 7 amending section 366 of the Practice Act. In 1854 the distinction between appeals on questions of law and fact was first introduced by amendments to the Practice Act (Stats. 1854, pp. 59, 70, § 54, amending section 624, section 55 amending section 625). The amendments provided for a trial anew when the appeal was on questions of fact or both law and fact (Stats. 1854, pp. 59, 70, § 56, amending section 626), but when taken on questions of law alone it was to be heard on a statement of the case (Stats. 1854, pp. 59, 66, § 38 amending section 366), although if it appeared necessary upon the hearing of the appeal a new trial might be had where the appeal was on questions of law alone (Stats. 1854, pp. 59, 66, § 39 amending section 367). The object of the provision for an appeal on questions of law alone was to obviate the expense of a new trial in the appellate court where the facts were not in dispute. *People ex rel. Hitchcock v. Freelon*, 8 Cal. 517. These provisions of the law have remained substantially the same since 1854, excepting that in 1860 section 628 (corresponding to section 978, Code of Civil Procedure) was amended to make provisions for the form of stay bond where the judgment appealed from was for the recovery of personal property, etc. (Stats. 1860, pp. 298, 305, § 30, amending section 628).

Without setting forth in further detail the various statutory changes regulating appeals from a justice's court, it is sufficient for present purposes to point out that the requirement of a stay bond in substantially its present form was enacted before the distinction was drawn between appeals from a justice's court on the law and on both law and facts (Stats. 1853, pp. 276, 280, § 20 amending section 628 of the Practice Act, supra), and when all appeals from the justice's court resulted in a trial anew (Stats. 1853, pp. 276, 277, § 7 amending section 366 of the Practice Act, supra); and that such requirement was continued in substantially unaltered form after the distinction between the two methods of appeal was introduced in 1854 (Stats. 1854, pp. 59, 70, supra).

It is clear from this legislative history that there was no intention on the part of the Legislature to require a stay bond in cases of appeal on questions of law alone, and not in cases of appeal on both law and facts. There seems no room for doubt from the terms of the Code (section 978, Code Civ. Proc.) and from its legislative history that a stay bond is essential to prevent the enforcement of a justice's court judgment pend-

ing an appeal, but if this were a matter of doubt these provisions have been so construed for nearly three-quarters of a century, and this practical and long continued construction should not be overturned.

The justice's court, in the absence of a stay bond, had power to enforce the judgment by execution, and for that purpose to require the defendant to submit to an examination on supplemental proceedings. The point that the claim levied upon by the respondent constable is exempt from execution is not seriously pressed.

Judgment affirmed.

We concur: SHAW, C. J.; LENNON, J.; LAWLOR, J.; SLOANE, J.; SHURTLEFF, J.; RICHARDS, Justice pro tem.

(188 Cal. 645)

In re TETSUBUMI YANO'S ESTATE.
(Sac. 3191.)

(Supreme Court of California. May 1, 1922.
Rehearing Denied May 29, 1922.)

1. Guardian and ward ⚡10, 13(4)—Father is ordinarily entitled to custody and is presumed competent.

Under Code Civ. Proc. § 1751, the father of a minor under 14 years is entitled, as a matter of right, to the guardianship of such minor, unless shown to be incompetent, and competency is presumed and should be so found by the court, in the absence of evidence to the contrary.

2. Guardian and ward ⚡10—Preferential right of father applies to guardianship of estate.

The preferential right of a father to the guardianship exists as to guardianship of the estate as well as to guardianship of the person, which latter scarcely needs the protection of Code Civ. Proc. § 1751, in view of Civ. Code, § 197, making the parent the natural guardian and entitled to the custody of the person of the minor child, except as to circumstances set out in section 246, subd. 4.

3. Citizens ⚡3—Infants ⚡22—Native-born Japanese infant can take property.

A native-born child of Japanese parents is an American citizen and as such entitled to acquire and hold property, real and personal, and her infancy did not incapacitate her from becoming seized of the title to real estate.

4. Deeds ⚡194(4)—Acceptance of beneficial deed will be presumed.

Delivery to an infant and acceptance by him will be presumed, when a deed is clearly beneficial to him.

5. Deeds ⚡194(5)—Recording is sufficient delivery to infant.

When a deed, clearly beneficial to an infant, is given to him, his acceptance will be presumed, and the recording of the deed is sufficient delivery.

6. Aliens ⚡6(2)—Conveyance to disqualified alien transfers title until divested by state or inquisition had.

Alien Land Act 1913, by its provision that action shall be brought by the state for the escheat of any land conveyed to aliens in contravention of the act, recognizes the general rule that a conveyance to an alien, disqualified to hold real estate, transfers the title to such alien until the same is divested by the state, or by inquisition had upon its denouncement.

7. Guardian and ward ⚡13(1)—Extent of property right of qualified infant cannot be determined in proceedings to appoint guardian.

Whether a conveyance of property to an infant, who is a native-born citizen, made at the direction of her father, who was disqualified to hold land under Alien Land Act 1913, transferred title to the infant in view of the father's purpose, is a question which cannot be decided in proceedings for the appointment of the guardian of the infant, since she is entitled to a guardian to represent her in the settlement of that issue.

8. Aliens ⚡7—Payment of consideration by disqualified alien for conveyance to one qualified to hold title does not establish trust.

Payment by an alien, disqualified to hold land, for land conveyed to his daughter, who was a native-born citizen, does not establish a trust in the father's favor under Civ. Code, § 853, since the law will not imply a trust in favor of an alien prohibited from holding the lands, and a trust in favor of such alien would be unenforceable under Alien Land Act 1913.

9. Aliens ⚡7—Disqualified alien can procure conveyance of land to native-born child.

An alien disqualified to hold land can secure a conveyance of land to his minor daughter, who was a native-born citizen and therefore entitled to acquire and own real estate, though the conveyance was made to her confessedly because the laws did not permit the alien to buy the land for himself.

10. Guardian and ward ⚡10—Alien disqualified to own land may be guardian in absence of statute.

Initiative Alien Property Act 1920, disqualifying an alien, who cannot acquire land because he cannot acquire citizenship, from acting as guardian of a ward who owns land, recognizes that an alien Japanese was not disqualified, merely by his alienage, from qualifying as a guardian prior to the enactment of that statute.

11. Guardian and ward ⚡10—Initiative act prohibiting guardianship by alien did not apply to prior proceedings.

Initiative Alien Property Act 1920, which took effect December 9, 1920, did not apply to proceedings for the appointment of a Japanese as guardian, where the order refusing the appointment was made on November 6, 1920, in view of section 12 of the act, which declares that it shall not affect pending actions or proceedings.

12. Treaties ⚡8—Treaty with Japan does not secure to Japanese the right to be guardian of his own child.

The treaty between the United States and Japan, which gives to the citizens or subjects of each, in the territory of the other, protection and security for their persons and property, does not protect the right of a Japanese subject residing in this country to be appointed as guardian of his minor child, who was a native-born citizen of the United States, since the denial of such privilege would not endanger the person of the parent or jeopardize his property.

13. Treaties ⚡13—Native-born child of Japanese parent cannot invoke protection of treaty with Japan.

A native-born child of Japanese parents, residing in this country, being a citizen of the United States, cannot invoke the clauses of the treaty with Japan, protecting the property of Japanese subjects in this country.

14. Constitutional law ⚡210—Guardian and ward ⚡10—Statute, depriving resident Japanese of right to guardianship over estate of his child, denies equal protection of the laws.

Initiative Alien Property Act 1920, § 4, forbidding the appointment as guardian, of any alien not eligible to citizenship, with respect to property of the minor which the alien cannot acquire for himself, denies to the alien the equal protection of the laws which Const. U. S. art. 14, § 1, secures to all persons, including aliens, and which pledges the protection of equal laws, since it deprives such alien of the privilege given by Code Civ. Proc. § 1751, entitling a father to preference for appointment as guardian of his minor child, unless he is incompetent.

15. Constitutional law ⚡211—Ineligibility to citizenship is not reason for classification, with respect to right to act as guardian.

Though the clause of Const. U. S. art. 14, § 1, guaranteeing equal protection of the laws, does not prevent classification based upon some reasonable difference in the circumstances, it does prevent arbitrary classification, and the fact that an alien cannot acquire citizenship forms no reasonable basis for classification, with respect to the right of a parent to be appointed as guardian of his minor child.

16. Constitutional law ⚡205(2), 206(1)—Denial of right of father to act as guardian of his child invalid as to native-born citizen.

Initiative Alien Property Act 1920, § 4, providing that an alien shall not be appointed guardian, with respect to the estate of a minor, in lands, the title to which he could not acquire, violates Const. U. S. Amend. 14, and Const. Cal. art. 1, § 21, prohibiting special privileges or immunities to a citizen, or class of citizens, when applied to the father of a citizen, since it deprives such citizen of the rights under Code Civ. Proc. § 1751, giving the father of every minor the preferential right to be guardian of the minor, unless incompetent, and section 1748, giving a minor over 14 the right to nominate a guardian.

Lawlor, J., dissenting.

In Bank.

Appeal from Superior Court, Sutter County; K. S. Mahon, Judge.

In the matter of the estate and guardianship of Tetsubumi Yano, a minor. On petition of Hayao Yano for letters of guardianship. Petition denied, and petitioner appeals. Reversed.

Rehearing denied in bank; **LAWLOR, J.**, dissenting.

Algernon Crofton, of San Francisco, and Chas. A. Wetmore, Jr., of Marysville (Gillogley, Crofton & Payne, of San Francisco, of counsel), for appellant.

Albert H. Elliot and Guy C. Calden, both of San Francisco, amici curiæ.

U. S. Webb, Atty. Gen., and Leon French, Deputy Atty. Gen., for respondents.

PER CURIAM. This is an appeal by Hayao Yano, an alien Japanese, from an order of the superior court of Sutter county, denying him letters of guardianship of the person and estate of his minor daughter, Tetsubumi.

The petition for guardianship was filed October 23, 1920, and alleged that petitioner was the father of said minor daughter; that she was of the age of two years; that she had estate in Butte county, consisting of 14 acres of land, more or less, and that she was in the care and custody of petitioner and his wife, the mother of said minor, who were her only relatives in said county of Sutter.

It was made to appear on the hearing, by undisputed evidence, that the petitioner was a Japanese and not a citizen of the United States or the state of California; that he was and had been for several years a resident of California; that he was of good character, a good father, sober and industrious; that the minor was his daughter, aged between two and three years, and a native-born citizen of the United States and the state of California; that she had no guardian, and held title to 14 acres of improved land in Butte county of the value of \$3,000 or thereabouts, which required care and cultivation.

[1] Under this state of facts the petitioner was entitled to letters of guardianship, unless the fact of his being a Japanese alien defeated his right.

It is settled law in this state that the father of a minor under the age of 14 years, is entitled, as a matter of right, under the provisions of the Codes to the guardianship of such minor, unless shown to be incompetent. Competency is presumed and should be so found by the court, in the absence of evidence to the contrary. Code Civ. Proc. § 1751; Matter of Forrester, 162 Cal. 493, 123 Pac. 283; In re Mathews' Estate, 169 Cal. 26, 145 Pac. 503; Id., 174 Cal. 679, 164 Pac. 8; In re Galleher, 2 Cal. App. 364, 84 Pac.

352; Estate of Moore, 179 Cal. 302, 176 Pac. 461; Guardianship of Person and Estate of Akers, 184 Cal. 514, 194 Pac. 706.

[2] The Code makes no distinction as to this preferential right to letters of guardianship between guardianship of the person and guardianship of the estate. The last above-cited expression of the rule of the statute involved guardianship of both person and estate. Indeed, the parents' right to letters of guardianship of the person of a minor child scarcely needs the protection of section 1751, Code of Civil Procedure, as such parent is by law the natural guardian and entitled to the custody of the person of a minor child. Civ. Code, § 197; In re Hunt, 103 Cal. 355, 37 Pac. 206. The mere fact, if such were shown, that the minor would receive better care, training, and support, and be under better influences under other guardianship, cannot defeat the right of the parent to letters, except under the circumstances set out in subdivision 4 of section 246 of the Civil Code. In re Mathews, supra. No such showing was made here. There was no finding of incompetency and no evidence which would have justified such finding.

The sole ground for denying the petition, as appears from the record, is contained in the statement of the court refusing letters to the petitioner as follows:

"The guardianship is denied. It appears that the child had no property. The property or deed was taken in the child's name, solely to evade the laws of the state of California."

It appears from the transcript that, subsequent to the Alien Land Act of 1913 (St. 1913, p. 206), denying the right to acquire real estate to aliens disqualified to become citizens, and about a year prior to the Initiative Act of 1920 (St. 1921, p. lxxxiii), which adds the further disqualification of such alien to act as guardian of a minor, for property which the alien himself is incompetent to acquire under the act, the petitioner bargained for, and caused to be conveyed to his daughter, the minor named in this proceeding, the tract of land referred to in the petition. The deed was introduced in evidence, showing the conveyance by the grantors directly to the minor. The petitioner testified that he had the land deeded to his infant daughter because he was Japanese and could not take title himself; that his baby was a citizen of the United States; and that he had the land conveyed to her for that reason alone.

[3] The ruling of the court in this matter cannot be sustained on the ground stated in the order, that the minor took no title to the property. She was a native-born American citizen and as such entitled to acquire and hold property, real and personal. Her infancy did not incapacitate her from becoming seized of the title to real estate. 22 Cyc., 527, 529; Masterson v. Cheek, 23 Ill.

72; *Scanlan v. Wright*, 13 Pick. (Mass.) 523, 25 Am. Dec. 344.

[4, 5] Delivery to, and acceptance by, an infant will be presumed. When a deed clearly beneficial to an infant is given to him, his acceptance will be presumed, and the recording of the deed is a sufficient delivery. 22 Cyc. 529; *Masterson v. Cheek*, supra; *Haddon v. Neighbarger*, 9 Kan. App. 529, 58 Pac. 568; *Spencer v. Carr*, 45 N. Y. 406, 6 Am. Rep. 112; *De Levillain v. Evans*, 39 Cal. 120; *Turner v. Turner*, 173 Cal. 782, 161 Pac. 980.

[6] Even a conveyance to an alien, disqualified under the law to hold real estate, has been generally held to convey title to such alien, until the same is divested by the state or by inquisition had upon its denouncement. This was so, even under the common law, which excluded aliens from acquiring and holding real property. *Merle v. Mathews*, 26 Cal. 455; *Phillips v. Moore*, 100 U. S. 208, 25 L. Ed. 603; *Norris v. Hoyt*, 18 Cal. 217; *Santa Paula Water Co. v. Peralta*, 113 Cal. 44, 45 Pac. 168. It is apparent that the present Alien Land Law recognizes the same rule, as it provides that action shall be brought by the state for the escheat of any lands conveyed to aliens in contravention of the act.

[7] In any event, the nature and extent of the minor's property rights under the deed in question, she being qualified to own real estate, could not be determined in this guardianship proceeding. She would require a guardian to represent her in the settlement of just such a controversy.

[8] The fact that the father paid the consideration for the transfer of this land to the minor does not establish a trust in the father's favor, under section 853 of the Civil Code. Where aliens are prohibited from holding lands, an implied trust by operation of law will not arise in their favor. 2 Corp. Juris, 1057, § 5; *Phillips v. Crammond*, 19 Fed. Cas. No. 11092, p. 497; *Hubbard v. Goodwin*, 3 Leigh (30 Va.) 492; *Leggett v. Dubois*, 5 Paige Ch. 114, 28 Am. Dec. 413. Besides, the attempt of the alien to obtain title through such a trust would be in violation of the Alien Land Law, and could not be enforced.

[9] The act of petitioner, in securing conveyances of land to his daughter, while confessedly carried out because the laws of California did not permit him to buy it for himself, was in no sense unlawful, since the daughter is a citizen of the United States and entitled to acquire and own real estate. There is nothing in the evidence to indicate that it was not the purpose of this conveyance to vest absolute title to the land in the minor. If any legal ground appears in the record for denying letters of guardianship, it must be found elsewhere than in the reason stated in the order of the court.

[10] There is no claim that an alien Japanese was disqualified, merely by reason of his being an alien from qualifying as a guardian at the time this petition was filed and acted upon. The very fact that the act of 1920, in terms, creates such disqualification, is a recognition of the right of such aliens to qualify and serve as guardians, in the absence of such inhibition.

[11] All the proceedings in the superior court, including the final order denying the petition, were had in this matter before the Initiative Alien Property Act of 1920 went into effect, though the final order was not made until after the adoption of the law by popular vote at the election of November 2, 1920. Stats. 1921, p. lxxxiii.

That act provided that thereafter no alien, disqualified to acquire and hold real estate—

"may be appointed guardian of that portion of the estate of a minor which consists of property which such alien * * * is inhibited from acquiring, possessing, enjoying or transferring by reason of the provisions of this act."

It further provides that the—

"public administrator of the proper county or any other competent person or corporation, may be appointed guardian of the estate of a minor citizen whose parents are ineligible to appointment under the provisions of this section." Section 4.

Section 12 of the act declares that it—

"shall not affect pending actions or proceedings, but the same may be prosecuted and defended with the same effect as if this act had not been adopted."

The act did not take effect until December 9, 1920, five days after the official declaration of the vote thereon by the secretary of state. The order appealed from, having been made on November 6, 1920, was, of course, unaffected by the act. What we have already said sufficiently shows that the order was erroneous and that it must be reversed. The appellant, however, has presented and elaborately argued certain additional points upon which he claims the right to a reversal, to the effect that the Initiative Act of 1920, in the respect here involved, is invalid upon constitutional grounds. Section 4 of the act also authorizes the superior court to remove a guardian whenever it appears "that facts exist which would make the guardian ineligible to appointment in the first instance." If the court below, upon a retrial, should believe that the provisions of the act declaring the petitioner ineligible are valid, it may be that it would refuse to issue letters to him, or, having done so, it might immediately revoke them, on the ground that, as the facts showing ineligibility appeared in the proceedings, it was its duty to do so. Under these circumstances, we deem it ad-

visible to consider and determine the additional points presented.

These points are: (1) That the law in question violates the Treaty between the United States and Japan (37 Stat. 1504); (2) that it denies to the Japanese parent the equal protection of the laws, contrary to section 1, art. 14, of the Constitution of the United States; (3) that it denies to the child, who is a native-born citizen of the United States, the privileges guaranteed to her by section 21, art. 1, of the Constitution of California, and the privileges and equal protection of the laws secured to her by the Fourteenth Amendment aforesaid.

[12] 1. The preamble of the treaty states that it is made to fix clearly and positively "the rules which are hereafter to govern the commercial intercourse" between the respective countries. The opening clause of article 1 declares that the citizens of each country shall have liberty to enter and reside in the territory of the other, carry on trade therein and, among other things, to lease land for residential and commercial purposes. It contains no guarantee of the right to lease land for agricultural purposes. The principal clause relied on is a part of article 1, as follows:

"The citizens or subjects of each of the High Contracting Parties shall receive, in the territories of the other, the most constant protection and security for their persons and property, and shall enjoy in this respect the same rights and privileges as are or may be granted to native citizens or subjects, on their submitting themselves to the conditions imposed upon the native citizens or subjects."

[13] This, it will be seen, guarantees to subjects of Japan, residing here, protection and security for their persons and property, and provides that, in this respect, that is, in respect to such protection and security, they shall enjoy the same rights and privileges as citizens of this country. It is suggested, though the appellant does not lay stress upon this point, that one of the privileges of a native citizen of this country is the right to be appointed guardian of his own child, and that, as the act forbids the appointment of a Japanese alien residing here as guardian of his own child, it is, therefore, a direct denial of a privilege secured by the treaty. The language of the treaty, however, does not include such privilege. The rights and privileges which it declares the Japanese citizen shall enjoy here are such rights and privileges only as may be necessary for the protection and security of his own person or property. It cannot be said that it is necessary for the security or protection of either the person or the property of a parent that he should become the guardian of his own child. Eligibility to appointment as guardian is not property, nor is it a right of property. It pertains exclusively to the person.

It may be given or withheld by the law of the state in which the parent and child reside. The withholding thereof from all parents would be within the power of the state. Undoubtedly, when given, it is a privilege pertaining to the individual parent, but it is not a privilege which enhances his own personal security or which assists him in protecting his property. A deprivation of the privilege would in no manner endanger the person of the parent, or jeopardize his property. The child, being a native citizen of the United States, cannot as such, invoke the protection of the treaty to secure to the father, a citizen of Japan, equal privileges with other residents who are not citizens of Japan. The question whether the child is deprived of the privilege of having its own father serve as its guardian does not arise under the treaty. It must look to the provisions of the laws of this country, for the protection of its privileges as a citizen thereof. The law does not violate the treaty with Japan.

[14] 2. Our law provides that the father or mother of a minor child, less than 14 years of age, if competent, is entitled to be appointed guardian of such child in preference to any other person. Code Civ. Proc., § 1751. This law is general in terms. It is not confined to citizens in its application, but purports to confer the right upon all residents regardless of citizenship. The initiatory act of 1920 (Stats. 1921, p. lxxxiii, § 4), by its terms, forbids the appointment of any alien not eligible to citizenship as guardian of a minor, with respect to property of the minor of a character, which such alien cannot acquire for himself, that is to say, with respect to agricultural land belonging to such minor. Its effect is that a citizen of Japan, who is the parent of a native-born child, cannot be appointed guardian of the property of the child, where that property consists entirely of agricultural land. This restriction is not put upon a citizen of any country whose citizens are eligible to citizenship here, nor upon any other class of residents of this state who are not citizens thereof. It is clearly a discrimination against citizens of Japan, residing in this state.

Section 1 of article 14 of the Constitution of the United States declares that no state shall "deny to any person within its jurisdiction the equal protection of the laws." We had occasion to consider this language in *Ex parte Kotta*, decided on September 12, 1921, 200 Pac. 957. We there said that "the word 'person,' as used in this amendment includes aliens," and, quoting from *Yick Wo v. Hopkins*, 118 U. S. 396, 6 Sup. Ct. 1064, 30 L. Ed. 220, that it applies "without regard to any differences of race, of color, or of nationality," and that the guarantee of "the equal protection of the laws is a pledge of the protection of equal laws." These state-

ments are also quoted and approved by the Supreme Court of the United States, in *Truax v. Raich*, 239 U. S. 33, 36 Sup. Ct. 7, 60 L. Ed. 131, L. R. A. 1916D, 545, Ann. Cas. 1917B, 283. In *Barbier v. Connolly*, 113 U. S. 31, 5 Sup. Ct. 359, 28 L. Ed. 923, the court declared that this guarantee means that "equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights." It needs no argument to demonstrate the proposition that a law which gives to one person the right or privilege of becoming the guardian of his child and withholds it from another, both being alike competent in all respects, is not equal as between the two persons. The person from whom it is withheld is not in such a case accorded the protection of equal laws. In this respect the Initiative Act of 1920 is clearly a violation by this state of the guarantee contained in the Fourteenth Amendment, that no state shall deny to any person the equal protection of its laws.

[15] It cannot be successfully contended that the law may be declared valid in this respect, on the ground that persons who are ineligible to citizenship under the laws of the United States form, by reason of that fact alone, a class by themselves, for which the state may enact peculiar legislation, depriving them of rights or privileges which are accorded to others not of that class. The rule in regard to classification, peculiarly applicable to such an attempt, is that the classification—

"must be founded upon differences which are either defined by the Constitution or natural, and which will suggest a reason which might rationally be held to justify the diversity in the legislation. It must not be arbitrary, for the mere purpose of classification, that legislation really local or *special* may seem to be general, but for the purpose of meeting different conditions naturally requiring different legislation." [Italics ours.] *Darcy v. Mayor, etc.*, 104 Cal. 645, 38 Pac. 500.

A law—

"makes an improper discrimination if it confers particular privileges or imposes peculiar restrictions or disabilities upon a class of persons arbitrarily selected from a larger number of persons, all of whom stand in the same relation to the privileges granted or burdens imposed, and between whom and the persons not so favored or burdened no reasonable distinction or substantial difference can be found justifying the inclusion of one and the exclusion of the other from such privileges or burdens. The difference on which the classification is based must be such as, in some reasonable degree, will account for or justify the peculiar legislation." *Ex parte Miller*, 162 Cal. 698, 124 Pac. 430.

"While reasonable classification is permitted, without doing violence to the equal protection of the laws, such classification must be based upon some real and substantial distinc-

tion, bearing a reasonable and just relation to the things, in respect to which such classification is imposed; and classification cannot be arbitrarily made without any substantial basis. Arbitrary selection, it has been said, cannot be justified by calling it classification." *Southern R. Co. v. Greene*, 216 U. S. 417, 30 Sup. Ct. 291, 54 L. Ed. 536, 17 Ann. Cas. 1247.

The right or privilege of a father to be the guardian of his own minor child does not in any respect depend upon or arise out of his nationality or his eligibility to citizenship in this country. It has no relation thereto. Such privilege is no doubt as much prized by a Japanese resident of good character, who is not a citizen of this country and cannot become such, as by any other father of like character, who is a citizen or is eligible to become one. A law denying the privilege to one class and giving it to the other cannot be said to be a law justified by a classification based on a distinction which calls for such peculiar legislation. Such attempted classification does not relieve the act from the charge that it violates the Fourteenth Amendment.

[16] 3. The foregoing observations apply with equal force to the proposition that the act of 1920, taken in connection with section 1751 of the Code of Civil Procedure, denies to the child, Tetsubumi Yano, the privileges guaranteed to her by the Fourteenth Amendment to the Constitution of the United States and by section 21, art. 1, of the Constitution of this state. Section 21 declares that no citizen or class of citizens shall "be granted privileges or immunities which, upon the same terms, shall not be granted to all citizens." The child is a native citizen of the United States and of the state of California. Nothing can be denied to her because of her race or color that is not denied to all citizens, regardless of race or color. Any privilege that is given generally to citizens of other races must also be given to her, upon the same terms, and her race cannot be considered as a factor in the problem, or as a cause for denial thereof to her. The effect of the two laws would be that all native minor children, possessed of agricultural land in this state, whose parents are aliens residing in this state and eligible to citizenship, would have the privilege of having their father or mother appointed guardian of that part of their estate, while, on the other hand, all native-born minors, who are possessed of agricultural land in this state, whose parents are aliens and reside here, but are ineligible to citizenship, if a guardianship of such land is necessary or convenient, would be compelled to have strangers as such guardians. Furthermore, while a native California child of alien Japanese parents, if over 14 years of age, could nominate its own father as the guardian of its personal property or of its real property leased

for purposes of trade or residence solely (Code Civ. Proc. § 1748), it must nominate some stranger as guardian of any farming land it may own. No such burdensome disability is imposed upon any native-born child whose parents are citizens or eligible to citizenship. All such discriminations are forbidden by the constitutional provisions above mentioned.

It is argued, on behalf of respondent, that the object of the law is to prevent evasions of the law forbidding aliens ineligible to citizenship to acquire, possess, or enjoy agricultural land, that the only class doing so is composed exclusively of aliens who cause land to be vested in their own minor children, with a view of being appointed guardian of the estate of such children, and that it is permissible for the state to regard the persons who are producing the evil, which it desires to prevent, as a class by themselves, and to enact such measures operating only upon that class as may be necessary to accomplish the desired object as has been pointed out in *Patstone v. Pennsylvania*, 232 U. S. 138, 34 Sup. Ct. 281, 58 L. Ed. 539, and *Ex parte Spencer*, 149 Cal. 401, 86 Pac. 896, 117 Am. St. Rep. 137, 9 Ann. Cas. 1105. But, even in such case as has been shown, the differences on which the classification is based must suggest a reason for the peculiar legislation, and the legislation must be such as will have some tendency to remove the evil intended to be prevented.

The appointment as guardian would not enable such parents to acquire, possess, or enjoy agricultural land, and therefore their ineligibility to such appointment could not prevent their so doing. A guardian neither acquires, possesses, or enjoys the property belonging to the ward, in any accurate or legal meaning of these terms. At most, he merely has, for some purposes, the control of the property, but the control is not in his own right and does not inure to his benefit. He controls it as trustee only, and is held to strict accountability to the child, for all the benefits accruing from the use of it. He must render such accounts annually, or oftener, if required by the court. Code Civ. Proc. §§ 1773, 1774. He must hold all the receipts from the farming operations as the property of the native-born child, and must use so much of it for the support and education of the child as may be necessary, and no more, and must safely invest the remainder as the property of the child and for its sole use and benefit. In all of his acts as guardian he is under the supervision and control of the superior court of the county. His compensation is limited to the reasonable value of his services, and is to be fixed by that court. The use is in the child, not in the guardian. When the child becomes of age the control of the guardian immediately ceases. If the child should die, the con-

trol would pass forthwith to its heirs, and the alien parent, in that event, would not even inherit the property or any part thereof. It seems plain that, since the alien parent could not by this means evade the operation of the law, nor acquire, possess, or enjoy agricultural land, the law cannot be upheld on the ground that such persons constitute a class, and the only class, who attempt to evade the law forbidding alien ownership. They could not, by the use of such guardianship, enjoy the rights of ownership. The classification is therefore clearly arbitrary, and does not "suggest a reason which might rationally be held to justify" the peculiar legislation addressed to the class, as is said in *Darcy v. Mayor*, supra.

The object sought to be attained by these statutory provisions, that is, to discourage the coming of Japanese into this state, may be a proper one, and may be even desirable for the promotion of the welfare and progress of the state. The court can only consider its validity under the limitations of the Constitution. A similar object prompted the adoption of the anti-Chinese provisions of the Constitution of 1879, which, so far as they were effectual, were declared invalid by the federal courts. This entire question is international in character, and is a matter properly to be disposed of by the federal government. Appeal for its adjustment should be made to Congress, rather than to attempt to accomplish it by discriminatory legislative measures of the state.

Our conclusion is that the provisions of the Initiative Act of 1920, forbidding the appointment of an alien resident, ineligible to citizenship, as guardian of the farming land of his native-born child, and authorizing the removal of such parent, if previously appointed as such guardian, are invalid.

The order appealed from is reversed.

SHAW, C. J., and SLOANE, WASTE, SHURTLEFF, WILBUR, and LENNON, JJ., concur.

LAWLOR, J. I dissent. I cannot agree with the conclusion announced with respect to the constitutionality of that portion of the Alien Land Law, which provides that no alien ineligible to citizenship may be appointed guardian of—

"that portion of the estate of a minor which consists of property which such alien * * * is inhibited from acquiring, possessing, enjoying or transferring by reason of the provisions of this act."

The plain object of this provision was to deny the right to be such guardians to aliens, who were made ineligible to hold agricultural land under the Alien Land Law so as to prevent an evasion of the terms of that act, of which this provision is a part. The first question presented in considering its

constitutionality, it being conceded it does not violate the terms of the treaty with Japan, is whether it denies to such aliens the equal protection of the laws. In *Terrace v. Thompson* (D. C.) 274 Fed. 841, 843, it is said:

"A state may lawfully prohibit aliens acquiring land within its boundaries, if there is no treaty to the contrary. *Chirac v. Chirac*, 2 Wheat, 259, 272, 4 L. Ed. 234; *Hauenstein v. Lynham*, 100 U. S. 483, 484, 25 L. Ed. 628; *De Vaughn v. Hutchinson*, 165 U. S. 566, 570, 17 Sup. Ct. 461, 41 L. Ed. 827; *Clarke v. Clarke*, 178 U. S. 186, 20 Sup. Ct. 873, 44 L. Ed. 1028; *Blythe v. Hinckley*, 180 U. S. 333, 21 Sup. Ct. 390, 45 L. Ed. 557."

The several cases cited in the prevailing opinion state the general rules relating to classification for purposes of legislation. In this instance the aliens coming within the inhibition of the legislation seek by indirection, to control agricultural land which the Alien Land Law, the validity of which is not questioned by the majority opinion, denies them the right to own. To hold that, under the federal guarantee of equal protection of the laws, the state is powerless to prevent circumvention of a law it had the authority to enact, is in effect to declare that it cannot, by an exercise of its sovereign will, effectuate the purpose of the original legislation—to prevent its agricultural land from passing under the control of such aliens. I am not prepared to assent to such a conclusion. It seems clear to me that the state, having the power to enact the original law directed at these aliens, may classify them in supplemental legislation, the object of which is to make the parent legislation effective.

The statute held constitutional in *Patsone v. Pennsylvania*, 232 U. S. 138, 34 Sup. Ct. 281, 58 L. Ed. 539, made it unlawful for any unnaturalized foreign-born resident to kill any wild bird or animal, except in defense of person or property, and "to that end" made it unlawful for any such person to own or be possessed of a shotgun or rifle, with a penalty of \$25 and a forfeiture of the gun. In that case the Supreme Court of the United States, speaking through Mr. Justice Holmes, said:

"But we start with the general consideration that a state may classify with reference to the evil to be prevented, and that, if the class discriminated against is, or reasonably might be, considered to define those from whom the evil mainly is to be feared, it properly may be picked out. A lack of abstract symmetry does not matter. The question is a practical one, dependent upon experience. * * * The question therefore narrows itself to whether this court can say that the Legislature of Pennsylvania was not warranted in assuming as its premise for the law that resident unnaturalized aliens were the peculiar source of the evil that it desired to prevent."

It appears from that case that unnaturalized foreign-born residents were the chief

slaughterers of wild birds and animals, and to prevent violations of a statute which made the killing of the game unlawful, such persons were denied the right to own property, consisting of certain kinds of firearms, which they might use to kill game. Here, the object is not to prevent a violation of a statute, but to prevent an evasion of it, for, while it is true the alien parent does not acquire title to the land, as a practical matter he does secure control of it in his capacity as guardian. The only persons who would evade such a statute are those against whom it is directed, namely, aliens ineligible to citizenship—a definite class of the population, as between the members of which the act makes no discrimination. To prevent the circumvention of the law, such aliens are denied the right to be guardians of these estates by use of which form of guardianship they would control them. I perceive no distinction in principle between the two cases.

Viewed purely as a question of guardianship, it may be true, as stated in the prevailing opinion, that—

"the right or privilege of a father to be the guardian of his own minor child does not in any respect depend upon or arise out of his nationality or his eligibility to citizenship in this country. It has no relation thereto."

But, when it is considered that out of all the persons who may become guardians of this class of property, these aliens alone seek to be appointed as such with the definite object of evading the Alien Land Law, there is a relation established between them and the right to be guardians, which places them in a distinct class with reference to that subject.

The means adopted to accomplish the objects and purposes of the Alien Land Law are not unreasonable. As pointed out in the main opinion, matters of guardianship are within the control of the Legislature. The qualification and competency of guardians are therefore subject to statutory change. This provision is the latest expression of the legislative will on the subject of eligibility to guardianship. It is an additional qualification of the rule that a parent, or person nominated by a minor over 14 years of age, may be appointed as guardian. Section 1751, Code Civ. Proc. A parent, who is incompetent, has no right to be appointed guardian of his child. In the case at bar, it was found by the trial court and the petitioner himself admitted that the land was transferred to the minor and that petitioner is seeking to be appointed guardian solely because, under the Alien Land Law, he could not own the land himself. It is urged that one who avowedly seeks to circumvent a law of the state and defeat its plain purpose is an unfit person to be a guardian. However that may be, this statute expressly renders ineligible to be guardians of a certain class of property in

the estates of minors those in the class of whom petitioner is one. It does not interfere with the right of a natural parent to be the guardian of the person of the minor or of that portion of its estate which the guardian himself might lawfully acquire and enjoy. Such a regulation is clearly within the legislative power of the state.

Considered from this viewpoint, the rights of the minor are not infringed by this provision. It cannot be questioned that this minor has, under section 21, art. 1, of the Constitution of this state, the same rights as any other native-born citizen. Neither can it be questioned that the title to the land has vested in her. But no child has a right to have its parent appointed its guardian, if the parent is incompetent to discharge the duties of guardianship. By the provision in question, an additional class of persons are rendered incompetent to be guardians of property of a particular character. A minor has no more right to have a parent, declared by law to be ineligible appointed as guardian than such parent would have to be the guardian. The rights of each are subject to statutory regulation and in such a case as this, neither can have more ground for complaint than if the parent were disqualified because of incompetency to discharge the duties of the office. This legislation applies to all minors, whatever the nationality of their parents may be, and it applies whether the person sought to be appointed guardian is the parent of the minor or a stranger.

It follows that, since it was adopted to prevent the evasion of the Alien Land Law by the class of persons directly affected thereby, it was proper to classify them for the purposes of this provision, and, since the means used are not unreasonable, the enactment should be upheld as aiding the enforcement of the Alien Land Law, in spirit as well as in letter.

188 Cal. 714

In re UNGER'S ESTATE.**ROLL v. MOORMAN et al.****(L. A. 7142.)**

(Supreme Court of California. May 11, 1922.)

1. Trial $\S$ 139(1)—Nonsuit erroneous if evidence is sufficient to sustain verdict for plaintiff.

If the evidence is sufficient to sustain a verdict for plaintiff, it is error to grant a motion for nonsuit.

2. Wills $\S$ 166(1)—Evidence held insufficient to establish undue influence.

Evidence held insufficient to show that a will was procured by undue influence.

In Bank.

Appeal from Superior Court, Los Angeles County; Charles Monroe, Judge.

Application by Frances Moorman and another for the probate of the will of Minnie Unger, deceased. From an order admitting the will to probate, contestant, Emily Unger Croll, appeals. Affirmed.

H. Parker Wood, of Los Angeles, for appellant.

Wm. T. Kendrick, of Los Angeles, for respondents.

WILBUR, J. [1] This is an appeal from an order admitting to probate a will of the decedent, dated March 2, 1918, after the granting of a motion for nonsuit, at the close of the testimony in a will contest, instituted by the appellant, Emily Unger Croll, a daughter of decedent, upon the ground that the will was procured by the undue influence of Charles W. Unger, a son of the decedent, and Frances Moorman, a daughter of the decedent. The only question involved in the appeal is whether or not the evidence was sufficient to have sustained a verdict of the jury that the will was procured by undue influence, if such a verdict had been rendered, for, if there was sufficient evidence to sustain such a finding, the court erred in granting the motion for nonsuit. *Vanderford v. Foster*, 65 Cal. 49, 2 Pac. 736; *Davis v. Crump*, 162 Cal. 513, 123 Pac. 294; *Estate of Caspar*, 172 Cal. 147, 155 Pac. 631; *Stieglitz v. Settle*, 175 Cal. 131, 165 Pac. 436; *Estate of Flint*, 179 Cal. 552, 177 Pac. 451; *In re Wall's Estate* (Cal. Sup.) 200 Pac. 929.

[2] The evidence tends to show that the testatrix loved the contestant, notwithstanding the apparent estrangement between them; that the respondents Frances and Charles lived with the testatrix and prevented the contestant from seeing her mother or living with her, although the mother desired to live with the contestant and expected to do so when Charles and Frances married and established homes of their own; that the testatrix saw the contestant but did not want Charles and Frances to learn of that fact. The contestant testified that, in 1917 or 1918, her brother Charles said to her: "I will see that your mother will leave you but a dollar." Frances went with her mother to a law office in February, 1918, and, two days after the will was executed, returned with her mother to get the will and paid for it. Appellant also relies upon other evidence showing hostility between the children before and after the mother's death, and also upon the terms of the will giving contestant the mother's gold watch and chain, and upon the claim that the mother did not understand English and therefore did not understand the balance of the clause, particularly the word "resents." The clause of the will thus relied upon by the appellant to show undue influence is as follows:

"I also give and bequeath to my oldest daughter, Emily Croll, my gold watch and chain worn by me and I hereby state that the reason I do not give her an equal share with my other two children is that I have heretofore done more for her than for them and I also resent the way she has treated me as well as other members of my family and wish to state that I am free to act as I please in this matter and not influenced in any way by either of my two children at the time of making this will."

Thus the contestant relies upon evidence tending to show an opportunity and a disposition on the part of the respondents to exercise undue influence, and a prevention of counter influence by the contestant, as circumstantial evidence tending to show that the unequal disposition of the mother's property was a result of undue influence on the part of Charles and Frances, the respondents.

On the other hand, it appears that John N. Metcalf, the attorney who drew the will, had known the testatrix for about 15 years and had been her attorney for a long time. He was familiar with the affairs of the family, and the testatrix stated to him fully why she discriminated against the contestant. He questioned her at length concerning her wishes, and drew her will in accordance with her directions, expressed when he was alone with her. The attorney and his clerk, Agnes L. Boyd, attested the will as subscribing witnesses and testified that the testatrix was not acting under undue influence at the time the will was drawn and executed. There is no evidence that Charles or Frances, the son and daughter, charged with undue influence, were present at the time the will was executed, and both testified that they knew nothing about the will until after it was executed. Frances testified that she first learned of the will two days after its date, and Charles that he was away at the time the will was executed and that he did not learn of it until June, and then did not see the will until after his mother's death. Whatever inferences of undue influence might arise from the circumstances relied upon by the contestant are fully met by the uncontradicted evidence showing how the will was in fact drawn and executed. Thus the undisputed evidence taken as a whole is insufficient to establish undue influence, even if we wholly discredit the express denial of undue influence by the respondents, as the jury might have done. For a discussion of the principles involved see *Estate of Anderson* (Cal. Sup.) 198 Pac. 407.

Order affirmed.

We concur: SHAW, C. J.; LENNON, J.; LAWLOR, J.; SLOANE, J.; SHURTLIFF, J.; RICHARDS, Justice pro tem.

57 Cal. App. 141

Ex parte GERBER. (Cr. 871.)

(District Court of Appeal, Second District, Division 2, California. March 22, 1922.)

1. Physicians and surgeons — 6(5) — Physician licensed to practice naturopathy held entitled to practice optometry.

Under St. 1901, p. 56, § 16, providing that those who for a valuable consideration prescribe any drug, appliance, medical or surgical treatment, or perform any operation, shall be deemed as practicing medicine or surgery, and St. 1909, p. 418, providing that a person holding a certificate of the Association of Naturopaths, and practicing thereunder before passage of the latter act, shall be entitled to practice on indorsement of the certificate by the State Board of Medical Examiners, which by St. 1907, p. 252, § 16, was authorized to issue certificates authorizing the holder to practice any system or mode of treating the sick, in view of the fact that in a directory of persons authorized to practice by St. 1917, p. 93, to be published by the State Board of Medical Examiners, which is prima facie evidence of right of persons named therein to practice, a person whose certificate to practice naturopathy had been indorsed by the Board of Medical Examiners was classified therein as a practitioner of medicine and surgery and was entitled to practice optometry under Optometry Law, § 10, permitting duly licensed physicians and surgeons to treat eyes or fit glasses.

2. Physicians and surgeons — 6(1/2) — "Naturopathy" defined.

"Naturopathy" is a process or system whereby remedies for disease are discovered and whereby they are applied to the healing of disease.

3. Physicians and surgeons — 2 — Statute providing for a board of osteopathic examiners supplanted.

St. 1901, p. 113, § 2, legalizing the practice of osteopathy and providing for a board of osteopathic examiners, was supplanted by St. 1907, p. 252, providing for a State Board of Medical Examiners containing osteopathic physicians.

In the matter of Rudolph H. Gerber. Application for writ of habeas corpus to the sheriff of Los Angeles county to secure release of petitioner Rudolph H. Gerber from custody. Petitioner discharged.

H. C. Millsap and Millsap & Kendall, all of Los Angeles, for petitioner.

Irwin Widney and Schweitzer & Hutton, all of Los Angeles, for respondent.

WORKS, J. [1] Petitioner demands his release from an alleged unlawful detention pursuant to his conviction upon a charge of having violated that portion of section 1 of the Optometry Law (Stats. 1913, p. 1097) providing that no person shall engage in the practice of optometry without having first obtained a certificate of registration from the

State Board of Optometry. Petitioner does not claim ever to have obtained such a certificate, but he contends that his imprisonment is unlawful because of the provisions of section 10 of the Optometry Law to the effect that the act shall not be construed "to prevent duly licensed physicians and surgeons from treating or fitting glasses to the human eye." In other words, petitioner makes the claim that he was a duly licensed physician and surgeon at the time of the commission of the acts which were the basis of the charge against him. Whether or not he then was so licensed is the only question presented for our consideration and decision in this proceeding.

Petitioner is a graduate and holds a degree from a school conducted by the Association of Naturopaths of California, which association is a corporation, having been organized in August, 1904. The officers of the association whose duty it is "to pass upon and determine the educational requirements of students" of the school, are known as the State Board of Examiners of the Naturopathic Physicians of California. At the time of petitioner's graduation and under date March 17, 1905, this board issued to petitioner a certificate to the effect that he "has passed the required examination in all branches of Naturopathic Therapeutics and that the Board of Examiners herewith in consideration of the applicant's qualification and by the authority vested in us by the state of California confers upon Rudolph H. Gerber the degree of doctor of naturopathy with all the privileges, rights and advantages thereunto belonging." This certificate has never been revoked, and petitioner, ever since its date, to quote from his petition in this proceeding, "has continuously engaged within the state of California in the practice of naturopathy, making a specialty of the treatment of the eye."

[2] Counsel for both petitioner and respondent tell us that the word "naturopathy" has never been defined in any dictionary, but notwithstanding that fact we shall experience no great difficulty in determining whether petitioner, in practicing that system, if we may for the moment so designate it, has been following the calling of a physician and surgeon, and also whether he has been licensed to do so. These questions may be resolved, from the facts we have stated above as a basis, upon the provisions of certain statutes and upon certain practices of the State Board of Medical Examiners, a body the nature and functions of which will be dealt with below. It is to be observed, then, as to the facts, that petitioner is a graduate of a school the destinies of whose students are under the control of the State Board of Examiners of the Naturopathic Physicians of California, that upon his graduation this board certified that he had passed the required examination in all branches of naturopathic therapeutics, that they con-

ferred upon him the degree of doctor of naturopathy, and that petitioner has since engaged in the practice of naturopathy, making a specialty of the treatment of the eye. Webster's definition of "therapeutics" is: "That part of medical science which treats of the discovery and application of remedies for disease." He defines the adjectives "therapeutic" and "therapeutical": "Of or pertaining to the healing art; concerned in discovering and applying remedies for disease; curative." The same lexicographer defines "treatment" as the "act or manner of treating; management; handling; usage; as, unkind treatment; medical treatment"; and one of his definitions of the verb "treat" is, "to care for medicinally or surgically." This, he it noted, is the only meaning given by him to the word "treat" which can by any possibility fit the expression "treatment of the eye." It is not difficult, then, from the facts given us, and with the aid of Webster, to formulate the definition that naturopathy is a process or system whereby remedies for disease are discovered and whereby they are applied to the healing of disease.

The statutes which we have mentioned, being the medical practice acts successively passed by the Legislature, contain provisions defining those who shall be regarded as practicing medicine and surgery, and we now turn to them. The first of these statutes was passed in 1876. It provides (Stats. 1875-76, p. 792, § 11) that—

"Any person shall be regarded as practicing medicine, within the meaning of this act, who shall profess publicly to be a physician and to prescribe for the sick, or who shall append to his name the letters 'M. D.'"

This section was amended in 1878 (Stats. 1877-78, p. 918, § 5) to read as follows, in part:

"Any person shall be regarded as practicing medicine, within the meaning of this act, who shall profess publicly to be a physician, or who shall habitually prescribe for the sick, or who shall append to his name the letters 'M. D.'"

The medical practice law of the state was entirely recast by a statute passed in 1901 (Stats. 1901, p. 56). Section 16 of the act contains the following:

"The following persons shall be deemed as practicing medicine or surgery within the meaning of this act: (1) Those who profess to be, or hold themselves out as being, engaged as doctors, physicians or surgeons in the treatment of disease, injury, or deformity of human beings. (2) Those who, for pecuniary or valuable consideration, shall prescribe medicine, magnetism, or electricity, in the treatment of disease, injury, or deformity of human beings. (3) Those who, for pecuniary or valuable consideration, shall employ surgical or medical means or appliances for the treatment of disease, injury, or deformity of human beings, except dealers in surgical, dental or optical appliances. (4) Those who, for a pecuniary or

valuable consideration, "prescribe or use any drug or medicine, appliance, or medical or surgical treatment, or perform any operation for the relief or cure of any bodily injury or disease."

The next act concerning the practice of medicine and surgery was passed in 1907, but it contains no definitions upon the subjects covered by our quotations from the earlier statutes. The act of 1907 will be referred to more at large below.

The facts, as we have outlined them above, and the definitions which we have extracted from the statutes, will go far toward settling the question whether petitioner was engaged in practice as a physician and surgeon at the time of the commission of the alleged offense charged against him. The solution of that problem, however, will be effectively aided by a consideration of the question whether he was licensed to practice whatever calling he was engaged in at the time. From this point forward, in fact, the two questions go hand in hand; so much so that they may be said practically to be one.

Two years after petitioner had commenced the practice of his profession under the diploma issued to him by the State Board of Examiners of the Naturopathic Physicians of California, the Legislature passed the medical practice act of 1907 (Stats. 1907, p. 252). That act contained a certain section 16, the terms of which need not be stated, as we are at present concerned with its provisions as recast by an amendment passed in 1909 (Stats. 1909, p. 418). A part of the section as then amended reads, the italics being ours:

"Any person who holds an unrevoked certificate issued by the board of examiners of the Association of Naturopaths of California, incorporated under the laws of the state of California, August eighth, 1904, and who shall be practicing naturopathy prior to the passage of this act, shall be entitled to practice naturopathy in this state, *the same as if it had been issued under this act.* The board of medical examiners shall indorse said certificate at their first meeting after this act becomes a law, or at any subsequent meeting of the board, but not later than six months after the passage of this act by signature of its president and secretary and affixing its official seal."

In accordance with the mandate of this provision the State Board of Medical Examiners placed its indorsement on petitioner's naturopathic certificate on April 8, 1909.

The clause of the language last above quoted to the effect that one situated as was petitioner "shall be entitled to practice naturopathy in this state, the same as if it [his naturopathic certificate] had been issued under this act," at once inspires inquiry as to the effect of certificates issued under the act (of 1907) by the State Board of Medical Examiners. In truth, it will not be amiss to inquire into the nature and functions of that board under all the medical practice acts, for

they all provide for such a body and define its powers and duties. Under the act of 1876 (Stats. 1876, p. 792) the board was made up of members of the various incorporated state medical societies. It issued certificates authorizing the holders thereof to practice medicine and surgery in the state. These certificates were of two kinds, those which were to be issued to graduates "in medicine" upon the mere production of their diplomas to the board, and those to be issued to persons, not graduates in medicine, who passed examinations conducted by the board. None could practice medicine or surgery without having procured one of these certificates, of either the one form or the other. The act of 1878 (Stats. 1877-78, p. 918) was, as shown by its title, supplemental to and amendatory of the act of 1876. Instead of referring to state medical societies in general, it provided that the Board of Examiners should be appointed from the Medical Society of the State of California, the Eclectic Medical Society of the State of California, and the California State Homeopathic Medical Society. Otherwise, and so far as the functions of the board are concerned, the terms of the act take no material departure from those of the act of 1876. The statute of 1901 (Stats. 1901, p. 56) continued the provision that the board should be composed of members of the three medical societies above mentioned. It required that every person, "before practicing medicine or surgery, or any of the departments of medicine or surgery," must have a certificate issued by the board and authorizing him so to practice. This certificate was to be issued, whether the applicant had a diploma from a medical school or not, pursuant to an examination to be conducted by the board, except that the board might in its discretion issue the certificate without examination in the case of applicants holding certificates issued by the examining boards of other states. The act of 1907 (Stats. 1907, p. 252) was in the main similar to the act of 1901. By its terms, however, the Osteopathic Association of California was, together with the medical societies already mentioned, allowed representation on the board of examiners. The act also evidenced this departure from the terms of the earlier statutes: It provided that three forms of certificate should be issued by the board:

"First, a certificate authorizing the holder thereof to practice medicine and surgery; second, a certificate authorizing the holder thereof to practice osteopathy; third, a certificate authorizing the holder thereof to practice any other system or mode of treating the sick or afflicted."

The earlier statutes had directed alone the issuance of certificates permitting the practice of medicine and surgery. All of these medical practice acts, that is to say, those of 1876, 1878, 1901, and 1907, vest in the board of examiners the power both to refuse and to

revoke certificates on account of the unprofessional conduct of applicants for or holders of them. In the last two acts, those of 1901 and 1907, an elaborate machinery is provided for the conduct of hearings before the board pursuant to charges of unprofessional conduct. A written complaint is to be filed, followed by a written citation issued under the seal of the board to the person against whom the charge is preferred. Time is allowed within which to file written answer to the charge and default is to be entered if no answer is presented within the period. Provision is made for the issuance and service of subpoenas to compel the attendance of witnesses, depositions are to be taken, and "the board shall proceed to determine the matter, to that end shall hear such evidence as may be adduced before it," and it may then refuse or grant certificate, or revoke or refuse to revoke certificate, as the case may require.

If it were not for the language of the act of 1907 to the effect that the examining board may issue certificates in three forms, we might here end our quest. Up to the time of the inclusion of that provision in the chain of medical practice acts the functions of the board concerned only the practice of medicine and surgery, which practice, and no other, we are willing to concede for the purposes of this decision, at least, is conducted by those persons known as physicians and surgeons. In the exercise of its duties up to 1907, then, the board of examiners was the sole arbiter of the destinies of physicians and surgeons. No person might take up the practice of medicine or surgery except upon the duly declared consent of the board, and none might continue in that practice in defiance of its mandate, enunciated after a formal and proper investigation pursuant to a charge of unprofessional conduct. Physicians and surgeons could be made only by the board. Short of death or voluntary retirement from practice, they could be unmade only by the board. The legislative direction that such a body should indorse the certificates of practicing naturopaths, contained in section 16 of the act of 1907, as amended in 1909, would be most significant and would practically control the question whether a doctor of naturopathy follows the calling of a physician and surgeon. The significance of the direction does not entirely disappear because of the provision of the act of 1907 for the issuance of certificates in three forms, but it is materially minimized thereby. We therefore take up for consideration a point which involves what we have referred to early in this opinion as certain practices of the State Board of Medical Examiners.

[3] A statute not yet mentioned by us was passed by the Legislature in 1901 (Stats. 1901, p. 113) for the purpose of regulating the practice of osteopathy. It provided for a board of five examiners to be composed wholly of osteopaths and to be appointed by

the Osteopathic Association of the State of California. That board was to issue certificates allowing the practice of osteopathy, but the act provided that no such certificate should "authorize the holder thereof to prescribe or use drugs, nor to perform major surgery," and that "the system, method and science of treating diseases of the human body, commonly known as osteopathy, is hereby declared not to be the practice of medicine or surgery, within the meaning" of the act of 1876, or of any of the acts amendatory thereof. We have already mentioned the fact that the act of 1907 (Stats. 1907, p. 252) allowed the osteopaths representation on the State Board of Medical Examiners, and it is now pertinent to state the extent of that representation, in fact to state the manner in which the board was to be made up from the various societies and associations. The body was to be appointed by the Governor and was to consist of eleven members, being the total of "five members from a list of ten names presented by the Medical Society of the state of California, two members from a list of four names presented by the California State Homeopathic Medical Society, two members from a list of four names presented by the Eclectic Medical Society of the State of California, and two members from a list of four names presented by the Osteopathic Association of the State of California." It will be observed that nine-elevenths of the board thus provided for were to be selected from the societies whose members formerly and under all earlier statutes had made up the examining boards which had issued certificates only to physicians and surgeons and whose functions related only to the practice of medicine and surgery. It will be remembered, also, that the act of 1907 directed the issuance, as one of the three forms of certificates to be issued by the newly constituted board, of certificates authorizing the holders thereof to practice osteopathy. It is evident, then, that the act of 1907 supplanted the act of 1901 legalizing the practice of osteopathy and providing for a board of osteopathic examiners. We now proceed to a consideration of certain provisions of another act to which we have not yet referred (Stats. 1917, p. 93). This statute contains a provision that the State Board of Medical Examiners "shall, on or before the first day of January of each year, compile and may thereafter publish and sell, a complete directory giving the addresses of all persons within the state of California who hold unrevoked licenses to practice under any medical practice act of the state of California, which license shall in any manner authorize the treatment of human beings for diseases, injuries, deformities of any other physical or mental conditions," and that—

"The directory shall contain in addition to the names and addresses of said persons, the names and symbols indicating the title, name

or names, school or schools, which such person has attended and from which graduated, the date of issuance of the license, the present residence of said person and a statement of the form of certificate held. The directory shall be prima facie evidence of the right of the person or persons named therein to practice."

The facts before us do not show whether the directory thus authorized was issued for years prior to 1921 and 1922, but they do show that it was put forth in each of those years. The publication for each of the years mentioned shows first, as to petitioner, the mere entry "Rudolph H. Gerber, Los Angeles." Some pages beyond this entry appears a statement or note in each directory to the effect that certain affixes used therein show the character of the certificates held by the various "physicians," the letter "O" indicating a license to practice osteopathy and the letter "N" indicating a license to practice naturopathy. This note is followed on a later page in each directory with the entry "Rudolph H. Gerber, 523 S. Westmore Avenue, Los Angeles (N) April 7, 1909." Each directory contains the following statement, arranged, however, in tabular form:

"From August 1, 1901, to August 10, 1913, certificates were issued as follows: To practice medicine and surgery 2,233. To practice osteopathy 258. To practice any other system 0."

It is to be observed that this tabulation is formulated agreeably to the provision of the statute of 1907 requiring the examining board to issue certificates in three forms. We are, then, justified in stating the following recapitulation: As petitioner's certificate as a naturopathic physician was both issued to him and indorsed by the medical board between August 1, 1901, and August 10, 1913, he must be represented somewhere in the figures of the tabulation we have just quoted. The use in the directories of the letter "N" after petitioner's name in opposition to the letter "O" demonstrates that the board did not include petitioner among the 258 persons to whom licenses had been issued to practice osteopathy. They therefore did include him among the 2,233 who had been licensed to practice medicine and surgery, for none had been licensed to practice "any other system." Finally, then, we have, in effect, the declaration of the State Board of Medical Examiners that petitioner is among the physicians and surgeons of the state. We need not dwell upon the importance and controlling weight of this declaration, for if our course of reasoning has shown anything it has demonstrated that the examining board is better qualified than any other person or agency in the state, both in fact and by law, to determine whether a given individual be a physician and surgeon, if we except the courts, for with the courts, as a matter of law, must

finally rest the solution of such a question. We are satisfied with the conclusion of the Board of Medical Examiners as to the standing of petitioner, not only because it has reached that conclusion, but because of the other matters set forth in this opinion. We conclude that petitioner was a physician and surgeon at the time of the commission of the acts out of which the charge against him grew, that he was entitled to practice optometry under the provisions of section 10 of the Optometry Law, and that therefore his detention is unlawful.

Petitioner is discharged from custody.

We concur: FINLAYSON, P. J.; CRAIG, J,

(57 Cal. App. 172)

SMITH v. MASONIC MINES ASS'N et al.
(Civ. 2428.)

(District Court of Appeal, Third District, California. March 25, 1922.)

1. Stipulations $\S$ 18(4)—Party stipulating that only issue was location of single boundary not entitled to object that other issues not tried.

Where, in an action to quiet title, there was an understanding between the court and the respective counsel that the only issue involved was the location of a single boundary, after the case was tried on that theory, a party had no right to object that other issues raised by the pleading were not tried.

2. Boundaries $\S$ 3(3)—Courses and distances give way to ascertained monuments.

In view of Code Civ. Proc. $\S$ 2077, providing that, when ascertained monuments are inconsistent with measurement of lines, angles, etc., the former are paramount, courses and distances must give way to ascertained monuments.

3. Appeal and error $\S$ 1009(3)—Findings based on conflicting evidence conclusive.

Where, in an action to quiet title, the evidence as to the location of a boundary was conflicting, the finding as to its location was conclusive on appeal.

4. Mines and minerals $\S$ 38(18)—Evidence held to support findings as to boundaries of a claim.

Evidence held to support findings as to the location of boundaries of a claim.

Appeal from Superior Court, Mono County; Pat R. Parker, Judge.

Action to quiet title by D. M. Smith, administrator, against the Masonic Mines Association and others. Judgment for plaintiff. Defendant appeals. Affirmed.

Welles Whitmore, of Oakland, for appellants.

Charles L. Hayes, of Bridgeport, and John D. Murphey, of Berkeley, for respondent.

FINCH, P. J. The defendants appeal from a judgment quieting plaintiff's title to certain mining property. The plaintiff alleged ownership in fee of the property and that defendants claimed an interest therein adverse to him. The answer denied plaintiff's ownership and admitted that the defendants claimed an interest in the property.

Defendants demurred to the complaint on the grounds that it does not state facts sufficient to constitute a cause of action, and "that the same is uncertain in that it alleges ownership in fee, in plaintiff, and then bases title on a mining location made by one Ormand Smith." The complaint contains the usual allegations of an action to quiet title, and the reference therein to the mining location by Smith is merely for the purpose of describing the property. Neither ground of demurrer, therefore, has merit.

[1] The property described in the complaint is known as the Snow Shoe mine or mining location. From the briefs it may be gathered that the defendants own the Chemung mine lying to the south of the Snow Shoe, the north end line of the Chemung coinciding with the south end line of the Snow Shoe. Neither party proved ownership and appellants contend that the judgment must be reversed for such failure of proof. At the beginning of the trial the following occurred:

"The Court: The complaint seems to be in the usual form for an action to quiet title. From what has occurred, I take it that the main controversy is as to the boundaries of the claim of plaintiff.

"Judge Murphey: That is the only question in so far as it appears to me to get at, and if I recollect right it is the south line of the Snow Shoe and the north boundary line of the Chemung—is that correct?

"Mr. Whitmore: That is the line in controversy. There may be other questions arise later.

"Judge Murphey: It is the southern boundary line of the Snow Shoe and the northern boundary line of the Chemung claim.

"The Court: The understanding will be for the present at least to limit the testimony to the location of the boundary, assuming that Mox Smith was the owner of the Snow Shoe Mine and that he is now dead, and that action is being brought by his administrator, duly appointed by the order of the court?

"Judge Murphey: For the purpose of determining the boundary line.

"Mr. Whitmore: For that purpose only.

"The Court: That is the purpose only. You may proceed."

In their brief appellants say:

"It developed at the trial that the real controversy was the location of the south end line of the Snow Shoe mine, where it conflicts with the north end line of the Chemung mine."

The evidence of both parties was directed exclusively to the issue so stated. After the understanding had between the court and respective counsel as to the scope of the trial

and after the completion of the trial, on the theory that but the one issue was involved, appellants cannot now be heard to complain that the other issues raised by the pleadings were not tried. Such understanding must be treated as an admission or stipulation by defendants that the plaintiff was the owner of the Snow Shoe.

[2] The appeal is taken on the judgment roll and a bill of exceptions. Finding No. 3 describes plaintiff's mining claim by tracing the boundaries thereof from monument to monument, the description of all monuments being identical and consisting of a "stake 4x4 inches and about 4 feet high, set in a mound of stone." Omitting from the finding the description of the several monuments, the claim is bounded as follows:

"Commencing at the location monument of said claim * * * located 11 feet south from a certain cut known as the Schofield cut * * * and running thence easterly 242 feet, more or less, to the east center side line monument; * * * thence running northerly 631 6/10 feet, more or less, to the northeast corner monument; * * * thence westerly 600 feet, more or less, to the northwest corner monument; * * * thence southerly 636 feet, more or less, to the west center side line monument; * * * thence southerly 724 feet, more or less, to the southwest corner monument; * * * thence easterly 600 feet, more or less, to the southeast corner monument; * * * thence northerly 724 feet, more or less to the east center side line stake of said Snow Shoe mining claim hereinbefore described."

In their specifications of particulars in which the evidence is claimed to be insufficient to sustain the findings, appellants state:

"The evidence is insufficient to sustain finding 3 and particularly in that the location monument of the Snow Shoe mine or mining location was located about 11 feet south of a certain cut known as the Schofield cut, and in that the distance from the location monument to the north end line of the Snow Shoe mine or mining location is found to be 636 feet, when the evidence shows that it is 750 feet, and in that the evidence shows that the location monument is 214 feet northerly of the point where the same is located by said finding."

[3] There was positive evidence that the location monument was originally placed 11 feet north of the Schofield cut. Admittedly the finding is incorrect in locating this monument 11 feet south of the cut, instead of 11 feet north thereof. This error, however, is immaterial, as it forms no part of the described boundaries. The course of measurement from the location monument to the east center side line monument is described as "easterly," and easterly would correctly describe such course whether the location monument be placed 11 feet north of the cut or 11 feet south thereof. The boundary monuments were all in place. Courses and distances must give way to ascertained

monuments. Section 2077, Code Civ. Proc. Defendants introduced evidence to the effect that the location monument was a considerable distance north of the cut, but such evidence merely created a conflict on which the findings are conclusive on appeal.

[4] There is evidence to support the court's finding as to the location of the south end line. George Van Sickle testified:

"I am familiar with the mining location called the Snowshoe. Have seen it many times. I think the Snow Shoe claim was located in October, 1912. I helped measure it off. * * * I have been familiar with the Snow Shoe ever since 1912. The southwest corner of the Snow Shoe was staked. As near as I can tell you it was staked properly. It was square across. The end center line is in the proper place. * * * I saw the south end center stake just after the location was made."

William M. Fuller testified:

"I am familiar with the Snow Shoe claim. I first knew it about October, 1912. I first made an examination of it about the first of the year 1913. * * * All the monuments of the Snow Shoe, except the southwest corner, are about the same as they were. There is a monument there now. Many times there was no monument there. Many times it has been away. I built it up several times myself. The south center monument was about 200 feet south of a large bluff. The north end center of the Chemung is very near the bluff and it has been there ever since I have been in Masonic, and the south end center line of the Snow Shoe is about 200 feet south of that."

The evidence shows that the Snow Shoe was located before the Chemung, and consequently any conflict in the original boundaries must be resolved in favor of the former. From the foregoing it is clear that the findings are supported by the evidence.

The judgment is affirmed.

We concur: HART, J.; BURNETT, J.

(57 Cal. App. 162)

PEOPLE v. DIAMOND. (Cr. 607.)

(District Court of Appeal, Third District, California. March 23, 1922. Hearing Denied by Supreme Court May 22, 1922.)

1. Burglary § 41(1)—Evidence held sufficient to support conviction.

In a prosecution for burglary, testimony as to defendant's unlawful entry of the building, from which he fled when discovered, held to support a conviction of burglary in the first degree.

2. Criminal law § 1186(4)—District attorney's comment on defendant's failure to deny state's testimony held not prejudicial.

In a prosecution for burglary, a remark of the district attorney as to how easy it would be

for defendant to deny the facts testified to by a state's witness, if they were not true, was not such error as resulted in a miscarriage of justice under Const. art. 6, § 4½, where the court instructed the jury not to consider it and that defendant's refusal to testify for himself could not be used against him.

Appeal from Superior Court, Butte County; H. D. Gregory, Judge.

Charles Diamond was convicted of burglary in the first degree, and he appeals. Affirmed.

J. A. McGregor, of Oroville, for appellant. U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

BURNETT, J. [1] The defendant was charged with burglary in the first degree, and he appeals from the judgment and order denying his motion for a new trial. The evidence is amply sufficient to support the verdict. To show the strong and conclusive character of the showing made by the people, we may quote the following testimony of L. C. Webb, who was employed to watch the residence of J. H. Heuberger, the prosecuting witness, on the evening in question while all the family were absent from home:

"I went there, and went inside of the house and sat in the kitchen until some time—an hour or so, I don't know how long—and I got to thinking they might probably try that outer building, and I moved out in to the summer dining room or back porch where I could see the back buildings and stayed there about until 11:30 or somewhere around there. * * * I said about 11:30, or as near as I can figure out, two men approached from the northeast corner of the house and came around to the screen door and tried the screen door and then turned around and walked back around the east end of the porch, and I thought they were going on around, and I stepped back a little to see the door into the kitchen for fear they might try another door, and I heard a sound as if some one was whispering, and I thought they were still at the corner of the screen porch because the east end of the screen porch had a canvas over it and I couldn't see if any one was there, and I presumed they were there after I heard the sound, and I waited, and one of them came about one-half way between the corner and the screen door and came in on it and lit a match and looked in, and after he looked in on the screen porch he walked back to the corner, and they were there for a little bit, and they both came around to this door coming on to this back room and cut the screen and proceeded to walk in, and I halted them and ordered them to throw up their hands, and, instead of throwing up their hands, they whirled and ran out the door, * * * and I fired the shotgun over their heads, and they ran around the corner, and one of them or both of them shot back at me twice."

He further testified that from the street lights and from a match that was struck he

recognized one of the men as Diamond, the defendant, and that he was the one who unhooked the screen and entered the building first. This testimony was not disputed nor discredited in any way, and, manifestly, the unlawful entry of the building by the defendant having been thus shown, it was a rational and almost necessary inference that he there and then had the intent to commit larceny, thereby completing the offense of burglary. We may add that the presence of the watchman is accounted for by the circumstances that it was the custom of Mr. Heuberger and his family to be away attending a dance every Friday evening—that being the day of the week in question—and that he had reason to believe that his premises had been invaded by trespassers on previous occasions.

It is not claimed that the evidence does not warrant the verdict, but criticism is made of certain rulings of the court upon the admissibility of evidence and of a certain statement of the district attorney in his closing argument to the jury.

We deem it unnecessary to notice specifically these rulings, but it is sufficient to say that we have examined them with care, and, if it be conceded that doubt may exist as to the propriety of some of them, it is quite apparent that if any error was thereby committed it did not result in any prejudice to the substantial rights of the defendant.

[2] Said remark of the district attorney was as follows:

"The testimony of Mr. Webb stands absolutely uncontradicted; the defense cannot prove that he was not at that house that night and did not do the thing that Webb said he did—break into the house by ripping out the screen door and unlocking it and went in armed with a loaded pistol and he fired back through the wire at Webb, with the undoubted intention of killing him. Now the defendant cannot deny that; the fact stands uncontradicted before you; if the defendant wanted to deny it—I mean if it were not true—how easy it would be for him to deny it."

Thereupon the record shows the following proceeding:

"Mr. McGregor: We will object to the last remarks of the district attorney and assign them as prejudicial error. (At this time at the request of the court the foregoing remarks by the district attorney are read by the reporter.)

"The Court: The refusal of the defendant to—not to take the stand and testify for himself, cannot in any manner prejudice him or be used against him in the trial. Therefore the statement last made by the district attorney will be stricken out and you will not consider that at all against this defendant."

Appellant cites several cases in which it was held that such conduct of the district attorney constituted prejudicial error, and of these, one, to wit, *People v. Mirandi*, 38

Cal. App. 178, 175 Pac. 653, was decided since the adoption of section 4½ of article 6 of the Constitution. But in the *Mirandi* Case the error denounced by the appellate court consisted in the action of the trial court in overruling the defendant's exceptions to the unwarranted remark of the district attorney, while herein the trial court properly and correctly instructed the jury as to their duty in the matter. Moreover, in that case, the evidence of guilt was circumstantial and not so convincing as to justify the appellate court in excusing the flagrant error.

This case is governed by the principle laid down in *People v. Kromphold*, 172 Cal. 512, 157 Pac. 599, wherein it was said:

"While it was wrong for the district attorney to comment at all on the failure of defendant to testify upon this subject, it would be most unreasonable to assume in the light of the attitude of the trial judge in the matter and the nature of the remarks that the jury could have been influenced to the prejudice of the defendant by the statement complained of. See *People v. Sansome*, 98 Cal. 235, 33 Pac. 202. Certainly we cannot hold that this statement 'has resulted in a miscarriage of justice.' Section 4½, art. VI, Const."

We are assured that herein it would be a gross "miscarriage of justice" to reverse the cause, and the judgment and order are therefore affirmed.

We concur: FINCH, P. J.; HART, J.

57 Cal. App. 169

IN RE HAMALIAN'S ESTATE.

HAMALIAN v. BABIGIAN.

(Civ. 4104.)

(District Court of Appeal, First District, Division 2, California. March 25, 1922.)

1. Executors and administrators $\S$ 194(5) — Prima facie case in application for family allowance made when separation agreement shown to the advantage of husband.

Separation agreement, whereby husband transferred to wife an undivided one-half interest in property of the value of \$6,000, and the wife transferred to the husband her interest in property of the value of \$41,000, showed upon its face that the husband secured an advantage, and under Civ. Code, § 2235, made a prima facie case in an application for family allowance.

2. Courts $\S$ 200¼—Probate court has jurisdiction to consider application for family allowance.

The probate court has jurisdiction to consider an equitable attack by a wife upon separation agreement made with her husband.

Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

In the matter of the estate of George H. Hamalian, deceased, Nevrik Hamalian against Ed. S. Babigian, administrator. Appeal by widow, from an order dismissing her petition for family allowance. Reversed.

George Cosgrave, of Fresno, for appellant.
Ohannesian & Ohannesian and Harris & Hayhurst, all of Fresno, for respondent.

STURTEVANT, J. This is an appeal from an order dismissing the petitioner's application for a family allowance. The petitioner and the decedent were married in February, 1913; their relations were not amicable, and from time to time they lived separate and apart. The last separation occurred May 8, 1919, and on the 26th of May, a purported settlement was made between the petitioner and the decedent of and concerning their property rights. Shortly after that purported settlement the husband died, July 3, 1919. Administration on his estate was commenced, and thereafter the administrator filed in the probate court an inventory and appraisal which showed an estate of an apparent valuation of \$41,974.88. When that inventory had been filed the petitioner applied for a family allowance. In her petition she set forth the making of the purported property settlement, but alleged that the same was obtained by and through the false representations made to her by the decedent, and was obtained by and through his coercion. A hearing of said petition was had in the trial court, and the petitioner called to the stand seven witnesses, and also introduced certain documentary evidence. When the petitioner had rested the respondent administrator moved that the application be denied. As shown by the record, both court and counsel looked upon the motion as a motion to dismiss, and as such the trial court ruled on it. On her appeal the appellant claims that she had made a prima facie showing as to false representations and coercion. As to false representations there is some evidence in the record that the decedent stated that he was worth \$6,000, whereas, in truth and in fact, he was worth \$40,000, or thereabouts. There is neither allegation nor proof that the appellant relied or acted upon any representation made by the decedent. As resting upon coercion the showing contained in the record is that, at the time the decedent called on the appellant

for the purpose of negotiating the property settlement, he talked in a loud tone of voice; "he hollered." If the relation of husband and wife, a highly fiduciary relation, was not shown by the record, it must be conceded that the record was so weak as not to support any other ruling than as made by the trial court.

[1] But, disregarding the alleged false representations and coercion, the record as made showed another set of facts, which, taken alone, made out a prima facie case in favor of the petitioner at the time she ceased the introduction of evidence. At that time it had been proved without contradiction that the appellant and the deceased were husband and wife on the 26th day of May, 1919; that on that date a purported contract was made between them, under and by virtue of which the deceased transferred to the wife his undivided one-half interest in certain real and personal property of the value of \$6,000, and that at the same time the appellant transferred to the decedent her interest in properties of the value of over \$41,000. On the face of the transaction the husband obtained an advantage. The properties the appellant had transferred her interest in may have been heavily mortgaged, and the interests of both parties may have been nominal. Again, although the appellant executed a deed, in form a grant, bargain, and sale deed, the fact may transpire that she had no interest whatever to convey, and therefore she was not wronged. In the face of a motion for a dismissal, when the motion is made at the end of the plaintiff's case, the evidence must be taken most strongly in favor of the plaintiff or petitioner, and, as so construed, the petitioner had made a prima facie showing under the rule stated in section 2235 of the Civil Code. *McKay v. McKay*, 184 Cal. 742, 195 Pac. 385.

[2] During the argument, a question arose as to the jurisdiction of the probate court to consider the equitable attack made by the petitioner. The point was not discussed in the briefs. The point has been definitely decided in this state, and the question above mentioned is without merit. *Estate of Yoell*, 164 Cal. 540, 554, 129 Pac. 999; *In the Matter of the Estate of Cover* (Cal. Sup.) 204 Pac. 583.

It was error, therefore, to dismiss the appellant's petition, and the order should be, and the same is, reversed.

We concur: LANGDON, P. J.; NOURSE, J.

(57 Cal. App. 202)

PEOPLE v. CRIMMIN. (Cr. 590.)

(District Court of Appeal, Third District, California. March 28, 1922.)

1. Homicide — 237—Evidence held to justify finding defendant sane.

In a murder prosecution, evidence held to justify the jury in finding that the defendant was not insane at the time of the killing.

2. Criminal law — 554—Jury is not bound to accept defendant's testimony.

A jury is not bound to accept as true even the uncontradicted testimony of defendant, especially where facts were exclusively within his own knowledge, and there is no means of disproving his testimony.

3. Criminal law — 834(3)—Instruction on intoxication and insanity held properly modified.

Where the court gave defendant's instructions that defendant's intoxication at time of homicide would not excuse him, but if intoxication had ceased and been followed by insanity, he could not be held accountable, it was proper to strike the concluding words, "The question to be determined is whether or not he was intoxicated or insane, and if you find that he was insane, it matters not how such insanity was produced. Insanity produced by intoxication is just as much insanity as insanity produced by any other cause," since it might mislead the jurors into believing that insanity immediately produced by voluntary intoxication, which disappears on return of soberness, is a defense.

4. Criminal law — 1137(3)—Defendant conceding correctness of instruction may not complain that one he requested is inconsistent with it.

Where appellant has conceded that one instruction correctly states the law applicable, he cannot complain of any inconsistency between it and another instruction which he himself proposed.

Appeal from Superior Court, San Joaquin County; George F. Buck, Judge.

Michael Crimmin was convicted of manslaughter, and he appeals from the judgment and from an order denying a new trial. Affirmed.

Henry Brickley and Frank E. Murphy, both of Stockton, for appellant.

U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

FINCH, P. J. The defendant appeals from a judgment of conviction of the crime of manslaughter and from the order denying his motion for a new trial.

At about 11:30 a. m. March 18, 1921, the defendant was arrested for drunkenness at Stockton, and placed in the "drunk cell" of the county jail with other intoxicated men. At 4:10 p. m. the jailer entered the cell to give the prisoners their meals, and found

them all asleep. He called them two or three times, but did not succeed in awakening them. At 10:15 that evening one of the prisoners was found dead upon the cell floor, the skull fractured in several places, some of the bones of the face broken, the neck bruised and dislocated, and with blood on the face and hair. The defendant at that time was lying in his bunk. His shoes and pants were bloody. The officer said to him: "That man is dead. Did you do it?" The defendant replied: "I guess I will be tried for murder." One of the witnesses testified that between 8 and 9 o'clock the next morning the defendant said: "I have been drinking very heavy. * * * I have been drinking alcohol." On being asked if he hit the deceased the defendant said: "Yes; I hit him; he annoyed me in my cell, pulling my clothes, and I think I knocked him down. * * * I went back and went to bed, and he came after me again. * * * I got up and hit him again." When asked if he kicked the deceased and why, the defendant replied: "I think so. * * * I think he called me a son of a bitch." Another witness gave substantially the same testimony, and stated that the defendant said: "Well, it seems like a dream. * * * I guess I got the delirium tremens."

[1, 2] At the trial the defendant testified that for 10 days prior to the homicide he had been "drinking denatured alcohol, lemon extract, Jamaica ginger, and wintergreen"; that the night of the homicide he heard voices calling him vile names and threatening to kill him; that he saw a horse, which was singing a song called "Casey Jones"; that he saw a cat dancing a jig; that he noticed hands and rats and swarms of red ants; and he related other things, which he imagined he saw and experienced. Basing their answers on defendant's testimony, several physicians testified that in their opinion he was insane at the time of the homicide. From October, 1914, to May, 1915, the defendant was confined in the state hospital at Stockton for insanity produced by intoxication. In 1917 he was in the Merced county hospital a month for alcoholism.

Appellant contends that the evidence shows without substantial conflict that the defendant was insane at the time of the homicide. Enough has already been stated to show that the jury was justified in finding to the contrary. It further appears that the defendant not only gave the officers an account of what occurred, but that he testified at his preliminary examination and was examined by the medical staff of the state hospital. At no time prior to the trial did he mention the hallucinations with which it is now claimed he was afflicted on the night of the tragedy. A jury is not bound to accept as true even the uncontradicted testimony of

a defendant, especially where the facts are exclusively within his own knowledge and there is no means of disproving the testimony. His story here is substantially contradicted by his previous statements and the surrounding circumstances.

[3] The court gave an instruction which, as stated by appellant, "is in the language of Mr. Justice Henshaw in the case of *People v. Fellows*, 122 Cal. 233, 54 Pac. 830, cited and approved in *People v. Hower*, 151 Cal. 638, 91 Pac. 507." Appellant says:

"As an abstract proposition of law it is undoubtedly correct, but we contend it is inapplicable to the facts in the case at bar."

Appellant's contention is based upon his claim that the evidence shows without conflict that the defendant was suffering from delirium tremens, but there was ample evidence to support the inference that he was suffering from drunkenness instead.

The defendant proposed the following instruction and the court gave it as modified by striking out the part inclosed in parenthesis:

"It is true that under the laws of this state no act committed by a person while in a state of voluntary intoxication is less criminal by reason of his having been in such condition, yet there is a distinction to be made between a state of intoxication and a condition of mind following such state of intoxication. If at the time of the commission of the alleged homicide the defendant was actually intoxicated such state of intoxication would not justify or excuse him in the commission of the homicide. But if, on the other hand, the state of acute intoxication had ceased and another condition of mind had taken its place and such condition of mind rendered him insane and irresponsible for his acts and conduct, then he cannot be held accountable for such acts and conduct. (The question to be determined is whether or not he was intoxicated or insane, and if you find that he was insane it matters not how such insanity was produced. Insanity produced by intoxication is just as much insanity as insanity produced by any other cause.)"

The modification was manifestly proper. The part stricken out is subject to the objection discussed in *People v. Fellows*, 122 Cal. 233, 54 Pac. 830. The part stricken out would naturally tend to confuse the jurors and lead them to believe that insanity, or mental derangement, immediately produced by voluntary intoxication, and which disappears on the return to soberness, is a defense to a criminal charge. If by the part stricken out it was intended to refer to the insanity mentioned in the preceding sentence, then it states no principle of law not embraced within the instruction as given.

[4] At the request of defendant the court gave an instruction on the subject of temporary insanity which appellant contends is in conflict with that first herein considered.

Having held that the first instruction is applicable to the facts, and appellant having conceded that it correctly states the law, he cannot complain of any inconsistency between it and an instruction which he himself proposed.

The judgment and order are affirmed.

We concur: BURNETT, J.; HART, J.

57 Cal. App. 78

HALL v. INDUSTRIAL ACCIDENT COMMISSION et al. (Civ. 3773.)

(District Court of Appeal, Second District, Division 1, California. March 14, 1922.)

Master and servant — 367—Truck owner hauling milk for dairyman held "independent contractor" not "servant" or "employee" within Compensation Act.

A motor truck owner in the trucking business, who contracted to haul milk daily for a dairy man at a specified price, having complete charge of the hauling, paying the expenses thereof, guaranteeing timely transportation, and free to haul for others, was an "independent contractor" not a "servant" or "employee" within Civ. Code, § 2009, and the Workmen's Compensation Act, and therefore not entitled to compensation under the act and Const. art. 20, § 21.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Employé; Independent Contractor; Servant.]

Proceeding by David Ramgren against E. D. Hall, for compensation under the Workmen's Compensation Act. From an order of the Industrial Accident Commission awarding compensation, petitioner Hall applies for a writ of certiorari. Award annulled.

Earl D. Killion, of Los Angeles, for petitioner.

A. E. Graupner and Warren H. Pillsbury, both of San Francisco, for respondents.

JAMES, J. By this proceeding there is presented to the court for review an award made by the industrial accident commission, together with the evidence heard in support thereof. One Ramgren made application under provisions of the Workmen's Compensation Act (St. 1913, p. 279, as amended by St. 1917, p. 831) to secure an order allowing to him compensation on account of injuries alleged to have been suffered while in the employ of petitioner. An award was ordered by a majority of the commissioners, the third member dissenting therefrom. It is insisted that the award cannot be sustained for two principal reasons: (1) Because Ramgren was, at the time he was injured, acting not as the employee of Hall but as an independent

contractor; (2) conceding that Ramgren was such employee, that the act which he was engaged in doing was one wholly outside of the discharge of any duty owing to or required of him by his employer.

Under the undisputed facts as the record shows them to be, we are of the opinion that the commission erred in its decision, and that the award cannot be allowed to stand. Petitioner, Hall, was a rancher and dairyman. As a dairyman he produced a considerable quantity of milk, which he daily transported from his dairy in Lankershim to a creamery in the city of Los Angeles. Some of the neighboring ranchers were also engaged in the dairy business. Prior to the time that Ramgren began to haul petitioner's milk, petitioner had it transported through the agency of a person who was doing truck service between Lankershim and Los Angeles. This person sold his business to a second one and the latter continued to carry it on for a short while when, being unable to keep up payments which he had agreed to make to his predecessor on account of the purchase of a motor truck, he abandoned the business. Petitioner arranged to purchase that truck, but, so far as the record shows, did not operate it in handling the milk. Ramgren owned a motor truck and for a number of months—eight or more—had engaged in doing hauling for ranchers and any other persons who might be desirous of securing his services. Petitioner, about October 1, 1920, made a contract with Ramgren to have the latter haul the former's milk daily to Los Angeles. The price agreed upon for the service was \$9, if one load was hauled and delivered, and \$14, if two trips were made on the same day. Petitioner included the milk of two of his neighbors in making up the loads, and he received from them 18 cents per can for the delivery. He stated, however, that he made no profit on account of transportation of this last-mentioned milk. On the sixth day after Ramgren commenced to haul the milk, he arrived at one of the creameries at which he was to make delivery, and, finding a truck ahead of him being unloaded, started to assist the operator of that truck in passing the cans of milk into the creamery. This he did in order to expedite his own delivery. While placing a can of milk upon an automatic conveyor the fingers of one hand were caught between the can and a beam and badly crushed.

The situation, then, as to the facts material to a consideration of the points mentioned was that petitioner, having a quantity of milk which he desired to have daily transported from Lankershim to Los Angeles creameries, contracted with Ramgren, who was engaged in the trucking business, to have the milk carried at a specified price, varying as to whether there were one or two loads hauled on the same day. Ramgren, in

his testimony before the commission, stated that this "employment" with Hall did not prevent him from using any time that might not be occupied in actually transporting the milk, to do hauling for other persons. He stated that it was required of him to furnish the truck and fuel and oil, and that, if anything happened to the truck on the trip, it would be his (Ramgren's) duty to secure other means of transporting the milk. In other words, Hall was without the right to in any manner control the actions or movements of Ramgren. Hall was entitled only to insist that the milk be taken away from the place where it was produced at a seasonable time and delivered with reasonable expedition. As to the route which Ramgren might take, or the manner in which he might handle his own truck, these were matters wholly beyond the right of any control in Hall. We agree with the conclusion expressed by Commissioner Naftzger, in his dissenting opinion, that the facts of this case closely parallel those considered in *Flickenger et al. v. Industrial Accident Commission et al.*, 181 Cal. 425, 184 Pac. 851. The conclusion announced by the Supreme Court in that decision was that the claimant was an independent contractor and therefore not entitled to compensation under the act hereinbefore referred to. Counsel for petitioner pertinently cites *Fidelity & Deposit Co. v. Brush*, 176 Cal. 448, 168 Pac. 890, and section 2009, Civil Code, to the same point. Section 2009, in defining the term "servant"—which is synonymous with "employee"—declares that such person is one who is employed to render personal service to his employer, "otherwise than in the pursuit of an independent calling and who, in such service, remains entirely under the direction and control of the latter, who is called his master." In the *Flickenger Case*, supra, our Supreme Court also determined that the Legislature has no power, by any amendment to the Workmen's Compensation Act, to provide that an independent contractor, as the law had determined his character to be prior to the adoption of article 20, § 21, of the Constitution, may claim the benefit of that act, nor to enlarge the definition of the word "employee" as the same was then understood and defined.

Certain other facts shown in evidence we deem immaterial to a consideration of the question just discussed. Those facts were that the state railroad commission, as well as the public utility department of the city of Los Angeles, require certain permits to be secured by persons operating truck businesses, and that Hall, in order to enable Ramgren to transport petitioner's milk, made application as principal for those permits. As a matter of fact, the permit of the railroad commission was not ordered to be issued to Hall until some time after Ramgren had entered upon the discharge of his contract and

after he had suffered his injury. The question here concerns not a matter of permits or the regulations of any board, but the legal relation of the parties, as determined by the obligations of their contract and the methods to be used in discharging the same. Petitioner could not have required Ramgren to desist from doing the act in which he was engaged at the time he received his injury; had he assumed to give any such direction, Ramgren might well have answered:

"Under our engagement I have the right to use my own judgment as to means and methods, and the only thing that you can require of me is that your milk shall be taken and delivered at the specified times."

Clearly the rights which could properly be insisted upon by Ramgren show that his position was that of an independent contractor and that he was not a servant or employee of petitioner in any legal sense whatsoever.

Had we reached the conclusion that the relation of employer and employee existed, we would be inclined to hold that, as to the second contention made, petitioner was in error. We think that, assuming the existence of the relation of employer and employee, there was some substantial ground for concluding that the acts being done by Ramgren, at the time he received his injuries, were for the direct benefit of the employer and reasonably included within the scope of his duties. It is unnecessary to analyze the evidence further, particularly that referring to the fact that petitioner arranged for the delivery of other milk than his own, which evidence was material mainly to the claim that petitioner's business was exempt from the provisions of the Compensation Act.

The award is annulled.

We concur: CONREY, P. J.; SHAW, J.

87 Cal. App. 176

JUDSON MFG. CO. v. S. L. JONES & CO.
(Civ. 4098.)

(District Court of Appeal, First District, Division 1, California. March 27, 1922.)

1. Principal and agent — 148(2), 151(2)—Agent's notifying seller of refusal to accept delivery after certain hour held notice that agency to receive terminated at such hour; receipt of goods after termination of authority not binding on principal.

The authorized spokesman for the receiving agent of a company operating a steamer selected by the purchaser of goods to receive same for shipment when delivered at its dock was the purchaser's agent, whose statement to the seller's representative that any shipment received after a certain hour would not be shipped operated as a notice from the purchaser

that the company's agency to receive terminated at that hour, so that, if the company, after that hour, without further request by the purchaser, assumed to act as the purchaser's agent in receiving the goods, such act would not be binding on the purchaser.

2. Estoppel — 83(1) — Seller estopped by promise to take possession of goods not delivered by certain hour from claiming value thereof on ground it did not retake possession.

Where a seller's representative, on being informed that the company operating a steamship selected by the buyer for shipment of a quantity of goods to be delivered at its dock would not receive goods delivered after a certain hour, stated that the seller would take possession of loads delivered thereafter, and the buyer relied and acted thereon, the seller could not change its position to the buyer's injury by stating that it did not retake possession of a load, for the value of which it sued.

3. Sales — 161—Railroad, by which seller consigned goods to buyer, held not latter's agent because contract did not specially designate place of delivery in city named.

As respects the question of delivery to carrier as being delivery to buyer, a railroad company, by which a seller consigned goods to a buyer in a named city, was not the buyer's agent because no place of delivery in such city was specially designated, the buyer being entitled to select the point of delivery and give the seller notice in due time.

Appeal from Superior Court, City and County of San Francisco; George E. Crothers, Judge.

Action by the Judson Manufacturing Company against S. L. Jones & Co. Judgment for defendant, and plaintiff appeals. Affirmed.

Thomas, Beedy & Lanagan, of San Francisco, for appellant.

Powell & Dow and W. A. Dow, all of San Francisco, for respondent.

STURTEVANT, J. This is an action to recover the value of goods, wares, and merchandise sold and delivered. The defendant interposed an answer in which it denied the delivery, and also set up an estoppel. The defendant was given a judgment in the trial court, and the plaintiff appealed.

The case was tried on its merits. The trial court made copious findings, in which it found, among other things, that there was no delivery, and that the plaintiff was estopped from claiming that a delivery was had. For some months the plaintiff and defendant had been engaged in making numerous contracts for the purchase and sale of iron and steel products. Each of those transactions had been carried forward and completed without any controversy arising between the parties. Then, on January 17, 1918, the defendant wrote a letter to the

plaintiff placing an order for goods "f. o. b. steamer San Francisco, * * * shipment —per S. S. Hudson Maru, scheduled to sail from San Francisco March 23," 1918, and which order was designated (purchaser's record) No. 232. On February 11, 1918 (purchaser's record) No. 259, the defendant purchased another bill of goods "f. o. b. steamer San Francisco, * * * shipment by April 24," 1918. Following the practice theretofore existing between them, the defendant notified the plaintiff before February 28, 1918, that the defendant had obtained shipping space and asked that the goods designated in both of the above-mentioned orders should be delivered on board the Yuki Maru scheduled to sail March 4, 1918. After that request was received, and on February 28, 1918, the plaintiffs shipped by Southern Pacific from its factory at Emeryville the goods designated, in car N. W. P. No. 4805 and car S. P. No. 53012, the goods mentioned in both orders. As early as 8 o'clock a. m. on March 1, 1918, the defendant knew of such shipment, and between 8 and 9 o'clock a. m. of that date Mr. H. B. Harmon, representing the plaintiff, and Mr. D. R. Nunez, representing the defendant, met at pier 54, where the steamer Yuki Maru was loading. Such meeting was pursuant to mutual notices exchanged by letters and telephonic messages. At that time the representatives of both parties were endeavoring to ascertain whether or no the shipments could legally be made without violating regulations of the federal government. Before going further, it is proper to state that from the record before us the Associated Terminals Company, a corporation, was the duly appointed agent to receive at pier 54 for those operating the steamship Yuki Maru, freight to be taken on board of that vessel, and that G. W. Wilson was one of the agents of the Associated Terminals Company authorized to act for that company. When, therefore, Mr. Harmon and Mr. Nunez appeared on the wharf, and talked to Mr. Wilson, they were talking to the agent or subagent of the defendant—because Mr. Wilson was the spokesman for the Associated Terminals Company, and that company was the receiving agent for the steamship company that operated the Yuki Maru, the carrier selected by the purchaser. When they appeared on pier 54, and up to the time that they left that pier, according to the uncontradicted testimony in the record, the freight cars hereinabove mentioned had not been placed on the dock. A three-cornered conversation occurred, in which the real point at issue was whether or not the cargoes contained on the two cars could be received and shipped after midnight February 28, 1918, because the new federal regulation had taken effect at that hour. The conversation was of such a nature that Mr. Harmon and Mr. Nunez were definitely advised

by Mr. Wilson that any shipment of iron or steel received after 12 o'clock midnight, February 28, 1918, could not and would not be received on board the Yuki Maru. It is a conceded fact that the Yuki Maru was to sail, and did sail, March 4, 1918. Defendant's order No. 259, although shipped from Emeryville February 28, 1918, in car 53012, was not received and was not shipped on the Yuki Maru, but was shipped in the Siberia Maru on a later date, was duly paid for, and is not an issue in this case.

The plaintiff introduced in evidence a duplicate copy of a receipt issued to the Southern Pacific Company by the S. S. Yuki Maru Trans-Oceanic Company, "Receipt for freight delivered," then, "No. 046, N. W. P. 4805, Car No. S. L. Jones & Company. Pier 54. Received of Southern Pacific Company the following article, way bill from Emeryville, point of shipment. Consignor: Judson Iron Works. Date of way bill, 1/3/28. Number of way bill, 1342." Under the heading "Articles" the following: "C. L. Bar Steel. S. L. Company. Yuki Maru. Unloaded 3/2/18, 5 a. m., 561 bars steel." In the lower left-hand corner: "S. S. Yuki Maru. Trans-Oceanic Company. H.," and "561" in a circle. It will be noted that the receipt shows on its face that the car was unloaded March 2, 1918, at 5 a. m. In this connection it is important to state that Mr. Nunez testified that, when he and Mr. Harmon were on the dock at 8 a. m., March 1, 1918, car 4805 was not on the dock. He also stated that neither of the cars were on the dock, and that the dock was comparatively clear of cars, and that cars on the dock could be readily seen and enumerated.

After talking to Mr. Wilson and having heard from him that cars 4805 and 53012 had not arrived in time, and that the loads on the same therefore could not legally be accepted, Mr. Harmon and Mr. Nunez went to the office of the Southern Pacific on Market street and endeavored to get that company to assist them in getting the loads placed on board the steamer. They were advised by the Southern Pacific officials that it was impossible. From there they went to the war trade board and talked to Mr. C. O. G. Miller, the head of the board. Mr. Miller informed them that they were not allowed to ship the steel out of the country at that time if it had not been put on board before 12 o'clock midnight February 28, 1918. They then left Mr. Miller's office, and before they separated Mr. Nunez asked Mr. Harmon if he would take care of the goods until an export license could be obtained. Mr. Harmon said that he would do so as to both cars. He said he would take the two cars to the warehouse of his company. And it may be stated in passing that Mr. Harmon duly issued the proper orders to bring about such a result, and that his associates endeavored during

the following weeks to locate car 4805, but failed in their endeavor, but that car 53012 was taken to the warehouse as agreed. On March 2—that is, the next day—Mr. Nunez in a letter repeated the substance of the conversation (Defendant's 2), and on March 4 Mr. Harmon answered that letter and confirmed the agreement (Defendant's 2).

Therefore it had been the practice followed by Mr. Harmon that when a delivery was made he would present a bill for the amount thereof. As to the load on car N. W. P. No. 4805 he never presented a bill.

A few days later the Southern Pacific presented to the defendant its bill for freight. The defendant immediately notified the Southern Pacific that the bill should have been presented to the plaintiff, and at the same time sent copies of the correspondence to the plaintiff.

In this condition the matter rested until August. Whatever became of the shipment is not known. Assuming that the Associated Terminals Company and the Trans-Oceanic Company had been designated as the agents of the defendant the foregoing facts show that both companies had declined to act as such agents after midnight, February 28, 1918. That those companies had so declined Mr. Harmon and the plaintiff had direct and positive notice. If thereafter, without further request on the part of the defendant, the shipping company assumed to act as the agent of the defendant, such act on its part would not be binding on the defendant.

[1] From the facts which we have recited it seems to us that it is patent that, whether the load of N. W. P. No. 4805 was ever placed on board the Yuki Maru, nevertheless such placing was not a delivery as against the defendant. Although the Trans-Oceanic Company had been selected by the defendant, as the agent of the defendant, the shipping company had expressly and positively declined to accept the shipment on behalf of the defendant, and this fact was stated in the presence of the agent of the plaintiff. Until thereafter the defendant was further notified, and until it had given further instruction, the shipping company had ceased to be its agent. 2 C. J. p. 554; Van Dusen v. S. Q. M. Co., 36 Cal. 571, 95 Am. Dec. 209.

[2] And it further appears that the case, as presented by the foregoing facts, shows that on the 1st day of March, 1918, the plaintiff, through Mr. Harmon, stated that it would take possession of the loads on the two freight cars; that such statement was made in the best of good faith, intentionally and deliberately, and led Mr. Nunez and the defendant company to believe, and they did believe, the statement, and did act thereon. Having done so the plaintiff may not change its position to the injury of the defendant by stating that it did not retake possession of

the load on N. W. P. No. 4805, and it cannot thus claim the value of said load as against the defendant.

[3] The appellant claims that the Southern Pacific was the agent of the defendant in the foregoing transactions, and cites Meyer v. Sullivan, 40 Cal. App. 723, 181 Pac. 847. As we understand the claim, it is that the contract did not name a place of delivery. In this we think, that the appellant is in error. The contract did name a place of delivery, to wit, San Francisco, and the most that can be said is that no point was specially designated in San Francisco. Under such facts the defendant was entitled to thereafter select the point, and in due time to give the plaintiff notice thereof. This it did, and both parties acted thereon. Under these circumstances it is quite clear that the Southern Pacific was acting as the agent of the plaintiff and not of the defendant.

We find no error in the record. The judgment is affirmed.

We concur: LANGDON, P. J.; NOURSE, J.

57 Cal. App. 243

REED et al. v. CLARK et al. (Civ. 3896.)

(District Court of Appeal, Second District, Division 1, California. April 3, 1922.)

1. Appeal and error $\S$ 612(2), 640—Order denying motion to vacate default affirmed, where transcript containing judgment roll is not certified by judge.

An order denying a motion to vacate a default judgment will be affirmed, where the contents of the transcript containing the judgment roll and other documents have been certified by the clerk only, and not by the judge who determined the motion.

2. Appeal and error $\S$ 1135—Where mere inspection of record discloses no right to relief, order appealed from will be affirmed.

Where a mere inspection of the record discloses that appellant can obtain no relief, the order appealed from will be affirmed for lack of record showing error.

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Action by Mary E. Reed and another against Stephen A. D. Clark and another. From an order denying defendants' motion to vacate a default, they appeal. Affirmed.

C. Franklin Baxter, of Los Angeles, for appellants.

James P. Clark, of Los Angeles, for respondents.

CONREY, P. J. The defendants have appealed from an order made by the superior court on the 16th day of May, 1921, which was an order made after entry of judgment in the

action. By said order the court denied a motion of the defendants to vacate the default entered against them, and to set aside an order striking out their fourth amended answer, and that they be permitted to file a fifth amended answer.

[1, 2] Respondents now move that the order appealed from be affirmed, for the reason that appellants have not filed any transcript containing any judgment roll or bill of exceptions upon which said appeal might be considered. There is a typewritten transcript which contains the judgment roll and some additional documents in the form of notices and affidavits. The contents of the transcript have been certified by the clerk, but there is no certificate by the judge of the superior court. The situation is closely parallel to that shown in *Barnabee v. Hunstock*, 42 Cal. App. 659, 183 Pac. 951. Pursuant to authorities there cited, it was held that, where the order appealed from is subsequent to the judgment, and arises on a record outside the judgment roll it is not for the clerk, but for the judge who determined the motion, to certify the papers and proceedings on which the order appealed from was made, and that in the absence of a record on which the merits of the appeal could be determined, the order should be affirmed. Where a mere inspection of the record discloses that appellant can obtain no relief, "the proper order would be one of affirmance of the order upon appeal for lack of record showing error." *Hibernia Sav. & Loan Socy. v. Doran*, 161 Cal. 118, 118 Pac. 526.

The order is affirmed.

We concur: SHAW, J.; JAMES, J.

57 Cal. App. 187

GREATHOUSE v. DALENO. (Civ. 3673.)

(District Court of Appeal, Second District, Division 1, California. March 27, 1922. Hearing Denied by Supreme Court May 25, 1922.)

1. Evidence — 397(1)—Parol evidence inadmissible where it varies terms of contract, but admissible where it does not contradict writing.

Under Civ. Code, § 1625, and Code Civ. Proc. §§ 1856, 1860, parol evidence is generally not admissible to vary the terms of a contract which is complete in all its terms, but is admissible where it in no way changes or contradicts the instrument.

2. Evidence — 442(1) — Rule that written agreement supersedes negotiations not applicable to collateral agreement not purporting to affect terms.

The rule that an agreement in writing supersedes all prior or contemporaneous oral negotiations or stipulations concerning its matter has no application to a collateral agree-

ment upon which the instrument is silent, and which does not purport to affect the terms of the instrument.

3. Evidence — 442(5) — Contemporaneous agreement requiring owner to remove trees to permit contractor to grade land held effectual.

Where written contract to grade certain land on which there were a large number of trees, and to complete the work on a certain date, did not provide for removal of the trees, contemporaneous agreement requiring an owner to remove the trees held effectual, under Civ. Code, §§ 1597, 1598, and Code Civ. Proc. §§ 1856, 1860.

Appeal from Superior Court, Tulare County; J. A. Allen, Judge.

Action by H. B. Greathouse against Fred Daleno. Judgment for plaintiff, and defendant appeals. Affirmed.

Hearing denied by Supreme Court; WILBUR, J., dissenting.

Farnsworth, McClure & Burke and Dickson F. Maddox, all of Visalia, for appellant, Earl A. Bagby, of Visalia, for respondent.

CONREY, P. J. On the 24th day of November, 1920, the plaintiff entered into a written contract with the defendant whereby the plaintiff agreed to level and grade a 40-acre tract of land owned by the defendant. The grade was to be such that water would flow thereon in certain specified directions. The plaintiff agreed to furnish at his own cost all labor, material, teams, machinery, appliances, and outfit for the work, to begin work not later than 10 days from the date of the contract, and to fully complete and finish the same not later than January 1, 1921. Upon failure of the contractor in any material or substantial respect to perform any covenant or agreement contained in the contract, it was stipulated that the owner might at his option terminate the agreement, and that in such event the contractor should have no claim for any work theretofore done by the contractor. It was further provided that time is of the essence of the agreement, and of each covenant thereof.

This is an action by the contractor to recover damages for breach of the contract in the manner stated in the complaint. It is alleged in the complaint:

"That on the day of the execution of said agreement there were situated upon said land to be leveled and graded large numbers of oak and willow trees so situated as to prevent the proper leveling and grading of said lands, but which trees the said defendant, at the time of the execution of said written agreement, as a part of the consideration therefor, and as an inducement unto plaintiff to enter into the same, agreed to immediately remove from the said land at his, the said defendant's, own cost and expense; that the said defendant thereafter-

er commenced to remove said trees from said land, but that said trees are not yet removed so as to permit the proper leveling and grading of said lands, but, on the contrary, the defendant still keeps and maintains on said lands large numbers of trees, without the removal of which the plaintiff cannot complete his said agreement for the grading and leveling of said lands; that by the terms of said agreement said plaintiff agreed to fully finish and complete the said grading and leveling not later than January 1, 1921; that plaintiff has not so completed the said grading and leveling, but has in all respects complied with said contract so far as was possible, and would have completed said leveling by said last-mentioned date had he not been prevented from so doing by the said failure of the said defendant to remove said trees; that the defendant, as plaintiff is informed and believes, willfully and intentionally failed to remove said trees, so that said contract could not be completed by the plaintiff by or not later than January 1, 1921; that the plaintiff has at all times been ready, willing and able to perform his agreement aforesaid according to the tenor thereof."

It is further alleged that on or about January 3, 1921, the defendant elected to terminate the contract because the same had not been fully performed, and gave notice thereof to the plaintiff. The complaint alleges:

"That by reason of such termination plaintiff has been damaged in the sum of \$1,800."

A general demurrer to the complaint on the ground that it did not state facts sufficient to constitute a cause of action was presented by the defendant and overruled by the court. The defendant having answered, the case was tried before a jury.

The defendant appeals from a judgment entered against him in the sum of \$900 pursuant to the verdict rendered. The case is presented here on the judgment roll, without a bill of exceptions.

Appellant contends that the complaint fails to state a cause of action, because the only fact alleged in the complaint in justification of respondent's failure to perform his contract within the time limited by the contract is that appellant did not comply with a separate oral agreement to remove from the land trees which were an obstruction to the grading, and that, by such failure to remove the trees, appellant prevented respondent from completing the work; that such separate oral agreement, being inconsistent with the terms of the written contract, was incapable of proof, and therefore could not constitute an excuse for plaintiff's failure to complete the work of leveling and grading in accordance with the terms of the written contract. As counsel for respondent does not dispute the proposition that the complaint as written intended to plead an oral contract for the removal of the trees, we shall herein assume that this is a correct construction of the complaint.

[1, 2] The rules limiting the conditions under which oral evidence may be received other than the contents of the written instrument, where the terms of an agreement have been reduced to writing, are set forth in section 1625 of the Civil Code, and sections 1856 and 1860 of the Code of Civil Procedure. It is admitted to be the general rule that, where a contract in writing is complete in all its terms, parol evidence to vary those terms may not be admitted. A well-understood concurrent rule is that, where the parol evidence which is offered is entirely consistent with and in no way changes or contradicts the written instrument, such parol evidence may be admitted. *Harrison v. McCormick*, 89 Cal. 330, 26 Pac. 830, 23 Am. St. Rep. 469; *Johnson v. Bibb Lumber Co.*, 140 Cal. 95, 73 Pac. 730.

"The rule that an agreement in writing supersedes all prior or contemporaneous oral negotiations or stipulations concerning its matter has no application to a collateral agreement upon which the instrument is silent, and which does not purport to affect the terms of the instrument." *Whittier v. Home Savings Bank*, 161 Cal. 311, 317, 119 Pac. 92, 95.

[3] We are of the opinion that the oral agreement now under consideration is a contemporaneous agreement as to a matter upon which the writing is silent. The subject-matter of the oral agreement is distinct from that to which the writing relates. The fact being shown that there were trees on the land so situated that they prevented the proper leveling and grading of the land, a condition was thereby established which made it impossible for the contractor to perform his work unless they were first removed.

"Everything is deemed possible except that which is impossible in the nature of things." Civ. Code, § 1597.

"Where a contract has but a single object, and such object is * * * wholly impossible of performance, * * * the entire contract is void." Civ. Code, § 1598.

On the record as here presented, it is to be presumed that upon sufficient evidence the jury found that, at the time when the written contract was made, there was upon the land a large number of trees so situated as to prevent the proper leveling and grading of the land, and that without their removal, the plaintiff could not perform his agreement; in other words, that without the removal of the trees the due performance of the contract by respondent was in the nature of things not possible. But the contract did not bind respondent to remove those trees any more than it would have bound him to remove a house if one had been there. A situation existed which made appropriate a separate agreement with the owner not to pay the contractor any additional consideration, but to create on his property a condition which would make possible the perform-

ance of the contract as written. In order to save the contract, another agreement became necessary to deal with the conditions as they existed.

The judgment is affirmed.

We concur: SHAW, J.; JAMES, J.

57 Cal. App. 245

CAMBRIDGE CO. v. CITY OF ELSINORE.
(Civ. 3632.)

(District Court of Appeal, Second District, Division 2, California. April 3, 1922.)

1. Work and labor ⇨12—Recovery may be had on quantum meruit for services rendered and accepted, although contract not strictly performed.

Where one who agrees to perform services acts with a bona fide intention of fulfilling his contract, but fails strictly to do all that he has agreed to do, he may, nevertheless, recover on a quantum meruit the reasonable value of the labor actually done, if such services were beneficial to and accepted by the other party to the contract.

2. Assignments ⇨72—In construction of assignment, main object is to ascertain intention of parties.

In the construction of an assignment, the main object is to ascertain the intention of the parties as in any other contract.

3. Assignments ⇨72—Where no contradiction or ambiguity appears in assignment, apparent meaning regarded as intention.

Where the words of an assignment convey a definite meaning, and there is no contradiction or ambiguity, then the apparent meaning of the instrument must be regarded as the one intended.

4. Assignments ⇨115—Assignee of fee provided by express contract cannot recover quantum meruit for assignor's partially performed services.

Where defendant made a contract with engineer for services, and he assigned to assignor of plaintiff his right to the fee provided therein when contract had been fully performed, held that plaintiff assignee acquired no right except to the fee that might become due by the terms of the express contract between the engineer and defendant, and assignee could not recover on a quantum meruit the reasonable value of engineer's partially performed services.

Appeal from Superior Court, Riverside County; Pat R. Parker, Judge.

Action by Cambridge Company against City of Elsinore. From judgment for defendant, plaintiff appeals. Affirmed.

G. R. Freeman, of Corona, for appellant. Sarau & Thompson, of Riverside, for respondent.

FINLAYSON, P. J. This is an action upon a quantum meruit, brought by plaintiff, as assignee of the rights of one Frank A. Lathrop, to recover from the city of Elsinore the sum of \$1,680. This sum the complaint alleges to be the reasonable value of services which it is claimed were performed for defendant by Lathrop under a written contract whereby Lathrop was employed as consulting, designing and supervising engineer in the installation of a sewer system for the city. Lathrop assigned his rights to one W. E. Stowell, and she in her turn assigned to plaintiff. Judgment passed for defendant, and plaintiff appeals.

Lathrop's employment by the city was under an express contract in writing, executed by him and defendant on March 8, 1911. This contract, after reciting that the city officers intend submitting to the qualified voters the question of the issuance of bonds for the construction of a sewer system and to cause such system to be built when the necessary bonds should be authorized and sold, declares that the defendant "hereby engages and employs the said Frank A. Lathrop to act as the consulting, designing and supervising engineer of the said improvement." Following this are certain promises on the part of Lathrop to perform certain specified services for defendant, some to be performed by him before and some after the issuance and sale of the sewer bonds. The contract was entire, and not severable. Under its terms Lathrop was not to receive any pay until after a full and faithful performance of all of the agreed services. It expressly declares, after enumerating the services that Lathrop is to perform, that—

"Said Frank A. Lathrop agrees * * * to forfeit all claim to the fee hereinafter specified, if the work undertaken [the work of constructing the proposed sewer system] cannot be completed in a thoroughly proper and workmanlike manner, in full accord with the plans and specifications, and within the estimated cost."

Then follows a promise on the part of the city to pay Lathrop for his services, the city agreeing, "within 40 days after the completion and acceptance of the construction of that portion of the system provided for by the initial bond issue, to pay to the party of the second part [Lathrop], as compensation for the services herein specified, a total fee amounting to 8 per cent. of the money received from the sale of the said bond issue."

In the year 1911 an election was held at which the question of the issuance of bonds to pay for the construction of the proposed sewer system was submitted to the qualified electors of the city. The affirmative of the proposition failed to receive the necessary number of votes. Nothing further was done until October 28, 1912, when the matter of

the issuance of bonds to meet the cost of the contemplated sewer system being again agitated, the city's board of trustees adopted a resolution whereby it was resolved that—

"The construction of a sewer system by the city of Elsinore be started at once, and that Mr. Lathrop be continued as engineer of the contemplated works."

By thus voting to "continue" Lathrop as engineer in the construction of the contemplated sewer system, defendant, in effect, continued the employment that was evidenced by the written contract of March 8, 1911. Indeed, plaintiff's complaint is drawn upon the theory that the services, the reasonable value of which it is seeking to recover, are services that were rendered by Lathrop under his employment of March 8, 1911, continued by the board's resolution of October 28, 1912. Subsequent to such continuance of Lathrop's contract of employment, the issuance of bonds again was submitted to the electors. At this election a bonded indebtedness in the sum of \$20,000 for the construction of the first unit of the proposed sewer system was authorized, and the bonds were sold for \$21,000, 8 per centum of which (\$1,680) is the amount sued for here.

[1] The record before us is most unsatisfactory. It leaves many important facts in complete obscurity. It consists, in the main, of colloquies between court and counsel during arguments upon objections to evidence. It seems to be conceded, however, that Lathrop did not substantially perform the services which he agreed to render under his written contract of employment, and that therefore there can be no recovery upon his express contract with defendant, but this notwithstanding appellant claims that under the doctrine of such cases as *Jones, etc., Co. v. Doble Co.*, 162 Cal. 497, 123 Pac. 290, *Katz v. Bedford*, 77 Cal. 322, 19 Pac. 523, 1 L. R. A. 826, and *Castagna v. Balletta*, 82 Cal. 250, 23 Pac. 127, it is entitled to recover, upon an implied contract, the reasonable value of such services as Lathrop did perform. These cases enunciate the well-established rule that where one who agrees to perform services acts with a bona fide intention of fulfilling his contract, but fails strictly to do all that he has agreed to, he may, nevertheless, recover on a quantum meruit the reasonable value of the labor actually done by him, if the services performed were beneficial to the other party to the contract and have been accepted and enjoyed by the latter.

Appellant is met at the threshold with the objection that the assignment from Lathrop to Mrs. Stowell did not convey any right that Lathrop may have had to recover upon an implied contract to pay the reasonable value of partially performed services. The assignment to Mrs. Stowell, contained in a

written communication sent by Lathrop from Los Angeles, dated April 21, 1913, and addressed to defendant's board of trustees, reads:

"Mr. President and Members of the Board of Trustees of the City of Elsinore, California, Gentlemen: In consideration of the fact that W. E. Stowell of 2694 West Ninth street, this city, has kindly consented to make, has and is making all such expenditures as have been and may become necessary after April 1, 1913, to enable me to properly fulfill my contract with your city, dated March 8, 1911, on the engineering for a sanitary sewer system for your city, I hereby, with your permission, sell, assign and set over to said W. E. Stowell all of such fees *as may be due me under the terms of said contract*, to be paid to said W. E. Stowell when said contract has been *properly fulfilled* by me, according to the terms of said contract. This assignment will not result in any change in the services to be performed by me as stipulated in the said contract, as I will continue in the future, as I have in the past, to personally carry out said contract in full accord with its terms. I will greatly appreciate an official notification, at your earliest convenience, by your honorable body, to said W. E. Stowell, at 2694 West Ninth street, Los Angeles, Cal., that this assignment has been accepted by you. Yours very truly, Frank A. Lathrop." (Italics ours.)

At a meeting of the city's board of trustees, held May 5, 1913, the assignment was "accepted" by the board, and the document was filed with the clerk.

The assignment is not an attempted assignment of money then due to Lathrop, as is contended by respondent in one part of its argument. It is an assignment of the "fee" (8 per cent. of such money as might be derived from the sale of the bonds) which the city, in its written contract of March 8, 1911, agreed to pay to Lathrop "within 40 days after the completion and acceptance of the portion of the [sewer] system provided for by the initial bond issue." It is therefore an assignment of a "fee" to be earned by Lathrop's future services as well as by those already rendered by him. It is the assignment of a "fee" that was not to become due until some time after its assignment to Mrs. Stowell, i. e., on the completion and acceptance of the initial unit of the sewer system.

Assuming, for the purpose of this decision, that if Lathrop had made no assignment he could have recovered the reasonable value of his partially performed services, appellant's right to recover therefor depends entirely upon the nature and extent of the right which Lathrop assigned to Mrs. Stowell, appellant's assignor. It will be noted that Lathrop did not assign to Mrs. Stowell his contract with respondent. Nor did he assign to her whatever moneys might be due or become due to him for any services that he might perform for the city under his em-

ployment. The only right assigned to Mrs. Stowell is the right to the "fee" that was to be earned by the complete performance of Lathrop's contract. The assignment to her is an assignment of a specific, well-defined, and definite right, namely the right to "such fees as may be due me, *under the terms of said contract*," i. e., under the terms of Lathrop's written contract of March 8, 1911, with the city. Further, the assignment fixes the time and the condition of payment to Mrs. Stowell as follows: The "fees" are "to be paid to said W. E. Stowell when said contract has been *properly fulfilled* by me, according to the terms of said contract."

[2, 3] In the construction of assignment the main object is to ascertain the intention of the parties, as in the case of any other contract. This intention is to be derived from a consideration of the whole instrument, and is to be sought in the words and language employed; and, if the words are free from ambiguity and express plainly the purpose of the instrument, there is no occasion for interpretation. 5 C. J. p. 943. See, also, *Lynip v. Alturas School District*, 24 Cal. App. 426, 141 Pac. 835. Courts cannot correct suspected errors, omissions, or defects, or by construction vary the contracts of parties. If the words of an assignment convey a definite meaning, and there is no contradiction or ambiguity, then the apparent meaning of the instrument must be regarded as the one intended. *Schoonmaker v. Hoyt*, 148 N. Y. 425, 42 N. E. 1059.

[4] This assignment needs no construction to ascertain its meaning and scope. It clearly, unambiguously, and with certainty speaks for itself. As plainly as language can express any proposition, it provides that Lathrop's assignee is to have such "fees" as may become due "under the terms of said contract"—i. e., under the terms of Lathrop's contract with this defendant; also that such "fees" are to be paid to Lathrop's assignee when "said contract has been properly [i. e., completely] fulfilled by me, according to the terms of said contract." Every word of the document manifests the intention to make the vitality of the assignment depend upon the fulfillment by Lathrop of his contract with the city. It must have been so understood by all the parties to the transaction. The assignment was made in the course of a written communication addressed by Lathrop to the president and members of the city's board of trustees, whereby the latter were requested to "accept" the assignment. Nothing could be clearer than that, by the language of the writing, the defendant's board of trustees "accepted" the assignment upon the understanding that it was to be restricted in its operation to such "fee" as would become due only upon a complete performance of all the promises made by Lathrop in

his written contract with the city, and upon the happening of every contingency which that contract made a condition precedent to the payment of the fee. This being so, we are of the opinion that, as the assignee of Mrs. Stowell, plaintiff acquired no right other than the right to such "fee" as might become due to Lathrop under the terms of his express contract with defendant; and that, as Lathrop never became entitled to such fee, he having failed substantially to perform his contract, it follows that plaintiff cannot recover on a quantum meruit the reasonable value of Lathrop's partially performed services; the right thereto, if any there be, not having passed out of Lathrop under his assignment to Mrs. Stowell. For these reasons the judgment must be, and is, affirmed.

We concur: WORKS, J.; CRAIG, J.

57 Cal. App. 206

HINKLEY et al. v. WELLS, County Clerk.
(Civ. 4191.)

(District Court of Appeal, First District, Division 2, California. March 29, 1922.)

1. Statutes $\S$ 35 $\frac{1}{2}$ —County clerk or secretary of state may not refuse to file initiative petition because affidavit fails to state all qualifications of circulator if he makes satisfactory proof thereof.

Under Const. art. 4, § 1, neither the county clerk nor the secretary of state may refuse to file initiative petition merely because the affidavit fails to state all the qualifications of the circulator if he is in fact qualified and makes satisfactory proof of qualifications.

2. Statutes $\S$ 35 $\frac{1}{2}$ —Affidavit of qualifications of circulator of initiative petition is subject to amendment.

Affidavit as to qualifications of circulator of initiative petition is subject to amendment, and when so amended the affidavit dates back to the time of the filing of the original.

3. Statutes $\S$ 35 $\frac{1}{2}$ — Circulator of initiative petition filed with defective affidavit of qualifications held entitled to file new affidavit.

Circulator of initiative petition under Const. art. 4, § 1, whose original affidavit of qualifications as filed with the county clerk was defective in that it failed to state that the circulator was a qualified elector, held entitled to file a new affidavit supplying the omission as against county clerk's contention that filing of such affidavit would constitute the alteration or removing of public records in violation of Pen. Code, § 113; it being unnecessary that the affidavit be attached to the previously filed petition, or that the petition be delivered to petitioner for refileing.

4. Mandamus $\S$ 7—Writ not issued unless necessary to afford petitioner the relief to which he is entitled.

The issuance of a writ of mandamus is largely discretionary, and should be denied

when not necessary to afford the relief to which he is entitled.

Application by A. Burton Hinkley and another for writ of mandamus against J. H. Wells, as County Clerk of the County of Contra Costa. Writ denied.

Theodore A. Bell, of San Francisco, for petitioners.

Archibald B. Tinning, Dist. Atty., of Martinez, for respondent.

NOURSE, J. Petitioner Hinkley, as a registered elector of Contra Costa county, circulated in that county a petition proposing a new law in the form of an initiative measure to be submitted to the electors of the state under section 1 of article 4 of the Constitution. Petitioner Kurtz was one of the qualified electors of Contra Costa county, who signed one of such petitions. When the petition was filed with respondent as county clerk of Contra Costa county, a defective affidavit was attached—defective in that the circulator stated therein that he was a "resident" of said county, whereas the Constitution requires that the circulator should be a "qualified elector" of the county in which he obtains the signatures. Upon the filing of the petition the respondent, in accordance with the terms of the Constitution, examined the same, and certified to the secretary of state, as required, the number of qualified electors who had signed the same, first having been satisfied by an examination of the records of registration that the circulator of the petition was a duly qualified elector of the county, and that the petition was in due form. The respondent thereupon attached his certificate of such examination to a certified copy of the original petition, and transmitted the same to the secretary of state. Thereafter it was discovered that the affidavit attached to the original petition was defective in that it failed to state that the circulator was a "qualified elector" of the county. For that reason the secretary of state refused to recognize the certificate of respondent covering said petition.

Thereupon a new affidavit was made by the circulator of the petition, stating his qualifications in full as required, and this was tendered to the respondent, with a demand that he file the same, and attach it to the proper section of the petition, or that he permit the withdrawal of the petition from his files in order that the petitioner herein might attach the new affidavit thereto and refile the same. The respondent refused the demand, upon the ground that to permit the alteration or removal of the petition would be to violate section 113, Penal Code, which relates to the altering, mutilating, defacing or removing of public records. In his answer to the petition for a writ of mandate herein respondent admitted that the original initiative petition and affidavit were in his

possession, and alleged that he had examined the signatures attached thereto, as well as the qualifications of the circulator, and had certified them to the secretary of state as in accordance with constitutional requirements. Respondent then alleged that the new affidavit which was offered for filing was identical with the original, except that the words "registered qualified elector" were inserted in place of the word "resident," and that he refused to attach said affidavit to the petition or to refile the petition, on the ground that to do so would be an alteration of the petition.

Technically the original affidavit complied with the requirements of the Constitution; it stated the qualifications of the affiant, but did so imperfectly. That is to say the constitutional requirements are that the circulator of each petition must file an affidavit "stating his own qualifications" among other things. In stating that he was a "resident" of Contra Costa county he stated the truth, because to be a qualified elector he must have been a resident. But a resident of the county is not necessarily a qualified elector thereof. The purpose of the constitutional requirement is to aid the county clerk in his examination of the petition. If, notwithstanding some imperfection in the affidavit, the county clerk finds, as here, that the circulator's qualifications meet the requirements, and upon examination duly certifies the petition to the secretary of state, we do not understand that that official has any other duty than to receive the petition so certified, and submit the proposition to the electors at the ensuing general election if the certificates show the required number of qualified signatures. The duty of the secretary of state is found in the second paragraph of section 1 of article 4 of the Constitution, which reads:

"Upon the presentation to the secretary of state of a petition certified as herein provided to have been signed by qualified electors, equal in number to eight per cent. of all the votes cast * * * the secretary of state shall submit the said proposed law or amendment * * * to the electors at the next succeeding general election."

There is nothing in the quoted language which gives to the secretary of state any power to reject a petition because of any defect in the affidavit of the circulator. In the arguments it is said that the secretary of state is satisfied to receive amended affidavits, and we are urged to issue this writ because the error has occurred in the petitions circulated throughout the state, and to circulate these petitions anew and obtain the necessary number of signatures in the short time allowed would be extremely burdensome and expensive to the proponents of the measure. These are considerations which are not easily denied, but, unless the law re-

quires the respondent to perform the duty demanded, we are not authorized to require him to do so.

[1] In arriving at the legal duty of the respondent it should be observed that the original affidavit is not a nullity, but complies with the constitutional requirements as stating affiant's qualifications. Neither the county clerk nor the secretary of state may refuse to file the petition because the affidavit fails to state all the qualifications of the circulator if he is in fact qualified and makes satisfactory proof of those qualifications.

[2] The affidavit is subject to amendment like an affidavit on a bill of costs, on motion for change of place of trial, on attachment, justification of sureties, and similar proceedings. When so amended the affidavit dates back to the time of the filing of the original. *Burnham v. Hays*, 3 Cal. 115, 58 Am. Dec. 389; *Palmer & Rey v. Barclay*, 92 Cal. 199, 201, 28 Pac. 226; *Nichols v. Davis*, 168 Cal. 570, 143 Pac. 758; *Bone v. Trafton*, 31 Cal. App. 30, 32, 159 Pac. 819; *Gardner v. Steadman*, 31 Cal. App. 447, 450, 160 Pac. 834; *Jaques v. Owens*, 18 Cal. App. 114, 116, 122 Pac. 430; *Pittman v. Carstenbrook*, 11 Cal. App. 224, 229, 104 Pac. 699; *Lundy v. Lettunich* (Cal. App.) 195 Pac. 451.

[3] There is no essential difference between the requirement that the affidavit be filed with or at the time, or at the same time as the moving papers, as in the cases cited, and the requirement that it shall be attached to the papers, as in this case. The purpose of attaching the affidavit to the petition is to facilitate identification of the section of the petition. So long as the amended affidavit sufficiently identifies the section of the petition to which it relates, it is a paper which the affiant has a right to file with the county clerk as a part of the initiative proceedings. The method by which the affidavit is to be "attached" is not prescribed—whether by pin or clip, glue, or some other such method—but we are satisfied that, though the county clerk should receive and file the amended affidavit, and though he would not be amenable to any penal statute if he attached it to the original petition by some appropriate way, the law does not require him to either attach the amended affidavit to the petition or deliver the petition to petitioner for re-filing, and the writ should not issue for that purpose.

[4] Though we are satisfied that the petitioner is entitled to have respondent file the affidavit with the section of the initiative petition to which it relates, we do not understand that respondent has refused after demand to do so, but merely that he has refused to attach the affidavit to the petition or to permit the withdrawal and re-filing of the original with the amended affidavit attached. Assuming that the showing is suffi-

cient to authorize the issuance of the writ to require respondent to file the new affidavit, the issuance of the writ is largely discretionary, and should be denied when not necessary to afford petitioner the relief to which he is entitled. *Fawkes v. City of Burbank* (Cal. Sup.) 205 Pac. 675.

Writ denied.

We concur: LANGDON, P. J.; STURTEVANT, J.

57 Cal. App. 211

BRYANT v. SMITH et al. (Civ. 3693.)

(District Court of Appeal, Second District, Division 1, California. March 30, 1922.)

Patents —203—Where naked reassignment of patent contained no assumption of obligations, no privity exists between patentee and assignees.

Where the owner of letters patent granted to B. and S. the right to use and manufacture the patent, and B. and S. assigned to W. a one-third interest in the agreement, and W. made a naked assignment to others of his entire interest, in an action by the owner against all the parties to recover installments, there being no privity of contract between the owners and assignees of W., Civ. Code, § 1589, has no application, and judgment of nonsuit in favor of all defendants except B. and S. was proper.

Appeal from Superior Court, Los Angeles County; Louis W. Myers, Judge.

Action by Frank H. Bryant against Herbert L. Smith and others. From judgment of nonsuit, plaintiff appeals. Affirmed.

Westall & Wallace and Joseph F. Westall, all of Los Angeles, for appellant.

F. A. Jeffers and Sheran & Alvord, all of Los Angeles, for respondents.

SHAW, J. Plaintiff appeals from a judgment of nonsuit in favor of the defendants other than Josiah A. Briggs and Herbert L. Smith.

The appeal was submitted at the January term upon a typewritten record, no part of which was printed in appellant's brief as required by section 953c, Code of Civil Procedure. While in a supplement appellant has, pursuant to an order of court, printed certain documentary evidence from the record, to which no reference is made in his brief, it is wholly insufficient in illustrating the errors complained of. Nevertheless, in the absence of aid from appellant's counsel, we have examined the typewritten record in an effort to ascertain and determine the question presented to the trial court. Briefly stated, it appears therefrom that on June 28, 1918, plaintiff entered into a contract with Josiah A. Briggs and Herbert L. Smith whereby he, as the owner of letters patent

No. 1,258,530, covering machinery, devices, and a process for the manufacture of food products, granted to them, subject to revocation for breach of covenants, the right during the life of the patent to use the same in certain designated states, together with the right to manufacture, use and sell throughout the territory mentioned such machines, implements, and devices invented by plaintiff for the manufacture of such food products, for which Briggs and Smith were to pay a royalty of \$2 per ton on all finished products manufactured under the provisions of said letters patent until such royalty amounted to \$250,300. The contract further provided that its terms and conditions should apply, bind, and inure to personal representatives of the respective parties thereto, and for breach of the covenants made by Briggs and Smith, Byrant might at his option revoke the grant and terminate the contract. In consideration of the making of the agreement, Briggs and Smith promised to pay in monthly installments on the 7th day of each month certain sums, which in the aggregate amounted to \$250.02, and which installments the complaint alleges were paid to March 7, 1920, but that the installments due on the 7th days of April, May, June, and July, 1920, amounting for each month to \$250.02 have not been paid, and, for the recovery of which this action was instituted.

After the execution of the agreement, Briggs and Smith assigned to Owen A. Williams a one-third interest in said agreement, subject, however to a 1½ per cent. interest therein to W. H. Hodson and an 8 per cent. interest therein to Margaret A. Brown, after which, to wit, on June 5, 1919, Williams assigned to defendant Mansfield a 10 per cent. interest in said patent and stock and funds derived from the same, and on July 26, 1919, assigned to defendant Peck a 2½ per cent. interest in said patent and stock, and later, on September 30, 1919, assigned to defendant Chandler all his remaining interest in said patent and stock and an interest in 5,500 shares of the capital stock of the Cactus Food Products Company. The assignments from Williams to Chandler, Peck, Mansfield, and Hodson were mere naked assignments, and contained in terms no assumption on their part of any of the obligations imposed by the contract. We are directed to neither allegation nor evidence showing that any of such assignees ever utilized the subject of the patent in the manufacture of food products, or manufactured or sold any of the devices or machinery therefor. Nevertheless, and in the absence of any privity of contract between Bryant and the assignees of Williams, and notwithstanding the terms of the contract under which the monthly installments accrued were executory, appellant contends that, by virtue of the naked assignment of interest so transferred, the assignees and each of them

became obligated to pay to plaintiff the monthly installments which Briggs and Smith agreed to pay for the right to use the patented process. In support of his contention appellant cites the cases of *Robinson v. Rispin*, 33 Cal. App. 536, 165 Pac. 979, and *Cutting Packing Co. v. Packers' Exchange*, 86 Cal. 574, 25 Pac. 52, 10 L. R. A. 369, 21 Am. St. Rep. 63. Neither of these cases applies to the facts disclosed by the evidence herein. In the *Rispin* Case the contract was executory, and contemplated the boring of certain wells by Robinson for which Rispin agreed to pay him a stipulated price for each vertical foot drilled, after which Rispin transferred his interest in the lands upon which the wells were to be bored, together with the contract, to a corporation for which he, in acquiring the same, acted as agent, and the corporation accepted the assignment with full knowledge of the facts relating to the contract, and Robinson, at its request, fulfilled his part of the contract by drilling the wells. Upon these facts the assignee was held liable under the terms of the contract, for the reason that the contract was fully performed and the benefit inured solely to the assignee, which recognized the original contract as binding upon it and held itself out as personally liable thereon. In the case of *Cutting Packing Co. v. Packers' Exchange* the action was brought by the assignor against the assignee, and it not only appears from the decision that the assignee assumed the obligation of its assignor, but an inspection of the record shows that the corporation defendant, by action of its board of directors, formally assumed the obligation of its assignor. Hence neither of these cases is applicable to the facts in the instant case. There was no privity of contract between plaintiff and the assignees of Williams, without which section 1589, Civil Code, cited by appellant, has no application. *Chung Kee et al. v. Davidson*, 73 Cal. 522, 15 Pac. 100. In *Lisenby v. Newton*, 120 Cal. 571, 52 Pac. 813, 65 Am. St. Rep. 203, in discussing a similar question, it is said that—

If, upon the facts here involved, an assignee is liable for the covenants of his assignor. "It must be in consequence of the clause of the contract which in terms extends the obligations of the instrument to the assigns of the parties; but since the promise to pay was only the personal covenant of the promisor, the attempt to include in its force the assigns of the vendee is inoperative; it was not competent for the parties in this manner to create a contract for such assigns."

See, also, *California Packing Corporation v. Emirzian* (Cal. App.) 187 Pac. 77, and *Beazley v. Embree*, 41 Cal. App. 706, 183 Pac. 298. While defendants as assignees took the interest in the contract subject to all the conditions thereof, and hence could not enforce any right thereunder against plaintiff without showing performance of the obligations which it impos-

ed upon Briggs and Smith, nevertheless, by the assignment no new contract was created as between plaintiff and such assignees, as to whom no personal liability was imposed in the performance of the covenant to pay the monthly installments, for the reason that there was no meeting of minds essential to the formation of a contract between them.

We are directed to no evidence sufficient to show the existence of a copartnership between the parties, and, even conceding such to have been the case, there is no merit in appellant's contention that the respondents, in favor of whom the judgment of nonsuit was granted, became personally liable upon the obligation assumed by Briggs and Smith.

The judgment is affirmed.

We concur: CONREY, P. J.; JAMES, J.

57 Cal. App. 210

YARBROUGH v. HERBERT. (Civ. 2358.)

(District Court of Appeal, Third District, California. March 29, 1922.)

1. Joint adventures — 5(2)—Finding against in sending a jury back for further deliberations supported by evidence.

In an action based on the theory that defendant refused to account for one-third of the selling price of certain lands, finding against defendant on counterclaim held supported by evidence.

2. Appeal and error — 1011(1)—Judgment on conflicting evidence affirmed.

Judgment on conflicting evidence affirmed on appeal.

Appeal from Superior Court, Placer County; George L. Jones, Judge.

Action by P. L. Yarbrough against F. W. Herbert. From judgment for plaintiff, defendant appeals. Affirmed.

Charles A. Bliss and Harry J. Gray, both of Sacramento, for appellant.

John R. Connelly, of Sacramento, for respondent.

BURNETT, J. [1, 2] The action was based upon the theory that defendant refused to account to plaintiff for one-third of the selling price of certain lands in the state of North Dakota, the legal title to which was held by said defendant for "mutual benefit of the said plaintiff, P. L. Yarbrough, the said defendant, F. W. Herbert, and the said C. D. Ackerman in equal shares." The trial court found the existence of a contract among these three according to the claim of respondent; "that the defendants sold said land for the sum of \$5,280; that the expenses of the sale and the money advanced

by defendant was the sum of \$559.88; that the defendant, after deducting the money advanced and the expenses of the sale of said land, had on the 1st day of May, 1918, the sum of \$1,573.37 in his possession belonging to the plaintiff," and rendered judgment for respondent for that amount.

It is not disputed that the evidence supports the finding that such contract was entered into, and that the property was sold for said consideration, although some complaint is made of the action of the court in awarding a money judgment for the entire amount, since it appears that a part of the consideration in the hands of appellant is a note of the purchaser upon which is due about \$700. But since the sale was made without any consultation with plaintiff, and thereafter the defendant refused to render any account or to recognize the claim of respondent, it was just for the court to treat said note as cash. Besides, it is not questioned that the note is fully worth its face value, and there was no contention at the trial that any loss would be suffered by defendant if it were considered as money.

In fact, the only controversy of any moment at the trial or herein on appeal relates to certain items of an asserted counterclaim or offset on the part of defendant, as follows: Four hundred and sixteen dollars for taxes, which it is claimed that plaintiff promised to pay; \$250 collected as rent from Buchold & Hanreich; the sum of \$500 collected from one Shelly on a lease; and the sum of \$50 collected for pasturage from one Fuller—together with interest on these items. They all arose out of and were dependent upon the purchase of a certain tract of land near Lincoln, Cal., known as the Richard N. Fuller property. It is by virtue of his ownership of this land that appellant claims this credit against respondent. His title was based upon a deed dated August 24, 1917, but on September 28 following, he deeded it to the Auburn Creek Farms Company, a corporation; and there is evidence in the record from which a rational inference may be drawn that, if any indebtedness existed in reference to said items, it was due to said corporation instead of to appellant.

However, this feature may be disregarded, as the evidence amply supports the finding of the court:

"That none of the allegations of defendant's pleading designated a cross-complaint are true, nor is it true that the plaintiff is indebted to the defendant for the sum of \$1,550, or any other sum or at all for money had and received by the plaintiff for the use and benefit of the defendant, or for any purpose or manner or at all, and the court finds in this connection that the plaintiff did not receive any money for the use, benefit, or account of defendant, or in any other manner or at all."

In reference thereto it may be mentioned that on September 15, 1917, appellant leased said premises to respondent for the term of one year with the additional provision that—

"In case first party [Herbert] decides to have land seeded the following year to crop, that second party [Yarbrough] shall have the refusal to seed same on the same terms as the first year as herein provided."

This lease remained in force until February 9, 1918, at which time it was replaced by a lease to respondent from the said Auburn Creek Farms Company, in which lease was this recital:

"Reference is hereby made to a certain other lease of even date herewith executed by said first party to Jerry F. Shelley of Roseville, Cal., and it is understood and agreed that the within contract is entered into as compensation to the said second party for services performed in handling the said described lands, by means of securing tenants for said first parties and other services performed in connection therewith."

As justly stated by respondent, each of the items claimed by appellant as credits, except the sum of \$416 for taxes, arose under this lease, and according to the view we must take of the record, plaintiff was under no obligation to pay any of these several amounts to any one whomsoever.

As to the taxes, we may state that an agreement existed between appellant and respondent whereby the former agreed to pay the latter a commission of 5 per cent. for his services in the sale of said Fuller ranch, and it is the contention of Herbert—and he so testified—that Yarbrough agreed to pay said taxes out of said commission. But respondent testified directly to the contrary, and the trial court undoubtedly believed him, since it found in harmony with his testimony.

As to the item of \$500, the testimony of plaintiff and Jerry F. Shelley was to the effect that said amount was paid to the former for his leasehold rights in said premises. The transaction took place on February 9, 1918, and no reason appears why plaintiff was not authorized to sell said interest, or why he should account to any one for the consideration.

In relation to the item of \$50, it is sufficient to quote the following testimony of plaintiff:

"Q. With reference to the item of \$50 claimed by Mr. Herbert to have been paid you by Mr. Fuller, I will ask you if you received the sum of \$50 from Mr. Fuller. A. Richard Fuller; yes, sir. Q. When did you receive that? A. Soon after the 1st of January, 1918—some time in January I will say. Q. What was this for? A. I hired him pasture on the ranch in question for the month of January or until such time it got too muddy for the stock to run on. Q. You rented him this pas-

ture? A. Yes * * * and by authority of that lease [the Herbert lease] I was renting the pasture."

Mr. Fuller also testified:

"Well, when I sold the ranch I had it put in the agreement that I should have pasturage on the place until January 1, 1918—after that I asked Mr. Yarbrough if I could not leave them there for a couple of weeks for a while—and paid him after that."

The evidence is equally clear as to the item of \$250. There was a written agreement between Yarbrough as one party and M. Hanreich and Fred Buchold as the other, for the planting of certain summer crops on a part of said land, and in pursuance of this agreement, Hanreich and Buchold deposited with Yarbrough the sum of \$250 as a guarantee "that they would cultivate, farms and grow" said crops. It was further agreed that Yarbrough might use as much of this money as was necessary "in order to accomplish the growing and harvesting of said crops * * * and shall not be required to return to said farmers [Hanreich and Buchold] any part of the said \$250 on deposit."

It might be that Hanreich and Buchold could question the right of respondent to withhold this \$250, but that question is not involved here. As between plaintiff and defendant, there can be no doubt that the view of the trial court as to said amount must be upheld.

Of course, as far as the judgment of this court is concerned, it can be of no avail that there was some testimony opposed to what we have set out.

At most, the case is one of conflicting evidence, and the judgment is therefore affirmed.

We concur: FINCH, P. J.; HART, J.

57 Cal. App. 237

PEOPLE v. QUON FOO et al. (Cr. 850.)

(District Court of Appeal, Second District, Division 1, California. April 3, 1922.)

1. Witnesses $\Leftarrow$ 397—Jury had right to believe witnesses though testimony conflicted with that at coroner's inquest and preliminary examination.

The jury had the right to believe the testimony of witnesses, though they had given conflicting testimony at the coroner's inquest and at the preliminary examination.

2. Homicide $\Leftarrow$ 170—Testimony that defendant, when identified by other Chinamen, cursed in Chinese held admissible.

In prosecution for murder of a Chinaman, officer's testimony that at the time when he arrested defendant another Chinaman said to the officer, in the presence of defendant, "That was the man," and that defendant in reply cursed back in Chinese, using certain words to

which the officer, who stated that he knew the meaning thereof, testified, *held* admissible.

3. Criminal law ⚡388—Testimony as to experiments with pistol not admissible, in absence of showing that shells were of kind used in the homicide.

In prosecution for murder, testimony as to experiments made by witness with certain pistol to ascertain how far a shell could be thrown at certain different distances from the ground, offered to show that certain empty shells afterwards found in the room where the killing occurred were about in the location they would have been if they were the shells from which the bullets which killed deceased were fired, *held* inadmissible, in the absence of showing that the shells found in the room were of a particular kind used in the experiments.

4. Criminal law ⚡479—Physician held qualified to express opinion as to character of bullet by which deceased was killed.

A physician, in the course of his practice as an autopsy surgeon, who had examined about 50 cases of gunshot wounds, *held* qualified to express an opinion that the bullet that killed deceased was a 32-caliber, high-powered cartridge.

5. Criminal law ⚡829(19)—Refusal to charge that a juror should not vote for conviction merely because of the opinion of other jurors held not error.

Where the instructions correctly and sufficiently advised the jury that a verdict of guilty must be found solely on the evidence and the law as declared by the court, the refusal to give defendant's requested instruction that defendant was entitled to the opinion of every member of the jury, and that a juror should not vote for conviction merely because of the opinion of the other jurors, *held* not error.

6. Criminal law ⚡829(16)—Instruction as to rule in ascertaining credibility of witnesses not necessary.

Where jury was correctly instructed as to rules to be followed in determining the credibility of the witnesses, it was not necessary to give a requested instruction, stating a particular rule to be followed in weighing the testimony of the defendants.

7. Criminal law ⚡829(1)—Refusal of instructions covered by given instructions not error.

Refusal of instructions, the subject-matter of which is covered by other instructions given by the court, was not error.

8. Criminal law ⚡865(1)—Remarks of court in sending a jury back for further deliberation held not ground for reversal.

In homicide prosecution, in sending jury back for further deliberation after it had reported inability to agree and with a statement that he hoped they would be able to agree on some verdict, *held* not ground for reversal.

9. Criminal law ⚡730(7)—Prosecuting attorney's reference in argument to matter evidence of which had been excluded held not ground for reversal.

In murder prosecution, statement of prosecuting attorney, in argument to jury, as to

purpose for which a policeman had searched the premises of one of the defendants, though evidence concerning the purpose of the search had been excluded, *held* not ground for reversal, in view of instructions to disregard the statements.

10. Criminal law ⚡730(7) — Statement of prosecuting attorney, not warranted by evidence, held not ground for reversal, in view of instruction charging jury to disregard it.

In prosecution of Chinaman for murder, prosecuting attorney's reference, in argument to jury to "tongs," though there was no testimony in the case with reference thereto, *held* not ground for reversal, in view of instruction charging the jury to disregard the statement.

11. Criminal law ⚡1169(1)—Testimony as to experiments held harmless.

In prosecution for murder, the admission of testimony as to experiments made with certain pistol to show how far a shell could be thrown at certain different distances from the ground, for the purpose of showing that certain empty shells which had been found were in the location where they would have been if they were shells from the bullet which killed the deceased, error because of absence of showing that the shells found were of the particular kind used in the experiments, *held* not a ground for reversal.

Appeal from Superior Court, San Diego County; W. P. Cary, Judge.

Quon Foo and Wong Loy were convicted of murder in the first degree. From a judgment and order denying their motion for new trial, they appeal. Judgment and order affirmed.

Paul W. Schenck, James E. Wadham, and Richard Kittrelle, all of Los Angeles, for appellants.

U. S. Webb, Atty. Gen., and Arthur Keetch, Deputy Atty. Gen., for the People.

CONREY, P. J. The defendants were convicted of murder in the first degree and sentenced to imprisonment for life. They appeal from the judgment and from the order denying their motion for a new trial.

[1] The evidence is amply sufficient to sustain the verdict of the jury. It is not necessary to state the testimony. The fact that some of the witnesses for the people had been witnesses at the coroner's inquest and at the preliminary examination, and had there given testimony conflicting with their testimony at the later trial, might have affected their credibility, but did not affect the right of the jury to believe their testimony at this trial. Upon that testimony, and the testimony of other witnesses, facts were established which point very strongly to the guilt of the defendants.

[2-4] It is claimed that sundry errors were committed in the rulings of the court upon the admission of evidence. Very little ar-

gument has been presented, and no authorities have been cited in support of these points. The court did not err in overruling objections to the testimony of the witness Chadwick, who stated that at the time he arrested the defendant Wong Loy, another Chinaman said to the witness, in the presence of the defendant, Wong Loy, "That was the man," and that in reply Wong Loy cursed back at him in Chinese, using certain words the meaning of which in English was stated by the witness, who testified that he knew the meaning of those Chinese words. The witness Chadwick was permitted to testify to certain experiments made by him with a 32-caliber Savage automatic pistol for the purpose of showing how far a shell will be thrown from the pistol at certain different distances from the ground when the shell is ejected. Objections were made, one in particular being that there was no showing that the ammunition was the same as that used in the killing of the deceased, Quon You. The apparent purpose of the questions was to show that certain empty shells, afterwards found in the room where the killing occurred, were about in the location where they would have been if they were the shells from which the bullets which killed the deceased were fired. So far as we have been able to discover, the record does not show whether the shells found in the store were of the particular kind used in the experiments of the witness. It was stated, and is not denied, that the distance to which ejected shells would be thrown varies with different kinds of ammunition. We think that the objection to this testimony should have been sustained. The court did not err in permitting Dr. John J. Shea to testify that the bullet that killed Quon You was a 32-caliber, high-powered cartridge. The witness, in the course of his practice as an autopsy surgeon, had examined about 50 cases of gunshot wounds. We think that he was qualified to express an opinion upon the question stated. The remaining exceptions to the court's rulings with relation to evidence offered are merely stated, without argument, and we have discovered no merit in these exceptions.

[5-7] On behalf of appellants, it is contended that the court erred in refusing certain instructions requested by appellants, and which are set out in their brief. The court did not err in refusing to give the offered instruction stating the duty of each individual juror, if he entertained a reasonable doubt of the guilt of the defendant, not to vote for a verdict of guilty for the single reason that the other jurors were in favor of a verdict of guilty. Where the instructions given to a jury correctly and sufficiently advise it that a verdict of guilty must be found solely on the evidence and the law as declared by the court, no error will be held

to have been committed by the refusal to give the additional advice that the defendant is entitled to the opinion of every member of the jury, and that a juror should not vote for a conviction because of the opinion of the other jurors. *People v. Perry*, 144 Cal. 748, 754, 78 Pac. 284; *People v. Plumeyer* (Cal. App.) 202 Pac. 888, 890. The court did not err in refusing to give the requested instruction separately stating the rule to be followed in weighing the testimony of defendants. The jury having been instructed correctly upon the rules which should be followed in determining the credibility of witnesses, it was not necessary to state a particular rule concerning these witnesses because they happened to be the defendants. It has been held that justice would be more surely accomplished if such instructions, directed particularly to the testimony of a defendant, were not given. *People v. Boren*, 139 Cal. 210, 215, 72 Pac. 899; *People v. Fritz* (Cal. App.) 201 Pac. 348, 350. Concerning the other instructions requested by defendant and refused by the court, a sufficient answer to the exceptions is that the subject-matter of those instructions was correctly covered by other instructions given by the court to the jury. While the language differs in some particulars, the defendants were not deprived of any substantial right in relation to the instructions requested.

[8] After the case had been submitted to the jury, and after they had been deliberating for some time, they returned to the courtroom and informed the court that they were not able to agree. The court replied:

"It is of course your exclusive province to judge of the facts in this case, but I wish to impress upon you the great advisability of coming to some conclusion and rendering your verdict. As you doubtless know, this case has taken a number of days to try, and of course the expense incident to the trial is no small sum, and I sincerely trust that with further consideration of this case you will be able to agree upon some form of verdict. You will retire to your room for further deliberation."

Some time later the verdict was returned. There was no error in the conduct of the court relating to this matter. *People v. Miles*, 143 Cal. 636, 638, 77 Pac. 666; *People v. Cherry*, 30 Cal. App. 285, 287, 158 Pac. 335; *People v. Bruno* (Cal. App.) 193 Pac. 511, 514.

[9, 10] There are three instances of alleged misconduct of the district attorney, in each of which the acts complained of were assigned as misconduct. Likewise, in each instance, the court instructed the jury to disregard the statements made by the district attorney. The first statement was of trifling importance, and probably was inadvertently made. The second statement was

made in the course of the district attorney's argument to the jury, and was concerned with the purpose for which a policeman had searched the premises of one of the defendants. The statement was assigned as misconduct on the ground that the evidence offered concerning the reason for that search had been ruled out, and that this was an attempt to prejudice the minds of the jury upon an immaterial matter, to which the district attorney replied:

"I do not so remember it; if it is so, you need not pay any attention to it."

Thereupon the court instructed the jury to disregard any reference to the reasons for the policeman searching the premises, and the district attorney withdrew the statement. The third instance was in the district attorney's argument in reply to that of counsel for the defendants. The district attorney said:

"But they tell you another reason and that is because there is no evidence of a quarrel. Quarrels have nothing to do with the case. Tongs, if I understand them right—and we have had some expert testimony from my friend who just addressed you on the Tong proposition—that if they go out to kill it makes no difference who it is, they will get a human life in return for some fancied crime or some fancied offense."

Counsel for defendants assigned the making of that statement as misconduct. The court instructed the jury that there was no testimony before them with reference to any practice of any tongs, and that they should therefore entirely disregard said statement by the district attorney. Assuming, as we fairly may, that these were the only instances in which the district attorney stepped beyond the bounds of propriety in the course of the trial, it does not appear that there was any persistent or intentional effort on his part to disregard the rights of the defendants. Conceding that these particular assignments of misconduct should be sustained, and taking into consideration the instructions to the jury concerning them, we think that the defendants were not prejudiced thereby.

[11] The one instance of error in the rulings of the court, to which we have referred is not of such character in relation to the entire case that it would justify a reversal of the judgment. The defendants had the benefit of a fair trial. After an examination of the entire cause, including the evidence, we are of the opinion that the record shows no error whereby a miscarriage of justice has occurred.

The judgment and order are affirmed.

We concur: SHAW, J.; JAMES, J.

(57 Cal. App. 233)

PEOPLE v. VUYACICH. (Cr. 1022.)

(District Court of Appeal, First District, Division 1, California. April 3, 1922.)

1. Criminal law §785(4)—Refusal of instruction as to caution in receiving testimony of peace officers held proper.

In a prosecution for murder, refusal of an instruction that, in weighing evidence of police officers, care should be used because of their natural and unavoidable tendency to procure and state evidence against the accused, was proper.

2. Criminal law §811(5)—Instructions singling out testimony of witnesses for comment improper.

Instructions which single out testimony of particular witnesses for comment and bear on the weight attached thereto should not be given.

3. Criminal law §742(1)—Credibility of witnesses a jury question.

The credibility of a witness in a criminal proceeding is a matter to be determined by the jury.

4. Criminal law §763, 764(19)—Instruction that a confession should be received with caution held error.

In a prosecution for murder, an instruction that a confession made by the accused should be received with caution was properly refused, since it was objectionable as a comment on the weight of the evidence.

5. Criminal law §535(1/2)—After establishment of corpus delicti, confession of a defendant is sufficient to warrant a conviction.

After proof of the corpus delicti, the confession of a defendant is sufficient to warrant a conviction.

6. Criminal law §538(1), 741(3) — Weight and credibility of confession as evidence for the jury; confession is not conclusive on accused.

The weight and credibility as evidence of a confession are to be determined by a jury on consideration of all the circumstances connected therewith, the confession not being conclusive on the accused.

7. Homicide §169(6)—Exclusion of evidence of what deceased did to defendant's child held proper.

In a prosecution for murder, exclusion of testimony as to the birth of one of defendant's children and what deceased, her husband, did to it the October previous to the homicide, which occurred in May, offered to show the state of defendant's mind, was proper, since the evidence related to matters too remote in time.

Appeal from Superior Court, Santa Clara County; J. R. Welch, Judge.

Mary Vuyacich was convicted of manslaughter, and she appeals. Affirmed.

W. R. Biaggi, of San Jose, for appellant.
U. S. Webb, Atty. Gen., and John H. Rior-
dan, Deputy Atty. Gen., for the People.

TYLER, P. J. Defendant was charged by information with the crime of murder and convicted of manslaughter.

Little need be said of the evidence, as it is not claimed that it is insufficient to sustain a conviction. Briefly stated, it is as follows:

The accused was the wife of one Steve Vuyacich, who was murdered on or about the 9th day of May, 1921. She had been carrying on illicit relations with one Nick Jaramoaz, and they had planned to elope, for the reason given by her that her husband was cruel and had choked one of their children to death. Early in the morning of the day following the commission of the crime here charged, defendant called on her neighbors and informed them that her husband had been murdered by robbers. Shortly thereafter her paramour was arrested and accused of having committed the deed. There is evidence to show that prior to the arrest of defendant for participation in the crime she talked over the matter of the killing of her husband with a woman acquaintance, and related to her the manner in which he had been killed. In this conversation she stated that she and her paramour had killed him and had for a long time intended to do so, that they wanted him to insure his life for \$15,000 or \$20,000 so that they might be able to go back to the old country. The same story, in substance, was related to the witness at a subsequent period. Thereafter defendant was accused by another acquaintance of having lied to the authorities concerning the manner in which her husband met his death, and was informed by such acquaintance that her paramour had confessed. Defendant then directed this witness to the place where the clothes of the murderer had been buried. She was thereupon arrested. Shortly thereafter she made a confession to the authorities in which she related the details of the murder. She admitted that Jaramoaz and herself had discussed the killing of her husband, and of their intention to return to the old country. She further admitted that according to a prearranged plan Jaramoaz, on the night of the murder, pretended to be a burglar and that he entered the house, threatened her, and demanded that she tie her husband's hands and blindfold him. This she did, and then, as directed, led her husband out of the house, told him to sit down and not be frightened; that she was with him. Deceased followed her directions, whereupon Jaramoaz struck him on the head with a hammer and then stabbed him to death. Defendant at the trial denied making the confession, and testified that on the night of the murder she and Jaramoaz had decided to elope, and that, according to the plans as she understood them, her husband

was not to have been murdered but simply tied to a tree so that they could get away, but that after he was taken from the house by Jaramoaz she heard him call for help, and that she then ran to the door and saw Jaramoaz "working fast with a knife"; that thereafter Jaramoaz took off his clothes and they buried them.

[1-3] As before stated, no question is here raised as to the insufficiency of the evidence, but it is claimed that the judgment of conviction should be reversed for the reason that the trial court refused to give certain instructions, and for the further reason that it committed error in refusing to admit certain evidence during the progress of the trial. Defendant asked for and was refused an instruction to the effect that in weighing the testimony of peace officers care should be used because of the natural and unavoidable tendency of such persons to procure and state evidence against an accused. The instruction was properly refused. While in some jurisdictions the rule is to the effect that testimony of peace officers should be received with caution, it has never obtained here. Our courts have consistently held that instructions which single out the testimony of particular witnesses for comment, and instructions bearing on the weight to be attached thereto, should not be given. *People v. Keith*, 141 Cal. 686, 690, 75 Pac. 304; *People v. Converse*, 23 Cal. App. 687, 689, 153 Pac. 734; *People v. Fritz* (Cal. App.) 201 Pac. 348. Instructions should be general. *People v. Lonnen*, 139 Cal. 634, 637, 73 Pac. 586. The credibility of a witness in a criminal proceeding is a matter to be determined by the jury in arriving at their verdict.

[4-6] Defendant further complains of failure of the trial court to instruct the jury that, if they believed from the evidence that the defendant made a confession, such confession should be received with great caution, and unless supported by other proof in the case tending to convict her of the commission of the crime, it was insufficient to convict. It is established in this state that after proof of the corpus delicti the confession of a defendant is sufficient to warrant a conviction. *People v. Richardson*, 161 Cal. 552, 120 Pac. 20. This rule is conceded, but it is claimed that, as defendant denied that she made the confession, it has no application here. A confession is not conclusive against an accused. Its weight and credibility as evidence are to be determined by a jury upon the same principles that they determine the weight and credibility of any evidence; that is, upon the consideration of all the circumstances connected therewith. That portion of the instruction that her confession should be received with caution is a comment on the evidence and is objectionable for reasons heretofore given. The instruction was properly refused.

[7] The next refused instruction complain-

ed of relates to the presumption of innocence. The jury was fully and fairly instructed upon this subject. It is also urged that the court erred in sustaining objections to questions relating to the birth of one of defendant's children and what her husband did to it on October 2, 1920. The testimony was offered for the purpose of proving the state of mind of the defendant. The homicide, as heretofore stated, occurred on the 9th day of May, 1921, and the court refused to allow the question for the reason that it related to matters too remote. The objections were properly sustained.

No other questions are presented.

For the reasons given the judgment of conviction is affirmed.

We concur: KERRIGAN, J.; KNIGHT,
Justice pro tem.

MEMORANDUM DECISIONS

188 Cal. 663

In re WILLIAM'S ESTATE. (Sac. 3294.) (Supreme Court of California. May 2, 1922.) In Bank. Appeal from Superior Court, Nevada County; George L. Jones, Judge. In the matter of the estate of Caroline William, deceased. Appeal from a judgment denying admission of a will to probate. Affirmed. E. H. Armstrong and W. B. White, both of Grass Valley, for appellant. Nilon & Nilon, of Nevada City, for respondent.

PER CURIAM. [1] It is the opinion of the court that there is enough evidence in this case to uphold the finding of the trial court that at the time of the making of the will the testatrix was not competent to remember her affairs sufficiently to make a will or to remember her relatives and keep the matter in mind long enough to complete the task. Upon that ground the judgment of the court below is affirmed. The court expresses no opinion as to the sufficiency of the evidence to sustain the finding that the will was not properly executed. The judgment is affirmed.

SHAW, C. J., and LAWLOR, WILBUR, LENNON, SHURTLEFF, and SLOANE, JJ., and RICHARDS, Justice pro tem., concur.

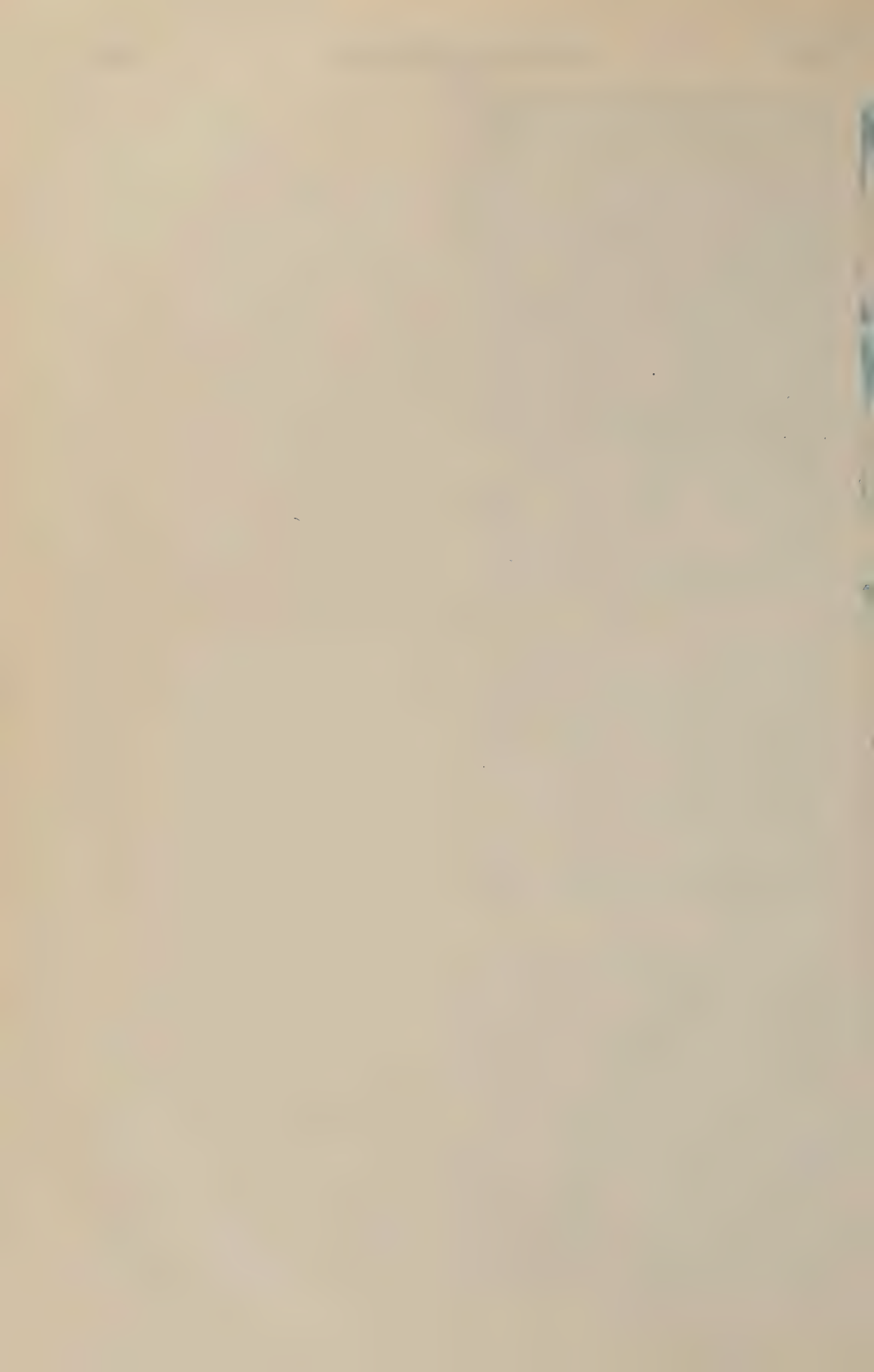
57 Cal. App. 256

PEOPLE v. NORVALL. (Cr. No. 602). (District Court of Appeal, Third District, California. April 4, 1922). Appeal from Superior Court, Tehama County; John F. Ellison, Judge. C. L. Norvall was convicted of violating the Medical Practice Act, and she appeals. Affirmed. Fred C. Pugh, of Red Bluff, for appellant. U. S. Webb, Atty. Gen., and J. Chas. Jones, Deputy Atty. Gen., for the People.

BURNETT, J. The charging part of the information against defendant was as follows: "The said C. L. Norvall on or about the 25th day of April, A. D. 1921, at and in the county of Tehama, and state of California, and prior to the filing of this information, willfully and unlawfully did practice, attempt to practice, and advertise and hold herself out as practicing, a system or mode of treating the sick and afflicted in this state, without having at the time of so doing, a valid unrevoked certificate from

the board of medical examiners of the state of California." She was regularly tried and convicted, and sentenced to pay a fine of \$300, with the alternative of imprisonment in the county jail at the rate of one day's imprisonment for every \$2 of said fine remaining unpaid. We find no error in the record. The proceedings seem to have been entirely regular and in accordance with the requirements of the law. The jury were correctly instructed by the learned trial judge. The evidence supports the verdict and no reason has been shown, nor does any occur to us, after an examination of the record, why there should be any interference with the judgment. No doubt, if counsel for appellant could have discovered any valid reason for calling in question the validity of the result reached in the court below, it would have been presented to this court. The failure to make any argument herein on behalf of appellant is not surprising, in view of the record. The judgment and order are affirmed.

We concur: FINCH, P. J.; HART, J.



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KEENA v. UNITED RAILROADS OF SAN FRANCISCO. (Civ. 3951; S. F. 9563.)

(District Court of Appeal, First District, Division 2, California. March 20, 1922. Hearing Denied by Supreme Court May 18, 1922.)

1. Trial §296(4, 5)—Instructions held erroneous as ignoring contributory negligence notwithstanding other instructions.

In father's action against street railway for death of child, struck by street car, defended on the ground of contributory negligence of parents, instructions making railroad liable if guilty of negligence which proximately contributed to child's death, without requiring the parents to have been free from contributory negligence, *held* erroneous notwithstanding other instructions as to contributory negligence.

2. Street railroads §95(1)—Injury not actionable unless caused by negligence.

A street railroad is not liable for the death of a child struck by a street car if the motorman was not negligent.

3. Street railroads §101—Contributory negligence bars recovery.

Where negligence of injured person proximately contributed to the injuries by a street car, the railroad company is not liable, even though it was negligent.

4. Street railroads §118(15)—Instruction on last clear chance doctrine held justified.

In father's action for death of child struck by street car, in which there was conflicting evidence as to whether the car was stopped as soon as it could have been stopped after the gripman saw the child in a place of danger, an instruction on the last clear chance doctrine was proper.

On Hearing in Supreme Court.

5. Husband and wife §249—Proceeds of father's judgment for death of child community property.

In father's action under Code Civ. Proc. § 376, for death of infant child, in which the mother was not joined as a plaintiff, under section 378, the proceeds of the judgment in the father's favor become community property, under Civ. Code, §§ 163, 164, 197, 687.

6. Death §24—Negligence of mother imputable to father claiming damages for death of child.

In father's action for death of infant child, in which the mother is not joined as a plaintiff the contributory negligence of the mother was a good defense, not because of her interest in the community property of which the proceeds of a judgment in the father's favor will constitute a part, but because in caring for the child she represents and acts for the community and for the husband as the head of the community, and her negligence in caring for the child is the negligence of the husband.

7. Negligence — §141(1)—General definition of contributory negligence sufficient.

In father's action for death of a child struck by a street car, in which it was claimed that the mother was negligent in not watching the child, a general definition of negligence would be a sufficient guide to the jury in determining whether or not the mother was guilty of negligence under the evidence.

Appeal from Superior Court, City and County of San Francisco; Bernard J. Flood, Judge.

Action by Michael T. Kenna against the United Railroads of San Francisco, a corporation. Judgment for plaintiff, and defendant appeals. Reversed.

Wm. M. Abbott and K. W. Cannon, both of San Francisco (Ivores R. Dains, of San Francisco, of counsel), for appellant.

Daniel A. Ryan, of San Francisco, for respondent.

STURTEVANT, J. The plaintiff commenced an action against the defendant to recover damages for the death of his minor child, a boy of the age of four years and eight months, who was struck by a Castro street cable car on May 9, 1918, and from which wounds the child subsequently died. The plaintiff was awarded a judgment in the sum of \$2,500, and the defendant has appealed under section 953a of the Code of Civil Procedure.

[1] In his complaint the plaintiff alleged that the defendant's agent negligently operated the car, and by reason of such negligence the child was killed. The defendant answered denying the material allegations of the complaint and pleaded the contributory negligence of the child and also the contributory negligence of the child's parents. The points made by the appellant asking for a reversal will be discussed in the order of their presentation by the appellant. The first two points are so closely allied that they will be discussed together. The plaintiff requested, and the trial court gave two instructions, which the appellant assigns as erroneous. One of the instructions is as follows:

"If you find that, at the time and place in question, the gripman in charge of said car saw said child upon or near the tracks, and did not give any warning of its approach, and if you further find that he was negligent in not doing so, and that such negligence proximately contributed to the death of the plaintiff's child, then your verdict must be in favor of the plaintiff and against the defendant."

The other instruction complained of is as follows:

"If you find at the time and place in question, the gripman operating said car drove the same at a dangerous rate of speed, then I charge you that he was guilty of negligence; and, if you

find that such negligence proximately contributed to the death of plaintiff's child, your verdict must be in favor of the plaintiff and against said defendant United Railroads of San Francisco."

The objection, made to each of the instructions, is that, if an instruction by its terms purports to settle the conditions necessary to the predication of a verdict, it must be correct in its entirety, and must not overlook pleaded defenses on which substantial evidence has been introduced. As the defendant had pleaded the contributory negligence of the child's parents, and as it had introduced substantial testimony in support of its plea, the defendant complains that the instructions were erroneous for, in legal effect, they directed a verdict even though the parents were guilty of contributory negligence. In support of its position the appellant cites and relies on *Pierce v. United Gas & Electric Co.*, 161 Cal. 176, 118 Pac. 700; *Killelea v. California Horseshoe Co.*, 140 Cal. 602, 74 Pac. 157. The respondent attempts to justify the instructions by calling attention to the fact that each of the instructions contained the limitation, "That such negligence proximately contributed to the death." As we understand the respondent, he would argue therefrom that if a defendant is negligent, and the negligence proximately contributes to an injury, then, and in that event, the defendant is liable, notwithstanding that the plaintiff is negligent and the plaintiff's negligence proximately contributes to the injury.

[2, 3] However, we think it is settled law in this state that in such a case as the case before us a defendant is not liable if it is not negligent; again, if it is negligent, and the injured person is also negligent, and the negligence of the injured person proximately contributes to the injuries complained of, the defendant is not liable. The respondent also claims that, in other places, the court had fully instructed the jury on the defenses of contributory negligence and its importance as an element in the case. However, the same argument could have been made and was made in those cases in which the same error was complained of as is complained of in this case. *Lemasters v. Southern Pacific Co.*, 131 Cal. 105, 108, 63 Pac. 128; *Rathbun v. White*, 157 Cal. 248, 253, 107 Pac. 309; *Pierce v. United Gas & Electric Co.*, 161 Cal. 176, 184-187, 118 Pac. 700; *Tognazzini v. Freeman*, 18 Cal. App. 468, 472-473, 123 Pac. 540. As the Supreme Court said in *Rathbun v. White*, 157 Cal. at page 253, 107 Pac. 311:

"Nor was the vice of the instruction cured by the general direction that plaintiff must establish every material allegation of the complaint by a preponderance of the testimony. This produced, at most, a hopeless conflict between the various instructions. The different declarations of the court were not capable of being harmonized. In such case it is impossible to deter-

mine which of the conflicting rules presented to them was followed by the jury and the error in any of the instructions must be deemed prejudicial. *Estate of Cunningham*, 52 Cal. 465; *Sappenfield v. Main St. R. R. Co.*, 91 Cal. 48 (27 Pac. 590)."

The respondent attempts to distinguish the *Pierce* Case by calling attention to the fact that there were two children involved. However, the most cursory examination of the case shows that the instruction complained of, and which was held to be prejudicially erroneous, was faulty, not because of the number that had been injured, but by reason of the fact that the instruction took from the jury material facts pertinent to the issues on trial. The respondent attempts to distinguish the *Killelea* Case by pointing out that in that case the court "recited the evidence and virtually told the jury that, if they found the evidence was true, 'then I charge you that the defendant is guilty of negligence and plaintiff is entitled to a verdict.'" True, but the instructions complained of in this case did the same thing. The trial court recited merely the evidence of the defendant's negligence, and the jury was directed that if they found that the defendant was so negligent that then, and in that event, it should return a verdict in favor of the plaintiff, and, in so doing, the case of the plaintiff on the issue of contributory negligence was entirely ignored.

In what we have said above we are not to be understood as holding that either instruction was a sound proposition of law in all other respects.

The appellant complains of another instruction which is as follows:

"If you find that the mother of said child permitted the child to go upon the street in front of the house and across the street therefrom, and that she made frequent trips to the window to watch said child, and if you find that she exercised reasonable care in that regard, and that during one of the intervals of time between the mother going to the window, the said child wandered away from where he had been playing, and that the interval of time was not longer than that which would be ordinarily permitted by an ordinarily prudent person under the same circumstances, then contributory negligence cannot be imputed to the parents."

The appellant says that said instruction violates section 19, art. 6, of the state Constitution, which provides that judges shall not charge juries with respect to matters of fact, and that it took from the jury the question of ordinary care. The appellant also contends that the instruction states in effect that watching a child at intervals constitutes reasonable care. In reply to this criticism, the respondent claims that the instruction particularly defines the meaning of ordinary care, and instructs the jury that if they find that the parent, or parents, of the child, did use ordinary care, then, so far as the parents, or custodians, of the child are con-

cerned, they cannot be held guilty of contributory negligence. We will not attempt to answer the objections made by the appellant. A brief reading of the instruction and of respondent's explanation thereof, both show that the instruction attempts to define ordinary care. Both show that the definition as tendered is to the effect that ordinary care is reasonable care. However, as reasonable and ordinary are interchangeable expressions, the definition does not carry us forward. We will not attempt to frame a full instruction on the subject, and are not to be understood as attempting to do so. However, we call attention at this time to the fact that as an instruction pertinent to the particular facts of this particular case the instruction omits many pertinent matters. It does not state the age of the deceased child, whether the child was allowed to go out of the house attended or unattended, whether the house is in a thickly populated neighborhood, or whether the street and adjacent streets are slightly traveled or busy thoroughfares, nor does it state what is meant by frequent trips to the window. Neither does it state whether the windows were opened or closed, and whether the mother was possessed of good hearing or was very deaf. It seems unnecessary for us to do more than to mention the foregoing as being elements that would enter into the mind of a reasonably careful mother as quieting her mind with reference to the welfare of her child. It is also quite clear that a material change or addition of any one of the foregoing elements might cause any jury to take a different view of the matter.

[4] The appellant complains because the court instructed the jury on the last clear chance doctrine. In this behalf the appellant quotes the testimony of the gripman to the effect that after he saw the child in a place of danger that then he stopped the car as quickly as he could. The respondent replies by pointing to the record and showing that the respondent called two experienced railroad men who testified that the car was not stopped as soon as it could have been. Under these circumstances, we think that the trial court did not err in instructing the jury on the doctrine of the last clear chance. There was a conflict in the evidence, and the jury were entitled to be advised as to the law and then to believe the plaintiff's witness, or witnesses, or to believe the defendant's witness.

The appellant asserts that the verdict of \$2,500 was excessive. In view of what has been said above, we think it is unnecessary for us to pass on that point. A new trial must be had, and it should be left to the jury under appropriate instructions to determine the amount without being hampered in any respect by the opinion of this court.

After the above was written, the respondent filed a petition for a rehearing, and in

that petition set forth that the father was in no manner responsible for the acts of omission on the part of the mother, and that therefore the instruction on the subject of the mother's contributory negligence was not pertinent because the father is maintaining this action. These matters had not been touched on theretofore by counsel, and, for the purpose of giving the question a full consideration, the court granted a rehearing. In this state a father may maintain an action for an injury to, or the death of, a minor child. Code Civ. Proc. § 376. The mother, having an interest in the subject of the action, and in obtaining the relief demanded, may be joined as a plaintiff. Code Civ. Proc. § 378. The proceeds of a favorable judgment in such an action become community property. Civ. Code, §§ 163, 164, and 687. The father and mother of a legitimate unmarried minor child are equally entitled to its custody, services, and earnings. Civ. Code, § 197. And, under the law of this state, when a right is created in favor of several persons, it is presumed to be joint and not several. This presumption in the case of a right can be overcome only by express words to the contrary. Civ. Code, § 1431. Such an action as the instant case did not exist at common law and is purely statutory. *Bond v. United Railroads*, 159 Cal. 270, 276, 113 Pac. 366, 48 L. R. A. (N. S.) 687, Ann. Cas. 1912C, 50. If a judgment for damages is recovered, the proceeds do not belong to the estate of the decedent and are not liable for the decedent's debts. The recovery is for the injury inflicted upon the plaintiff personally and not for injuries inflicted upon the decedent. *Redfield v. Oakland C. S. Ry. Co.*, 110 Cal. 277, 290, 42 Pac. 822, 1063. It would therefore appear to be the law of California that the proceeds of such a judgment passed to the surviving husband and wife, one moiety to each. It has been directly held that such is the rule in other jurisdictions. *Toner's Adm'r v. South Covington & C. St. Ry. Co.*, 109 Ky. 41, 58 S. W. 439, 441. Actions for injuries to a child are commonly classified: (1) Action by the child; (2) action by the executor or administrator of the child; and (3) action by the parent. This case does not fall in class 1, nor in class 2, but does fall in class 3. In other jurisdictions it has been held that when the case falls in class 3, and where the statute vests a common joint interest in the award in both father and mother, as does the California statute, contributory negligence of the mother constitutes a defense in an action by the father for the death of a child of tender years. *Vinnette v. Northern P. R. Co.*, 47 Wash. 320, 91 Pac. 975, 18 L. R. A. (N. S.) 328; *Nashville Lumber Co. v. Busbee*, 100 Ark. 76, 139 S. W. 301, 38 L. R. A. (N. S.) 754; *Darbrinsky v. Pennsylvania Co.*, 248 Pa. 503, 94 Atl. 269, L. R. A. 1915E, 781; *Phillips v. Denver City Tramway Co.*, 53 Colo. 458, 128 Pac. 460, Ann. Cas. 1914B, 29; *Kuchler v.*

Milwaukee Elec. R., etc., Co., 157 Wis. 107, 146 N. W. 1133, Ann. Cas. 1916A, 891. In California the earnings of the wife and the earnings of the husband are both community property, and the contributory negligence of the husband may be set forth as a defense in an action by him to recover damages for an injury sustained by the wife. *Basler v. Sacramento Gas & Elec. Co.*, 158 Cal. 514, 518, 111 Pac. 530, Ann. Cas. 1912A, 642. The statute makes no distinction between the case last cited and the instant case, and we think that we are controlled by the doctrine declared in the *Basler* Case and for the reasons there stated. The respondent calls to our attention the case entitled *Atlanta, etc., Ry. Co. v. Gravitt*, 93 Ga. 369, 20 S. E. 550, 26 L. R. A. 553, 44 Am. St. Rep. 145. That decision discloses that it was based on a special statute then in force in the state of Georgia. Respondent also relies on the case entitled *Macdonald v. O'Reilly*, 45 Or. 589, 78 Pac. 753. That case is not helpful. In the state of Oregon the father is the sole heir of a deceased minor child. B. & C. Ann. Codes, §§ 5577 and 5578. Such a suit as the instant case is provided by statute, but it must be maintained by the representative of the decedent and the proceeds become a part of and are administered upon the same as other personal property. B. & C. Ann. Codes, § 381. The Oregon court was therefore logical in holding that the father was not chargeable with the negligence of the mother.

The judgment is reversed.

We concur: LANGDON, P. J.; NOURSE, J.

Opinion of Supreme Court in Bank Denying Hearing.

PER CURIAM. [5-7] We approve of that portion of the opinion holding that the proceeds of the judgment in favor of the father is community property, but we disapprove of that portion of the opinion to the effect that the proceeds of the judgment pass to the parents, one-half to each. The contributory negligence of the mother is a defense to the action on behalf of the community to recover for the death of the child, not because of her interest in the community property, but because in caring for the child she represents and acts for the community and for the husband as the head of the community, and her negligence in caring for the child is the negligence of the husband. We agree with the balance of the opinion of the District Court of Appeal, but think that a general definition of negligence would be a sufficient guide to the jury in determining whether or not the mother was guilty of negligence under the evidence.

Transfer denied.

SHAW, C. J., and WILBUR, LENNON, SLOANE, and SHURTLEFF, JJ., concur.

LAWLOR, J., voted for a hearing in this court.

57 Cal. App. 312

PFLUG v. BROWN. (Civ. 4249.)

(District Court of Appeal, First District, Division 2, California. April 11, 1922.)

Appeal and error ⚡347(2) — **Appeal taken more than 30 days after entry of order denying new trial in minutes is too late.**

Under Code Civ. Proc. § 939, permitting appeal to be taken within 30 days after entry of the order determining a motion for a new trial, a notice of appeal filed more than 30 days after the entry of the order in the minutes of the court was too late, though within 30 days after the entry in the register of actions.

Appeal from Superior Court, City and County of San Francisco; James M. Troutt, Judge.

Action by Pauline Pflug against Julius B. Brown. From a judgment for plaintiff, defendant appeals. On motion to dismiss. Appeal dismissed.

Klein, Clarke & Gerlack, of San Francisco, for appellant.

Wm. J. Hayes, of Oakland, for respondent.

LANGDON, P. J. This is a motion to dismiss an appeal upon the ground that it was not taken within the time prescribed by section 939 of the Code of Civil Procedure. Said motion is supported by a certificate of the clerk of the superior court, showing that a judgment herein was rendered in favor of plaintiff on November 10, 1921; that on November 17, 1921, defendant served and filed a notice of intention to move for a new trial; that on November 25, 1921, said defendant filed a bond on appeal in due form; that said motion for a new trial was heard on January 6, 1922, and denied; that the following entry appears in the minutes of said court under date of January 6, 1922:

"No. 113527. Pauline Pflug v. Julius B. Brown. In this action, the motion for a new trial came on regularly this day to be heard, and, after argument by counsel for respective parties, it is ordered that said motion be, and the same is hereby, denied."

The certificate of said clerk further states that on February 27, 1922, defendant filed a written notice of appeal from said judgment.

It is apparent from the foregoing recital of facts that the notice of appeal was filed too late, having been filed more than 30 days "after entry in the trial court of the order determining" the motion for a new trial.

Upon the hearing before this court of the motion to dismiss the appeal, appellant opposed the same urging that there was no showing made by respondent that the notice of appeal had been filed more than 30 days after the entry in the register of actions of the denial of said motion for a new trial. It was contended that section 939 of the

Code of Civil Procedure contemplates such an entry in the register of actions, and not in the minutes of the court. We are cited to no authorities in support of this position, and we think it is without merit.

Upon the face of the record presented to this court, the appeal was not taken in time.

The motion to dismiss the appeal is granted.

We concur: **NOURSE, J.; STURTEVANT, J.**

57 Cal. App. 66

VIAU v. VIAU. (Civ. 4130, S. F. 9920.)

(District Court of Appeal, First District, Division 2, California. March 14, 1922. Hearing Denied by Supreme Court May 11, 1922.)

1. Pleading ⚡9—**Unnecessary to allege in hæc verba that consideration of promise to be specifically enforced was adequate where facts are alleged.**

It is unnecessary to allege in hæc verba that the consideration for the promise sought to be specifically enforced was adequate, and that the contract was just and equitable, where sufficient facts are alleged from which a court of equity can see that these elements exist.

2. Frauds, statute of ⚡129(3)—**Working on farm in partial execution of contract not part performance.**

The fact that the purchaser worked on the land in partial execution of an oral contract to convey did not furnish the part performance required to withdraw the case from the stringency of the rule requiring the contract to be in writing; the purchaser never having been given possession.

3. Limitation of actions ⚡36(4)—**Delay in suit for specific performance within statute.**

Where the complaint in an action for specific performance alleged that defendant repudiated the contract and refused to perform in March, 1916, and the action was not brought until February, 1920, under Code Civ. Proc. § 339, subd. 1, the action was barred.

4. Trusts ⚡95—**Fraudulently procuring services in consideration of oral contract to convey held not to create trust in land.**

In view of Civ. Code, § 847, providing that the only trusts in relation to real property are those enumerated under title 4 and section 2217, declaring that an involuntary trust is one which is created by operation of law, and section 2224, providing that one who gains a thing by fraud, etc., the violation of a trust, or other wrongful act, is, unless he has some other or better right thereto, an involuntary trustee of the thing gained for the person who otherwise would have had it, the fact that oral promises by defendant to convey land were made in bad faith and were false and were to deceive plaintiff and to receive the fruits of his labor through fraud did not create a trust, as the thing gained by the alleged fraud was plaintiff's labor, and not title to the land.

5. Trusts ⇨17, 18(3), 33—Defendant not made a trustee of an express trust by her declarations.

The contention that the owner by telling plaintiff to take the land, but she would never give him a deed to it, created a trust, was without merit, Civ. Code, § 852, requiring such trust to be in writing, and section 2222 requiring, in order to create, as to the trustee, a voluntary trust, that the trustee must have used such language in writing as would indicate with certainty her acceptance of the trust made upon sufficient consideration of its existence.

On Hearing in Supreme Court.

6. Specific performance ⇨49(2)—Inadequacy of consideration not made good by love and affection.

In suits for specific performance, inadequacy of consideration shown by the evidence cannot be made good by consideration of love and affection.

Appeal from Superior Court, Fresno County; M. F. McCormick, Judge.

Action to compel specific performance by Will Viau against Benjamin H. Viau, administrator of the estate of Mary H. Viau, deceased. From judgment for plaintiff, defendant appeals. Reversed.

Edgar S. Van Meter, C. K. Bonestell, C. M. Ozias, and George Cosgrave, all of Fresno, for appellant.

Gallagher & Simpson, Ray W. Hays, and Ben H. Johnson, all of Fresno, for respondent.

LANGDON, P. J. This is an appeal by the defendant, as administrator of the estate of Mary H. Viau, deceased, from a judgment entered in favor of the plaintiff, who was the son of said deceased.

The complaint alleges on January 2, 1903, Mary Viau, now deceased, acquired title to lots 14 and 15, according to the plat of Orangedale, county of Fresno, Cal., and at said time said property was wholly unimproved except 9 acres planted to young vines; that Mary Viau was the mother of plaintiff, Will Viau, and at the time she acquired title to said property and on other occasions thereafter she promised that, if the plaintiff would remain with her and assist in the planting and improvement of said property and other property then owned by said Mary Viau, she would give said plaintiff the north 20 acres of lots 14 and 15; that plaintiff went on said property in January, 1903, and remained there continuously, supervising and managing and planting and improving said property and working on said land until April, 1918; that frequently during said time he had opportunities to engage in other business undertakings, but was dissuaded from so doing by his mother's promise that, when the property was improved, he should have the

said 20 acres of land; that from January, 1903, to April, 1918, the plaintiff, having confidence in the representations and promises of the said Mary Viau and relying upon the same, and solely and only by reason thereof, devoted his entire time and attention to the improvement of the property above described, and other property owned by said Mary Viau, and during all of said time worked his own horses on the said property for the improvement thereof, and for the benefit and improvement of other property owned and possessed by defendant; and the promises made by said Mary Viau were made in bad faith and were false, and were made with intent to deceive and did deceive said plaintiff; that said land was completely planted and improved by March, 1915; that plaintiff then demanded of his mother a good and sufficient deed to said 20 acres, but said Mary Viau at that time refused to give a deed to plaintiff; that Mary Viau now claims to own the whole of said 20 acres and repudiates said trust and denies that plaintiff has any interest in said property; that said property is of the value of \$20,000.

Plaintiff prayed for a decree adjudging him to be the owner of said 20 acres of land and directing Mary Viau to convey the same to him.

The action was originally commenced against Mary Viau during her lifetime, and during its pendency she died, and the administrator of her estate was substituted in her place and stead. Mary Viau answered the complaint. She denied ever making the alleged promise to plaintiff; denied that he ever remained continuously on the property or that he supervised, managed, or improved any portion thereof; denied that plaintiff was ever dissuaded by her from entering into any business undertaking whatsoever or that any promises were made by her to him regarding the land. Defendant also alleged that plaintiff had done certain work upon the land in common with his three brothers, and that such work was done by him in consideration of his being cared for and partially supported by defendant; denied that plaintiff at any time by reason of any promise or representation of hers devoted any portion of his time or attention to the improvement of the land described, or ever worked any horses belonging to himself or did any other work upon the property.

The trial court found that the allegations of the complaint were true, and that said Mary Viau did, during her lifetime, claim to own the whole of the 20 acres described in the complaint, and did repudiate the trust set forth in said complaint, and did deny that plaintiff had any interest in said property; that the allegations of the answer were untrue; that plaintiff was deprived of the use and occupation of the premises for the years

1916, 1917, 1918, and 1919; that the value of said use and occupation for said period of time was \$8,900. The judgment decreed that the plaintiff was the owner of said 20 acres and directed the administrator to convey the same to him and gave judgment for plaintiff for \$8,900.

The record reveals that the Viau family consisted of the mother, father, and seven children, four of whom were boys. At the time the alleged promise was made to plaintiff in 1903, he was of the age of 23 years, and was living at the family home with his brothers and sisters. Three of the brothers worked on the property, more or less, during these years, and it certainly cannot be said from a reading of the entire record that the plaintiff contributed more of his time and labor than did the other brothers. He was the eldest son, and, naturally, assumed some of the responsibility about the property, especially as his mother and father separated after the property was acquired, and this forced the mother to look more to her sons. However, a detailed discussion of the evidence in the present case is entirely futile, as the appeal presents to this court merely questions of law.

It is contended by the appellant that the elements necessary to support a decree of specific performance of an oral contract for the conveyance of land are neither pleaded nor proven, and therefore the complaint does not state a cause of action nor the proof warrant the judgment entered.

The complaint is totally lacking in any allegation that the consideration received by the defendant was adequate or that the contract as to her was just and equitable. Reliance is placed upon the case of *O'Hara v. Wattson*, 172 Cal. 525, 157 Pac. 608, wherein it is said:

"The cross-complaint will be scanned in vain to discover therein any allegation of the adequacy of the consideration moving from defendant to plaintiff's intestate or of the justness and reasonableness of the contract. Yet from the early case of *Bruck v. Tucker*, 42 Cal. 346, consistently down it has been uniformly held that such averments are essential to a good pleading in equity for specific performance. Only a few of these cases need be cited: *Civ. Code*, § 3391; *Stiles v. Cain*, 134 Cal. 170, 66 Pac. 231; *White v. Sage*, 149 Cal. 613, 616, 87 Pac. 193; *Kaiser v. Barron*, 153 Cal. 788, 96 Pac. 806; *Joyce v. Tomasini*, 168 Cal. 234, 236, 142 Pac. 67; *Young v. Mathew Turner Co.*, 168 Cal. 671, 143 Pac. 1029."

[1] While it is true that it is unnecessary to allege in *hæc verba* that the consideration for the promise sought to be specifically enforced was adequate, and that the contract was just and equitable, where sufficient facts are alleged from which a court of equity can see that these elements exist (*Stiles v. Cain*, 134 Cal. 170, 66 Pac. 231; *White v. Sage*, 149 Cal. 616, 87 Pac. 193), in the present case

the complaint does not show facts from which the court could make such deductions. It alleges that the property is worth \$20,000. What the value of farm labor was during the years from 1903 to 1915 is not alleged and is not in evidence; and it is also clear from the evidence that the plaintiff did not work on the ranch continuously during these years, but it appears that he was away on several occasions, that he was ill part of the time, and that he did engage in other business enterprises during part of the time he was at the property. The trial court did not find that the consideration for the alleged promise of Mary H. Viau was adequate, or that the contract was, as to her, just and equitable. Inadequacy of consideration shown by the evidence cannot be made good by considerations of love and affection. *O'Hara v. Wattson*, 172 Cal. at page 537, 157 Pac. 610. In the last-cited case the meaning of section 3391 of our Civil Code was carefully discussed, and it was decided that it is "beyond the reach of successful argument that the laws of the state of California declare to its courts of equity that they shall deny the equitable relief of specific performance when they find an inadequacy of price standing alone. Such has been the universal rule of decision in this state. * * *" Respondent contends, however, that the present case falls within the rule of *Fleischman v. Woods*, 135 Cal. 256, 67 Pac. 276, and that the court will not attempt to place a money value upon the personal services of the respondent, but will presume that a breach of an agreement to transfer real property cannot be adequately relieved by pecuniary compensation. However that may be in the present case, we are not called upon to decide the question, because, if the action is to be regarded as one for specific performance of an oral contract to convey land, it would seem that there is not only the objection to the pleadings and proof above discussed, but also the further objection that such a contract as is here sought to be enforced is within the purview of the statute of frauds.

[2] The fact that plaintiff worked upon the land in partial execution of the oral contract does not furnish the part performance required to withdraw the case from the stringency of the rule requiring such a contract to be in writing. *Davis v. Judson*, 159 Cal. 131, 132, 113 Pac. 147; *Woerner v. Woerner*, 171 Cal. 298, 300, 152 Pac. 919. The plaintiff was never given possession of the land. Mary H. Viau held possession of the same until after the filing of the present action, and plaintiff resided with her in her home, together with her other children.

[3] It is also contended by appellant—and this we think is a decisive attack upon the judgment—that the trial court should have sustained the demurrer to the complaint upon the ground that the action was barred by

the statute of limitations applicable thereto. Section 339, subd. 1, Code Civ. Proc.; *Lowell v. Kier*, 50 Cal. 646. The complaint alleged that Mary Viau repudiated the contract and refused to perform the same in March, 1916, and this action was not brought until February, 1920. This objection is fatal to the judgment if the action be considered as one for specific performance. However, respondent meets it and the other contentions of appellant by contending that the action is one to enforce a trust, and that, under the findings of the court, the property was charged with a constructive trust in favor of plaintiff, and that constructive trusts fastened upon the conscience of a party are not within the statute of frauds. *Kimball v. Tripp*, 136 Cal. 631, 69 Pac. 428; *Hayne v. Hermann*, 97 Cal. 259, 32 Pac. 171. It is stated in the supplemental brief of respondent that the case is in no sense an action for specific performance, and it is tacitly admitted that, unless the facts create a trust in the property for the benefit of plaintiff, the judgment must be reversed, as the objections to the showing made for specific performance of an oral contract for the conveyance of land are insuperable.

[4] We are therefore brought to a consideration of this last question as the only real one upon this appeal. Section 847 of the Civil Code provides that the only trusts in relation to real property in this state are those which are enumerated under title 4 of said Code. See, also, *McCurdy v. Otto*, 140 Cal. 48, 51, 73 Pac. 748. Respondent relies upon sections 2217 and 2224 of the Civil Code. Section 2217 declares that "an involuntary trust is one which is created by operation of law," and section 2224, Civil Code, provides that "one who gains a thing by fraud, accident, mistake, undue influence, the violation of a trust, or other wrongful act, is, unless he has some other and better right thereto, an involuntary trustee of the thing gained, for the benefit of the person who would otherwise have had it." It is his contention that, as the trial court found the allegations of the complaint to be true, and as the complaint alleged that the promises made by Mary Viau were made in bad faith and were false and were made with intent on the part of said Mary Viau to deceive the plaintiff, therefore Mary Viau received the fruits of the labor of plaintiff through fraud. Respondent then contends that this constitutes her a trustee for him in respect to the land on which the labor was expended. Such a contention is not warranted by the language of the Code section above referred to, which provides that the thing gained by fraud (in this case plaintiff's labor, and not the title to the land) shall be charged with a trust in favor of the person from whom it was thus fraudulently obtained. The cases cited by respondent in support of his contention are cases where the real property to

which the trust was held to attach had been acquired by the legal holder by his or her own fraud or undue influence. The situation in the present case does not create a constructive trust attaching to the legal title of this land under our Civil Code or the decisions of our courts.

[5] Upon the oral argument of this cause there was a contention made by respondent that Mary Viau had made herself the trustee of an express trust by her declarations, testified to by plaintiff and denied by Mary Viau, that "she told me to take the 20 acres, but she would never give me a deed to it." This contention is also without merit. There are two objections to it. In the first place, the trust contended for by respondent would be a voluntary trust, as distinguished from an involuntary trust created by operation of law. Such a trust, relating to real property, is required by section 852 of our Civil Code to be in writing. Second, in order to create, as to the trustee, a voluntary trust with relation to real property, the trustee must have used such language (in writing) as would "Indicate with reasonable certainty his acceptance of the trust, or his acknowledgment, made upon sufficient consideration, of its existence." Section 2222, Civ. Code. The above-quoted language which plaintiff testified was used by his mother indicates no such acceptance or acknowledgment with reasonable or any certainty.

We are unable to see that the facts of this case raise either a voluntary or involuntary trust with relation to real property under the law of this state. The situation is not within sections 2216, 2222, 2223, or 2224 of the Civil Code, and, as stated before, there are no trusts recognized in this state except those provided for in the Civil Code.

The conclusion is unescapable that this judgment cannot be justified if we view the action as one for specific performance of an oral contract for the conveyance of real property, and assuredly it cannot be justified in an action to enforce the execution of a trust, because the facts do not establish a trust. If Mary Viau breached any contract with the plaintiff, he has an adequate remedy at law, or he would have had such a remedy had he pursued it in time, and, if he has lost it by his own laches, that does not afford a reason for according him a remedy not secured to him by the laws of this state.

The judgment is reversed.

We concur: STURTEVANT, J.;
NOURSE, J.

Opinion of Supreme Court in Bank denying Hearing.

PER CURIAM. The petition for a rehearing is denied.

[6] The opinion of the District Court contains the following statement:

"Inadequacy of consideration shown by the evidence cannot be made good by considerations of love and affection."

In support of this statement the opinion cites *O'Hara v. Wattson*, 172 Cal. at page 537, 157 Pac. 608. The quotation is made from the opinion of Department 2. A rehearing was granted in that case for the purpose of modifying this statement, and the correct rule, as the court finally determined it, is found in 172 Cal. at page 528, 157 Pac. 608, in the opinion of the court in bank.

SHAW, C. J., WILBUR, SLOANE, SHURTLIFF, and LAWLOR, JJ., and RICHARDS, Justice pro tem., concur.

(57 Cal. App. 182)

MURPHY v. MURPHY et ux. (Civ. 2427.)

(District Court of Appeal, Third District, California. March 27, 1922. Hearing Denied by Supreme Court May 25, 1922.)

1. Judgment $\Leftarrow$ 249—Form of pleading or failure to ask appropriate relief will not foreclose a plaintiff disclosing facts entitling to some relief.

The form of the pleading or failure to ask appropriate relief will not foreclose a plaintiff, if, upon the facts disclosed, the plaintiff is entitled to some relief.

2. Fraudulent conveyances $\Leftarrow$ 226, 263(1)—Action by judgment creditor to set aside conveyance held to lie; complaint held not sufficient to warrant setting aside conveyances as fraudulent.

Where a daughter obtained a judgment against her father for her maintenance and support, she is entitled, by reason thereof, to maintain an action to set aside a conveyance by her father to defraud her and to subject such property to the judgment lien; but mere allegations of transfers to her stepmother by way of gift, and of the father's ownership of lots at date of judgment sued on, and stepmother's purchase of home residence, without alleging fraudulent transfer, is insufficient as against the stepmother.

3. Appeal and error $\Leftarrow$ 195—Sustaining demurrer to complaint without leave to amend cannot be reviewed unless plaintiff asked permission to amend.

To review an assignment that the court erred in sustaining a demurrer to the complaint without permission to amend, plaintiff must have applied for permission to amend.

Appeal from Superior Court, San Joaquin County; H. D. Burroughs, Judge.

Action by Lula Mignon Murphy against S. S. Murphy and wife. From a judgment of dismissal in favor of the wife, Alice K. Murphy, the plaintiff appeals. Affirmed.

Lula Mignon Murphy and J. E. White, of San Francisco, for appellant.

John R. Cronin, of Stockton, for respondents.

BURNETT, J. A general demurrer to the complaint was interposed by the defendants, and it was sustained without leave to amend as to Alice K. Murphy and overruled as to S. S. Murphy. From the judgment of dismissal in favor of said Alice K. Murphy, following the order sustaining her demurrer, the appeal has been taken. From the complaint it appears that plaintiff is the daughter of S. S. Murphy by a former marriage; that on April 26, 1911, she obtained a judgment against him for her maintenance and support in the sum of \$15 per month, and that the amount due under said judgment is \$930, as principal, and \$179.91 interest. The complaint then proceeds:

"That at the time of the filing of the action in said case No. 9896 as per Exhibit A hereto attached, there stood, upon the official records of the above county, recorded in the name of said defendant S. S. Murphy, ten acres of almonds in the Acampo Orchard and nine lots in the town of Lodi, all of which said property is located in the above county.

"That at said time of filing said case No. 9896, said S. S. Murphy received a United States pension of \$12 per month. That since said time said pension has been increased to \$40 per month.

"That at said time of filing said case No. 9896 there stood recorded in the name of the wife of said S. S. Murphy, the above Alice K. Murphy, ten acres of prunes only.

"That after the filing of the said action in case No. 9896, the said almond orchard was recorded by deed of gift into the name of the above Alice K. Murphy, and lots Nos. 4 and 17, block 7, East Lodi addition, were recorded sold.

"That upon January 5, 1912, the time from which said judgment in said case No. 9896 was made final, there stood recorded in the name of the said and above S. S. Murphy lots Nos. 1, 2, 3, 15, 16, 23, and 24 in block 7, East Lodi addition, town of Lodi, as per Book A, vol. 198, p. 431, of the official records of the above county.

"That since said time said lots have been sold and that no other properties have been purchased and recorded in the name of S. S. Murphy.

"That since said time January 5, 1912, there has been purchased in the name of the above Alice K. Murphy the home residence of the above defendants—February 26, 1913, as per Book A, vol. 225, p. 298, of the records of the above county.

"And also ten additional acres of prunes—lot 37 North Acampo Orchard recorded July 30, 1912, in Book A, vol. 218, p. 393. That since said time—January 5, 1912—there has been recorded in the name of the above Alice K. Murphy a mortgage for \$500 against lots 23 and 24, block 7, East Lodi addition, recorded

March 9, 1915, in Book B of Mortgages, No. 124, p. 135, official records of above county.

"That as the husband of the above Alice K. Murphy the said above S. S. Murphy is entitled to and enjoys a community share and interest in the income from all of the above properties which now stand in the name of the above Alice K. Murphy. And that said community interest in said income is subject to the lien of the judgment in the said case No. 9896, Lulu Mignon Murphy v. S. S. Murphy.

"That the properties above described which have been purchased in the name of the above Alice K. Murphy since the date whence the final judgment in the said case No. 9896 commenced, that is, January 5, 1912, and the above mortgage recorded since said time in the name of the above Alice K. Murphy, are incumbered with the lien of said judgment.

"That said above properties are incumbered with the lien of said judgment up to the full valuation of all of the properties sold or conveyed, as above described, out of the name of the above S. S. Murphy since said January 5, 1912, from which said time above plaintiff holds final judgment against the above S. S. Murphy."

The prayer was for judgment against each of the defendants for the amount due in said case No. 9896, and that—

"Said properties and said interest in the income as above set forth be found subject to the lien of the above amounts due under said judgment, * * * for attorney's fees, for costs of court and for \$15 per month pendente lite."

[1] No doubt appellant is right in the contention that—

"The form of the pleading or failure to ask for appropriate relief will not foreclose a plaintiff if, upon the facts disclosed, the plaintiff is entitled to some relief." *Walsh v. McKeen*, 75 Cal. 519, 17 Pac. 673; *Zellner v. Wassman et al.*, 184 Cal. 80, 193 Pac. 84.

[2] It is true, also, that plaintiff, by reason of said judgment, is entitled to maintain an action to set aside a conveyance made by her father to defraud her of the fruits of her judgment and to subject to the lien of said judgment the property thus fraudulently conveyed. This is a fair inference from the following cases cited by her: *Jenner v. Murphy*, 6 Cal. App. 434, 92 Pac. 405; *Sheppard v. Sheppard*, 15 Cal. App. 617, 115 Pac. 751; *Murray v. Murray*, 115 Cal. 266, 47 Pac. 37; *Tully v. Tully*, 137 Cal. 65, 69 Pac. 700; *Clopton v. Clopton*, 162 Cal. 27, 121 Pac. 720. Many other decisions are to the same effect. But there is no allegation in the complaint to bring this case within the operation of such principle. It does not appear that any conveyance was made with intent to defraud any one or to deprive appellant of the opportunity to enforce her judgment. Nor is any fact alleged from which it can be inferred that any transfer to said Alice K. Murphy was fraudulent. As to the almond orchard there is no allegation, in-

deed, of the time when the conveyance was made. It does appear that the deed was recorded after the filing of said action in case No. 9896, but that is unimportant in the absence of other allegations. If it may be said that the averment, "the said almond orchard was recorded by deed of gift into the name of the above Alice K. Murphy," may be construed as an affirmation that said orchard was conveyed to said Alice K. Murphy by deed of gift, there is no allegation of any fraudulent intent or that it was executed in contemplation of insolvency or while the grantor was insolvent.

The succeeding allegation as to lots Nos. 1, 2, 3, 15, 16, 23, and 24 in block 7, East Lodi addition, etc., is not connected in any way with Alice K. Murphy. It does not appear to whom they were sold, but it must be assumed that they were not sold to her or else the pleader would have alleged it. Of course, if said lots were owned by S. S. Murphy at the time said judgment was docketed and they were not exempt from execution, they would be subject to the lien of said judgment for the statutory period of five years (section 671, Code Civ. Proc.); but the complaint herein was filed some seven years after the judgment became final, and there is nothing in the complaint to show why Alice K. Murphy should be brought into the case in connection with them.

As to the home residence and the ten additional acres of prunes purchased "in the name of the above Alice K. Murphy," no fraud is shown, nor does it appear that they were purchased with community funds. We must assume that the purchase was made with her separate estate, and in good faith from a third party. If the allegation "that as the husband of the above Alice K. Murphy the said above S. S. Murphy is entitled to and enjoys a community share and interest in the income from all of the above properties which now stand in the name of the above Alice K. Murphy" by any possibility could be considered as sufficient to show that said property was community estate and subject to execution, nevertheless, for the reason already stated, the lien of said judgment had ceased to be operative, and upon that theory the complaint utterly fails.

[3] Appellant complains that the court abused its discretion in sustaining the demurrer without permission to amend.

But the decisions in this state are uniform that, to make that a subject of review by an appellate court, it must appear that the party against whom the ruling was made has applied to the lower court for permission to amend. *Buckley v. Howe*, 86 Cal. 596, 25 Pac. 132; *Durrell v. Dooner*, 119 Cal. 411, 51 Pac. 628; *Prince v. Lamb*, 128 Cal. 120, 60 Pac. 689; *Williamson v. Joyce*, 140 Cal. 669, 74 Pac. 290.

No such showing was made, and it cannot

be said that the trial court abused its discretion.

The judgment is affirmed.

We concur: FINCH, P. J.; HART, J.

57 Cal. App. 346

Ex parte CANTUA. (Cr. 1054.)

(District Court of Appeal, First District, Division 2, California. April 13, 1922.)

Habeas corpus $\S$ 85(1)—Evidence held sufficient to support an order holding accused to answer charge of embezzlement.

On application for a writ of habeas corpus, evidence held sufficient to support an order holding the accused to answer a charge of embezzlement.

In the matter of the application of A. R. Cantua for a writ of habeas corpus. Application for writ of habeas corpus to the Sheriff of Alameda County to secure the release of petitioner, A. R. Cantua, from custody on a charge of embezzlement. Writ discharged, and petitioner remanded.

Louis Glickman, of Oakland, for petitioner.
Charles Wade Snook, Deputy Dist. Atty., of Oakland, for respondent.

LANGDON, P. J. This matter comes before us upon a writ of habeas corpus. The sole question raised by petitioner is that the evidence is insufficient to justify the order holding the petitioner to answer the charge of embezzlement before the superior court.

The record discloses that the petitioner received a piano from the Heine Piano Company under the terms of a written contract. Certain contentions are made by petitioner regarding the legal effect of this contract, but, after a careful reading of the same, we are satisfied that not only in legal effect, but expressly, it consigns all property to be delivered thereunder to the petitioner for the purpose of sale, the title to said property, and to the proceeds thereof to remain in the consignor. The petitioner sold the piano in question, which he had received under this contract, and accepted a cash payment from the purchaser. A demand for the proceeds of the sale, due to the consignor, was made by said consignor. The petitioner failed to pay over said proceeds and admitted that he had converted said money to his own use.

This evidence is sufficient to support the order holding petitioner to answer to the charge before the superior court. The writ is discharged, and the petitioner remanded to the custody of the sheriff.

We concur: NOURSE, J.; STURTEVANT, J.

57 Cal. App. 218

CADY v. SANFORD. (Civ. 3670.)

(District Court of Appeal, Second District, Division 2, California. March 30, 1922.)

1. Appeal and error $\S$ 907(2)—Where appeal contains only documents on motion to enter judgment for defendant on facts found, evidence presumed to sustain findings denying the motion.

Where appeal from an order denying motion to enter judgment in defendant's favor on facts found by trial court comes on bill of exceptions containing nothing but the pleadings, the findings, the judgment, and notice of the motion, it must be presumed that the evidence sustained the trial court's finding.

2. Appeal and error $\S$ 931(1)—Finding construed to uphold judgment.

The findings must receive such a construction as will uphold the judgment.

3. Highways $\S$ 184(6)—Details and circumstances of accident presented by findings not inconsistent with general finding of last clear chance and negligence.

Details and circumstances of an accident as presented by the court's findings held not inconsistent with the general finding that defendant had the last clear chance to avoid a collision but negligently failed to do so.

4. Negligence $\S$ 83—Doctrine of last clear chance inapplicable in case of contemporaneous fault.

The doctrine of the last clear chance does not govern, where the negligence of the plaintiff continues to the moment of the accident and both parties are contemporaneously and actively in fault at the instant of the injury.

5. Highways $\S$ 175(1)—Neglect of driver at point of collision, discovering peril and able to extricate himself, held to prevent recovery, though other party could have stopped in time.

If the driver of an automobile when he reaches the point of collision and discovers his peril is still in a situation to help himself, and by the use of his faculties is able to extricate himself and avoid injury, his neglect to do so will prevent his recovery, notwithstanding the other party could have stopped in time to avoid the accident.

6. Highways $\S$ 175(1)—Circumstances as stated under which negligence of injured driver in a collision not proximate cause so as to preclude recovery.

Where an injured automobile driver, because of his heedlessness, has reached a point where he can no longer escape injury by the exercise of any reasonably prudent measures which he may adopt and his peril is discovered by the other driver in season to avoid injury, the negligence of the injured driver in reaching his position of peril becomes the condition and not the proximate cause of the injury and will not preclude recovery.

7. Negligence — 83—Doctrine of "last clear chance" stated.

The doctrine of the last clear chance presupposes negligence on the part of the injured party and proceeds upon the theory that, notwithstanding the question of negligence, if the other party, being cognizant of the negligence and the peril in which the party had placed himself, fails to take the necessary precautions to avoid the injury, he is liable on the theory that he had a fair chance to avoid the catastrophe by the use of ordinary care.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Last Clear Chance.]

Appeal from Superior Court, Los Angeles County; Leslie R. Hewitt, Judge.

Action by William H. Cady against G. A. Sanford. From judgment for plaintiff, defendant appeals. Affirmed.

See, also, 201 Pac. 951.

Henry T. Gage, Ingall W. Bull, and Harold Larson, all of Los Angeles, for appellant.

E. E. Kirk and Wally Vogel, both of Los Angeles, for respondent.

FINLAYSON, P. J. This is an action to recover damages for injuries received in a collision between two automobiles, one of which was being driven by plaintiff and the other by defendant. The case was tried by the court without a jury. Besides denying the material allegations of the complaint, defendant's answer alleges contributory negligence on plaintiff's part. The trial court found that plaintiff was negligent at the crossing where the accident happened, but that defendant had the last clear chance to avoid the collision, and upon that ground gave judgment for plaintiff. Defendant, proceeding under section 663 of the Code of Civil Procedure, moved to set aside the judgment and to enter in lieu thereof a judgment in his favor, on the ground that the conclusions of law are inconsistent with and not supported by the findings of fact. The motion was denied. The appeal is from the judgment and from the order denying defendant's motion. The sole point made by appellant is that the doctrine of the last clear chance is not applicable to the facts as found by the trial court.

[1, 2] None of the evidence is before us. The appeal from the judgment is on the judgment roll alone. The appeal from the order denying defendant's motion to enter a judgment in his favor on the facts found by the trial court comes here on a bill of exceptions containing nothing but the documents upon which the motion was made, i. e., the pleadings, the findings, the judgment, and the notice of motion. This being the state of the record here, it must be presumed that the evidence before the trial court was ample to sustain the findings. If appellant would

question its sufficiency for that purpose, or would claim that the evidence, if brought up, would have impaired the correctness of the findings, he should have presented it to us in a bill of exceptions or by the reporter's transcript. Not having done so, the facts as found by the trial court must be regarded as fully supported by the evidence. Moreover, the findings must receive such a construction, if possible, as will uphold rather than defeat the judgment. *Paine v. San Bernardino, etc., Co.*, 143 Cal. 654, 77 Pac. 659.

Coming now to a consideration of the lower court's findings: That court found the facts to be substantially as follows: The accident occurred on January 16, 1920, at about 6 o'clock p. m., at the crossing formed by the intersection of Washington boulevard with Del Rey road, two public highways in the county of Los Angeles, one of which, Washington boulevard, runs in a general northeasterly and southwesterly direction and is intersected at a point between Culver City and the city of Venice by the other highway, Del Rey road, which runs in a general northwesterly and southeasterly direction. On the evening in question, while plaintiff was driving easterly toward the city of Los Angeles along Washington boulevard and on the right-hand or south side thereof, he approached the crossing formed by the intersection of these two highways. At the same time defendant, driving his automobile, was approaching the crossing from the opposite direction, that is, he was traveling westerly along Washington boulevard on the right-hand or northerly side thereof. It was dark when the accident occurred and the headlights of each automobile were lighted.

When defendant reached a point on Washington boulevard about 60 feet easterly of the intersection, he slackened his speed and by raising his arm gave the signal that he intended turning to the left and south into Del Rey road at its intersection with Washington boulevard. At the same time he sounded his horn. Plaintiff did not see the signal nor hear the horn. Defendant continued his course until he came to a full stop immediately before reaching the intersection, when he shifted into low gear and proceeded into the intersection. As defendant started forward from the full stop to which he had come just before reaching the intersection, he saw plaintiff's car approaching from the west and knew that it was traveling at a speed much greater than his own. Defendant's car at this time was traveling at a rate not to exceed 5 miles an hour, while plaintiff's car was approaching the intersection at a speed of about 20 miles per hour. Defendant's car, proceeding into and across the intersection in low gear at a rate of speed not to exceed 5 miles per hour, reached a point

about opposite the center of the intersection, when defendant turned his car to the left and proceeded on a curve southerly, intending to enter Del Rey road. From the time that he started forward from the full stop just prior to reaching the intersection, defendant saw and kept his eyes on plaintiff's car, which, proceeding easterly along Washington boulevard, continued to approach the intersection. When defendant started from the place where he had come to the full stop, plaintiff's car was about 350 feet westerly from the intersection. Upon reaching the place where he commenced to turn to the left, which was about 40 feet from the point where he had come to the full stop, defendant continued on a curve to his left for about 30 feet towards and into the path of plaintiff's car, which, approaching from the west, was struck by defendant's car on its left-hand side, at a point about midway between the motor and windshield.

Immediately before the collision and when defendant was about to cross the pathway of plaintiff's car, plaintiff first observed defendant's car. Thereupon plaintiff turned his car toward the right-hand side of Washington boulevard and slackened his speed to about 18 miles per hour.

The two automobiles approached the place of the collision in such a manner that when defendant's car, while making the turning movement to the left proceeded forward across the path of plaintiff's car, a collision was inevitable unless one or the other of the two cars should come to a stop or otherwise yield the right of way or so alter its course as to avoid a collision. At all times subsequent to the time when defendant's car came to a full stop immediately before reaching the intersection, and up to the moment of the collision, defendant had complete control over the movements of his own car, which, proceeding at a rate of not to exceed 5 miles an hour, could have been stopped almost instantly, or within a distance of a very few feet. Defendant saw plaintiff's car approaching the intersection at a higher rate of speed than his own, and knew that plaintiff's car was in danger of collision with his own if he continued his turn to the left and crossed the intersection ahead and in front of plaintiff's car. Plaintiff did not perceive such danger and was not aware thereof until defendant's car had begun to make the turn to the left across the intersection, directly in front of plaintiff's car. At that moment, owing to the close proximity of the two cars and the greater speed at which plaintiff's car was traveling, there was neither time nor opportunity for plaintiff to come to a stop or so to alter his course as to avoid the collision, and defendant then and there had the last clear chance to avoid the accident, but negligently failed to avail himself thereof.

Plaintiff, so the lower court found, was

negligent in that he entered the intersection and crossed it as far as the place where the impact occurred at a speed greater than 15 miles an hour. The trial court also found that plaintiff was negligent in that he did not yield the right of way to defendant, whose automobile was nearer the point of intersection of the paths of the two vehicles than was plaintiff's car. But this, notwithstanding plaintiff's negligence, so the lower court found, was not the proximate and direct cause of the accident. The direct and proximate cause, according to the findings, was the defendant's negligence in failing to stop his car before the collision, for he saw plaintiff's car prior to the accident, knew that plaintiff was in a situation of danger, and had the opportunity, by the exercise of proper care, to stop his own slowly moving car and avoid the collision and the consequent injury to plaintiff and his automobile.

[3] Such are the facts as found by the lower court. Are the details and circumstances of the accident, as thus presented by the court's findings, inconsistent with the general finding that appellant had the last clear chance to avoid the collision, but negligently failed to avail himself of the opportunity? That is the sole question presented for our determination. To sustain the contention that the doctrine of the last clear chance is inapplicable, it is claimed: (1) That appellant did not know or have the means of knowing that respondent's automobile could not have been slowed down in time to permit appellant to make his turn in safety, and that therefore he never knew that respondent was in a position of peril; (2) that, if appellant was negligent in any particular, his negligence and that of the respondent were contemporaneous and continued actively up to the very moment of the collision, and that therefore the case is governed by those decisions which hold that the last clear chance doctrine does not obtain where both parties are contemporaneously and actively in fault up to the very instant of the accident.

We fail to find any merit in either ground for the asserted inapplicability of the last clear chance doctrine. In support of the first ground it is argued that, because appellant was strictly within his legal rights in attempting to make the turn, he had the right to assume that respondent would decrease his speed and would slow down in time to avoid a collision, and that therefore appellant did not know or have the means of knowing that respondent ever was in a position of peril. This contention is negated by the facts as found by the trial court. It is expressly found that, from the time when he started forward from the place where he had come to a full stop, appellant "saw and kept his eyes on plaintiff's car * * * until the time of the collision," and that—

"At all of said times defendant saw plaintiff's car approaching said intersection at a higher rate of speed than his own, * * * and knew that plaintiff's car was in a situation of danger if defendant should proceed to turn to his left in crossing said intersection ahead and in front of plaintiff's car."

Also that—

"Before the collision defendant saw plaintiff's car and knew that plaintiff was in a situation of danger,"

We need not pause to inquire how or why it was that appellant knew that respondent's car was in a situation of danger while the former was making his turning movement into Del Rey road. It is sufficient that the court has so found. Unless the finding that defendant "knew that plaintiff was in a situation of danger" appears to be inherently impossible when considered in the light of the particular circumstances found by the trial court, we are bound to assume that the finding is fully supported by the evidence; for, since the evidence is not before us, we must assume that, if it had been brought up, it would have sufficed to support each and every finding, unless there be some general finding that is directly contradicted by the special circumstances of the accident as disclosed by the more particular findings of the trial court. The question, therefore, to which we must address ourselves, is this: Is the finding to the effect that defendant had knowledge of plaintiff's peril in time to avert the accident inconsistent with all the circumstances as found by the lower court?

According to the findings, appellant not only observed respondent approaching the danger zone, but discovered respondent's position of peril after the latter was actually in the danger zone, i. e., discovered respondent's peril when it no longer was possible for the latter to extricate himself by the exercise of ordinary care on his part, but while it still was possible for appellant to avoid the accident by adopting reasonable means to that end, as, for example, by using all reasonable efforts to bring his own slowly moving car to a stop. We find nothing inherently impossible in this finding, nor any inconsistency between it and the details of the accident as disclosed by the other findings. At some appreciable time prior to the crash plaintiff was in a position of peril. He was in a position of peril at the very instant that he arrived at that point where he no longer could avoid an accident by exercising ordinary care. Then, and not until then, was the last clear chance doctrine applicable. "The last clear chance doctrine," says our Supreme Court in *Young v. Southern Pacific Co.*, 182 Cal. 380, 190 Pac. 40, "was not applicable until he arrived at such a point as to be in peril, and this was the point where he could no longer escape injury by exercising ordinary care." It will be recalled that

in one of its findings the trial court finds that respondent, just prior to the collision, slightly decreased his speed and turned to the right; and yet, notwithstanding this attempt to avoid the accident, a point had been reached by respondent where it was too late to extricate himself from the peril of a collision with appellant's car. Meanwhile appellant, according to the court's findings, had observed respondent approaching toward and into the intersection. It is quite possible that if the evidence had been brought up it would show appellant to be an experienced automobile driver, whose trained eye can gauge with great accuracy the speed and the distances from him of other automobiles, and whose experience has taught him much about the idiosyncrasies of other drivers. When we bethink ourselves of all the possible facts which may have been disclosed by the evidence, and which would naturally tend to support the findings, we are unable to say that it was not possible for appellant to have discovered that respondent had heedlessly rushed into a position of peril where he was too late to save himself by any reasonable measures that he might adopt, but where it still was possible for appellant to avert a collision by the exercise of reasonable care on his part.

Until respondent arrived at the point where ordinary care on his part could not extricate him from the danger of a collision, appellant had the right to rely upon the presumption that respondent would observe appellant's turning movement and would take reasonable precautions to avoid being struck by appellant's car. But when respondent reached that point where an ordinarily prudent and careful driver, situated as appellant was, and with a knowledge of the circumstances that were known to appellant, would naturally question respondent's ability to avert the collision by the vigilant use of his faculties and strength, it then became appellant's duty to stop his car or to take whatever appropriate measures were reasonably available to avoid running into respondent's car. It was not necessary that appellant should actually know that an accident was inevitable if he failed to exercise care. It is enough if the circumstances of which he had knowledge were such as to convey to the mind of a reasonably prudent man a question as to whether respondent would be able to escape a collision. In *Harrington v. Los Angeles Ry. Co.*, 140 Cal. 523, 74 Pac. 18, 63 L. R. A. 238, 98 Am. St. Rep. 85, the court says:

"It is, of course, true, as urged by defendant, that it is essential to such liability that the defendant did actually know of the danger, and that there is no such liability where he does not know of the peril of the injured party, but would have discovered the same but for remissness on his part. *Herbert v. Southern Pacific Co.*, 121 Cal. 227. This, however, does not mean, as seems to be contended, that de-

fendant must know that injury is inevitable if he fails to exercise care, and the decisions indicate no such requirement. It is enough that the circumstances of which the defendant has knowledge are such as to convey to the mind of a reasonable man a question as to whether the other party will be able to escape the threatened injury. One in such a situation is in a dangerous position."

We think it quite within the bounds of reason that, under all the circumstances of the case as disclosed by the court's findings, a point was reached by respondent's automobile where, while there still was time for appellant to avert a collision by stopping his slowly moving car, there was conveyed to appellant's mind, while he was observing respondent's automobile, a question as to whether respondent could escape injury by the exercise of ordinary care on his part. If so, appellant had knowledge of respondent's peril and had the last fair chance to avoid the accident by taking all reasonable measures to stop his car before it crashed into respondent's automobile; and his failure to do so was, as the court found, the direct and proximate cause of the injury.

[4] Equally devoid of merit is the claim that, if appellant was negligent, his negligence and that of the respondent were contemporaneous and actively concurrent as the proximate cause of the injury up to the very moment of the catastrophe. Without doubt, the doctrine of the last clear chance does not govern where the negligence of the plaintiff continues to the moment of the accident, and both parties are contemporaneously and actively in fault at the very instant of the injury. But it cannot be said that the facts as found by the trial court in the present case show that the negligence of the plaintiff continued to the moment of the accident, and that both parties were contemporaneously and actively in fault at the time thereof. Respondent unquestionably discovered his dangerous situation just prior to the collision. Upon making that discovery he immediately attempted to save himself as best he could, but it was then too late. The fact that he decreased his speed somewhat and made a turn to the right immediately before the crash, apparently in an effort to avoid the collision, fully justifies the conclusion that he used all reasonable care and made all practicable efforts to save himself as soon as he became alive to his peril, and that therefore he did not continue actively in fault up to the very instant of the injury. His previous negligence ceased when, upon realizing his peril and in an endeavor to avoid the imminent collision, he decreased the speed of his car and turned it toward the right and away from the direction of appellant's approaching automobile. See *Harrington v. Los Angeles Ry. Co.*, supra, 140 Cal. 524, 74 Pac. 15, 63 L. R. A. 238, 98 Am. St. Rep. 85.

Moreover, this is not a case where the de-

fendant negligently fails to discover the plaintiff's peril in time to avert the injury. In this case, according to the court's findings, appellant actually discovered the situation and realized the danger while it yet was possible to avert the collision by the use of ordinary care on his part. The case, therefore, is not one where the negligence of the defendant consists merely of an omission of a duty before the discovery of the peril. Here the negligence of the defendant consisted of the omission of a duty after his discovery of the plaintiff's peril. Under the findings we are bound to assume that while he was making his turning movement, meanwhile observing respondent, there arose in appellant's mind, shortly before the impact, a question as to whether respondent could escape the threatened injury. During this interval, short though it may have been, appellant had the power to prevent the accident by simply bringing his slowly moving automobile to a stop before it crashed into respondent's car. Since he saw and knew respondent's position of peril as the latter came heedlessly into the crossing, and could have prevented the collision if he had brought his own car to a stop as soon as he became aware that respondent had entered the zone of danger, appellant ought to have anticipated the accident. He failed to do so, and the legal responsibility is his. His negligence, if not his willfulness and wantonness, continued up to the moment of the impact. Such being the case, appellant, who knew the danger, but, in reckless disregard thereof, continued making his turn toward the south, can find no refuge in the fact that respondent, who was not aware of the danger until it was too late for him to avoid it would have known of his peril had he used reasonable care to ascertain it. "In such a case he who knows of the danger and can avoid it, as against one who does not in fact know thereof, has the last clear opportunity to avoid the accident." *Harrington v. Los Angeles Ry. Co.*, supra, 140 Cal. 526, 74 Pac. 19, 63 L. R. A. 238, 98 Am. St. Rep. 85.

[5-7] If the driver of an automobile, when he reaches the point of collision and discovers his peril, is still in a situation to help himself, and, by the vigilant use of his ears, eyes, and physical strength, is able to extricate himself and avoid injury, his neglect to do so will prevent a recovery notwithstanding the other party could have stopped in time to avoid the accident; and his failure to make such vigilant use of his faculties when he reaches the point of collision is negligence on his part at the very instant of the accident, and constitutes such contemporaneous negligence at the moment of injury as is spoken of in the cases. But where, as in the instant case, the injured driver, because of his own heedlessness, has reached a point where he no longer can escape the injury by the exercise of any reasonably pru-

dent measures that he may adopt, and his perilous position is discovered by the other driver in season to avoid the injury by the exercise of ordinary care on his part, the negligence of the injured driver in reaching his position of peril becomes the condition, and not the proximate cause of the injury, and will not preclude recovery. In such a case the failure of the injured driver to discover his perilous situation in time to avoid the collision is a precedent negligence, and the failure of the other party, who is aware of the peril, to exercise ordinary care to prevent the injury, is a new and independent negligence and the proximate cause of the injury. This, in substance, is the rule as stated in *French v. Grand Trunk Ry. Co.*, 76 Vt. 441, 58 Atl. 722, quoted by our Supreme Court in the *Young Case*, 182 Cal. 369, 190 Pac. 360. The doctrine of the last clear chance presupposes negligence on the part of the injured party, and proceeds upon the theory that, notwithstanding this negligence, if the other party, being cognizant of that negligence and of the peril in which the party had placed himself, fails to take the necessary precautions to avoid the injury, he is liable on the theory that he had a fair chance to avoid the catastrophe by the use of ordinary care; and his failure to exercise it is, under such circumstances, the proximate cause of the injury. In such cases, the defendant's neglect to use ordinary care to avoid the injury, after discovering the plaintiff's peril, is a negligence that differs in every essential from the mere continuation of the plaintiff's original negligence, and is the negligence for which the defendant is held liable.

The authorities cited by appellant present the case where neither party discovered the plaintiff's position of peril until it was too late to avert the injury, or where the plaintiff had a better opportunity than the defendant to anticipate the accident. But that is not the case presented by the findings before us here. In the instant case defendant was negligent in failing to take proper precautions after he discovered plaintiff's position of peril. The following quotation from *Brugeman v. Illinois C. R. Co.*, 147 Iowa, 187, 123 N. W. 1007, Ann. Cas. 1912B, 876, is a correct statement of the rule that obtains in those cases where, as here, the defendant has neglected to avail himself of reasonable precautionary means to avert the accident after he has discovered plaintiff's peril:

"It is one thing to hold that the continuing negligence of a plaintiff will prevent a recovery for a negligent omission of defendant to discover his peril, and quite another to hold that plaintiff's continuing negligence will prevent a recovery for the negligence of the defendant in failing to take proper care to avert the accident after the plaintiff's danger had been discovered and ought to have been appreciated.

If each party is negligent in failing to discover the danger, then the negligence is ordinarily concurring, and the doctrine of last fair chance does not apply. But if defendant discovered plaintiff's negligence and his peril in time to have avoided the injury, and did not take the necessary means to do so, then the doctrine does apply in full force; for in such cases the defendant has the last opportunity of avoiding the collision."

See, also, *Wilson v. Illinois C. R. Co.*, 150 Iowa, 33, 129 N. W. 340, and note thereto in 34 L. R. A. (N. S.) 687.

The same idea is expressed by our own Supreme Court in the following:

"This doctrine [the last clear chance doctrine] applies where the injured party by his own negligence has placed himself in a position of danger from which he cannot extricate himself, or of which he is obviously unconscious, and the defendant, seeing or knowing his peril or seeing or knowing facts from which a reasonable man would believe him to be in peril, and being able by the use of ordinary care to avoid injuring the plaintiff in his perilous position, fails to use such care and thereby causes the injury." *Arnold v. San Francisco, etc., Rys.*, 175 Cal. 4, 164 Pac. 798.

The judgment and the order appealed from are affirmed.

We concur: WORKS, J.; CRAIG, J.

57 Cal. App. 307

ERICKSON MOTOR CO. v. RUSSELL.
(Civ. 4087.)

(District Court of Appeal, First District, Division 1, California. April 10, 1922. Hearing Denied by Supreme Court June 8, 1922.)

Subrogation — Assignor of contract guaranteeing payment was subrogated to assignee's rights upon payment.

Under Civ. Code, § 2788, plaintiff seller, assigning a contract of sale calling for payment in installments and guaranteeing payment, upon subsequently paying the amount due, became subrogated to the assignee's rights, and was entitled to reimbursement from defendant buyer; and hence, where plaintiff alleged such facts, plaintiff's further allegation that "it is now the owner and holder" of the contract was not a mere conclusion of law rendering the complaint demurrable, but the complaint, as a whole, sufficiently alleged ownership.

Appeal from Superior Court, Alameda County; J. J. Trabucco, Judge.

Action by the Erickson Motor Company against A. S. Russell. From a judgment for plaintiff, defendant appeals. Affirmed.

J. R. Cunyngham and H. H. McPike, both of San Francisco, for appellant.

Haven, Athearn, Chandler & Farmer, of San Francisco, for respondent.

KERRIGAN, J. This is an appeal from the judgment in an action by plaintiff, a guarantor, against the defendant, its principal, for reimbursement, and is taken upon the judgment roll after a trial upon the merits. The sole question to be decided is whether or not the court erred in overruling defendant's general demurrer to the complaint.

The complaint alleges that the plaintiff and defendant entered into a conditional contract for the purchase by defendant from plaintiff of a certain Moon automobile, by the terms of which portions of the purchase price were to be paid monthly; that said contract also provided that, if the purchaser failed to perform any of its terms or conditions, the seller might declare the entire purchase price to be due and payable; that subsequent to the making of said contract it was assigned by the plaintiff to the Merchants' Security Company, the former guaranteeing the prompt payments by defendant of the sums due thereunder; that defendant paid to said assignee six of the monthly installments due under the contract, but has failed and refused to pay those later falling due; that thereafter upon demand the plaintiff paid to the Merchants' Security Company the balance due; and that "it is now the owner and holder of the aforesaid contract of conditional sale."

It is to this last allegation quoted from the complaint that the defendant's objection runs, he contending that it is but the statement of a conclusion of law, and does not amount to an allegation that the contract was reassigned to plaintiff, and that therefore the demurrer to the complaint should have been sustained, for where an action is brought upon an assigned contract such assignment must be alleged. Sutherland, Code Pleading, § 3274.

The point would appear to be well taken if this were the only allegation in the complaint upon the subject of the plaintiff's ownership of the chose in action sued upon (Curtin v. Kowalsky, 145 Cal. 433, 78 Pac. 962), but it is also alleged therein that upon assigning the contract to the Merchants' Security Company the plaintiff guaranteed its prompt payment, and that, the defendant having failed to make certain of the payments provided for, the plaintiff upon demand did so. It is clear that when plaintiff, the guarantor, paid to the Merchants' Security Company, the guarantee, the amount due, it became subrogated to the rights of the latter, and to reimbursement of the amount so paid. "When a guarantor pays his principal's matured debt he at once has a right of action against him to be reimbursed for the amount so paid, whether there is an express agreement by the principal to indemnify him or not." 20 Cyc. 1495. "A

person may become guarantor even without the knowledge or consent of the principal." Civ. Code, § 2788. This allegation of payment by plaintiff, the guarantor, taken in connection with the averment that plaintiff is the owner and holder of the contract, was sufficient to show ownership by plaintiff of the outstanding rights thereunder. It was entitled therefore to maintain this action for the recovery from the defendant of the money paid by it to the Merchants' Security Company as a consequence of the defendant's default. Eames v. Crosier, 101 Cal. 260, 35 Pac. 873.

The judgment is affirmed.

We concur: TYLER, P. J.; KNIGHT, Justice pro tem.

57 Cal. App. 333

WALLACE v. OSWALD (LEE, Intervener).
(Civ. 4164.)

(District Court of Appeal, First District, Division 1, California. April 12, 1922.)

1. Evidence — 354(22)—Book entries by decedent admissible against executor, though not made at time of transaction.

Under Code Civ. Proc. § 1853, and section 1870, subd. 2, entries made by a decedent in account books were admissible against his executor and successors in interest, though not made at or near the time of the transaction; section 1946, requiring entries to be made at or near the time of the transaction, applying only to entries by strangers.

2. Appeal and error — 1056(4)—Exclusion of evidence prejudicial when nonsuit granted.

The exclusion of evidence offered by plaintiff, consisting of book entries made by defendant's testator, was prejudicial where a nonsuit was subsequently granted.

Appeal from Superior Court, Santa Clara County; F. B. Brown, Judge.

Action by Anna T. Wallace against Edmund F. Oswald, as executor of Van Alstine Wallace, deceased, in which Evelyn Jane Lee intervened. From an adverse judgment, plaintiff appeals. Reversed.

A. M. Free and F. H. Bloomingdale, both of San Jose, for appellant.

Rodgers & Smith and Frederick Schneider, all of Palo Alto, for respondent.

KERRIGAN, J. This is an action brought by the plaintiff against the defendant as executor of the last will and testament of Van Alstine Wallace, deceased, to recover the sum of \$1,929.76 alleged to be due from the deceased upon an open, mutual, and current account.

The complaint sets forth an itemized statement of the account, charging deceased with certain items of rents collected and received

by him from properties of plaintiff during the period from 1911 to 1919, and crediting him with expenses incurred by him for repairs upon plaintiff's said properties, together with taxes and insurance premiums and various remittances made by him to plaintiff during said period. The answer of the defendant consists in general of a denial upon information and belief of the allegations of the complaint, and sets forth a counterclaim upon a mutual, open, and current account between said decedent and plaintiff for services of decedent in caring for the properties, and for commissions on collection of rents during the period set forth in the complaint. The intervener, Evelyn Jane Lee, filed a complaint in intervention, setting forth substantially the same matters of defense against plaintiff's claim as are contained in said answer. Upon the trial of the cause plaintiff offered in evidence certain entries made by the deceased in account books kept by him in his own handwriting, showing items of rents received by him from properties of the plaintiff. None of these entries were made at or near the time of the transaction, many of them having been made five or six months, and some as late as two years, after the transactions which they purported to record, and upon objection by the defendant the court excluded them upon this ground. The respondents justify this ruling of the trial court by citing the provisions of subdivision 1 of section 1946 of the Code of Civil Procedure. The section in its entirety reads as follows:

"The entries and other writings of a decedent, made at or near the time of the transaction, and in a position to know the facts stated therein, may be read as prima facie evidence of the facts stated therein, in the following cases:

"1. When the entry was made against the interest of the person making it.

"2. When it was made in a professional capacity and in the ordinary course of professional conduct.

"3. When it was made in the performance of a duty specially enjoined by law."

[1] In excluding the offered entries the trial court, we think, committed error. When a party litigant seeks to establish his case by the introduction in evidence of his own books of account, he must lay the usual foundation, showing, among other things, that the entries sought to be introduced were made at the time of the transactions recorded. But the entries here in question constituted admissions or declarations of the decedent against his interest, and as such were admissible against the defendant independently of the provisions of the section of the Code above quoted, the effect of which is to broaden rather than to narrow the availability as evidence of writings of the character described. When a party to a civil action has made admissions of facts material to the is-

sue, they are as a rule admissible against him. Code Civ. Proc. § 1870, subd. 2. Entries in account books tending to establish a liability are, like other admissions, evidence against the party making them. Jones on Evidence, § 236. Section 1853 of the Code of Civil Procedure reads as follows:

"The declaration, act, or omission of a decedent, having sufficient knowledge of the subject, against his pecuniary interest, is also admissible as evidence to that extent against his successor in interest."

The defendant in his capacity as executor and the intervener are successors in interest of the deceased. *Stoddard v. Newhall*, 1 Cal. App. 113, 81 Pac. 666. The provisions of section 1946 of the Code of Civil Procedure are inapplicable to the facts of this case. That section is an adoption in part of the well-established rule by which admissions, declarations, and entries made by strangers to the litigation who are since deceased may under certain conditions be admitted in evidence therein. We have no doubt that under that rule and under the provisions of this section entries in books of account made by a person since deceased may be received in evidence in an action between other parties, if it appear that the person making the entry had knowledge of the facts declared and that the entry was against his interest. *Zimmerman v. Bloom*, 43 Minn. 163, 45 N. W. 10; Corp. Jur. p. 892, § 1089. The principle is thus stated by Mr. Jones in his work on the law of Evidence (section 323 [2d Ed.]):

"*Declarations of Deceased Persons Against Interest—In General.*—In several of the preceding sections the discussion has related to the admissibility of declarations or entries made in the regular course of business and as part of the *res gestæ*. In another chapter we discussed the admissibility of declarations of parties and those identified in interest with parties—that is, admissions. We now come to the consideration of an entirely different class of declarations which should not be confused with those already mentioned, namely, declarations made by strangers, that is, by persons not in privity with the parties to the suit; declarations which are not necessarily made in the regular course of business, but which are received on the ground that they were against the interest of such stranger and irrespective of the fact whether any privity exists between the person who made them and the party against whom they are offered. It has long been settled as one of the exceptions to the general rule excluding hearsay that the declarations of persons since deceased are admissible in evidence, provided the declarant had peculiar means of knowing the matter stated, if he had no interest to misrepresent it and if it was opposed to his pecuniary or proprietary interest. Thus in a leading case on the subject an entry of a charge for services made in a ledger on a certain day by a man midwife for attendance upon a woman when she was delivered of a child was admitted to show the age of such child. It is a fair presumption that men will

neither falsify accounts nor commit mistakes, when such falsehoods or mistakes would be prejudicial to their own pecuniary interests. This consideration, together with the facts that the declaration is not admissible during the lifetime of the author, that any fraudulent motive for making the entry may be shown, and that such declarations are frequently the only mode of proof available, are deemed of sufficient force to justify the admission of such declarations, although, the sanction of an oath and the test of cross-examination are wanting."

[2] This quotation from the work of Mr. Jones and section 1946 of our Code of Civil Procedure evidently refer to the same rule of evidence, and make it apparent that the admissibility in evidence of the book entries rejected by the trial court is not governed by such rule, but must be referred rather to the rule stated in section 1853 of the Code of Civil Procedure above set forth. In refusing to admit such entries, therefore, the trial court committed error; and, as it subsequently granted the defendant's motion for nonsuit, it is evident that the exclusion of this evidence was prejudicial to the appellant.

The judgment should therefore be reversed; and it is so ordered.

We concur: TYLER, P. J.; KNIGHT, Justice pro tem.

(57 Cal. App. 134)

MORGAN v. CITY OF LONG BEACH.
(Civ. 3711; L. A. 7306.)

(District Court of Appeal, Second District, Division 1, California. March 20, 1922. Hearing Denied by Supreme Court May 18, 1922.)

1. Municipal corporations §220(1) — **Employee who rendered services without confirmation of appointment as required by city charter could not recover therefor.**

Where city charter requires appointment of employee by a commissioner to be confirmed by other commissioners, an employee whose appointment by such commissioner was not confirmed by other commissioners could not recover for services rendered.

2. Municipal corporations §120—**In absence of facts showing urgency, city council's declaration of urgency not sufficient to render ordinance immediately operative.**

In the absence of facts showing urgency the mere declaration of urgency by city council will not render an ordinance immediately operative.

3. Municipal corporations §122(2) — **City council's declaration of urgency prima facie evidence of existence of emergency.**

In the absence of evidence to the contrary, the court will presume that the city council in making declaration of urgency acted upon sufficient inquiry as to whether or not an emergency existed; the declaration of urgency being

prima facie evidence of the existence of an emergency.

On Hearing in Supreme Court.

4. Appeal and error §1178(8) — **Defendant permitted to amend answer on new trial following reversal of judgment.**

Where judgment for defendant is reversed because of defendant's failure to prove certain facts, and a new trial is necessary, the defendant should be permitted to amend its answer and to prove such facts.

5. Municipal corporations §244(1)—**If declaration of urgency was unfounded, contract pursuant to ordinance made within 30 days after its passage would be unauthorized, but is valid if made after 30 days.**

If there was no foundation for city council's declaration of urgency, so that ordinance did not take effect until 30 days after its passage, a contract made within the 30 days would be unauthorized; but any contract, whether express or implied, made thereafter, would be valid.

Appeal from Superior Court, Los Angeles County; Lewis R. Works, Judge.

Action by Cora M. Morgan against the City of Long Beach. Judgment for defendant, and plaintiff appeals. Reversed.

Cora M. Morgan, in pro. per.

George L. Hoodenpyl, of Los Angeles, and Bruce Mason and Charles F. Cook, both of Long Beach, for respondent.

SHAW, J. The complaint herein contains two counts. In the first thereof plaintiff alleged that on the 7th day of July, 1915, she was employed by defendant to perform services for it and on its behalf to install a filing system, to do stenographic, secretarial, and general office work, and to provide for installing and carrying on the clerical work of the department of public affairs for the city of Long Beach, at a compensation of \$300, to be paid plaintiff by defendant for the term of said employment, commencing on July 7, 1915, and ending on the 2d day of November, 1915, and that pursuant to said agreement of employment plaintiff did during the whole of said term perform such services for and on behalf of defendant. In the second count it is alleged that on the 9th day of February, 1916, defendant employed plaintiff to perform services for it and on its behalf as a laborer in the charity department of said city at an agreed price of \$2 per day for each and every day of such labor performed, and that pursuant to said employment plaintiff herein, between February 9, 1916, and March 22, 1917, performed 288½ days' labor at \$2 per day, aggregating the sum of \$576.50. These allegations as to the employment of plaintiff by defendant were denied in the answer, and as to both thereof

the court found adversely to plaintiff, who appeals from the judgment entered thereon in favor of defendant.

The sole question presented is whether or not such findings are supported by the evidence. It appears that at the times in question the city of Long Beach was a municipal corporation operating under a freeholders' charter which provided for a commission form of government, under which the legislative department of the city consisted of five commissioners. Section 15 of article 4 of the charter provides that—

"The legislative body may from time to time, by a majority vote, create or discontinue offices and municipal employments and prescribe and alter the compensation of any officer or employee of the city, except the elective officers."

Pursuant thereto the commissioners, on July 6, 1915, adopted an ordinance designated as No. B-1, whereby the office of secretary to the commissioner of public affairs of the city was created, the duties of which officer were declared to be those of a private secretary, stenographer and clerk, together with such other duties as might be required by the commissioner of public affairs, and fixing the salary of such official at \$75 per month. Under said section 15 of the charter, such commissioner is empowered to nominate persons to fill all offices created therein, which nominations, in order to be effective, as provided by section 16 of the charter, "must be confirmed by the votes of at least three commissioners. Said appointees so elected by the commissioners shall hold office for a period of two years, and subject to removal at any time by a vote of four-fifths of all the commissioners, except those under civil service." It further appears that Frank M. Cates was commissioner of public affairs, and that as such commissioner he, on July 6, 1915, appointed plaintiff to fill the office of secretary, stenographer, and clerk in his department, which office was created by ordinance No. B-1. It further appears that Commissioner Cates and plaintiff sought to have her appointment as such subordinate official confirmed by the board of commissioners, but they steadfastly refused to confirm the appointment, and informed both Cates and plaintiff that they would not confirm the same, notwithstanding which fact plaintiff performed the duties of the office for the term named. It conclusively appears that the position held by plaintiff under Commissioner Cates and the duties performed by her were those of the office created by ordinance No. B-1, to which, by reason of the refusal of the commissioners to confirm the nomination, she was never legally appointed.

[1] It follows that, since the employment was unauthorized, she is not entitled to recover from defendant for the services ren-

dered under the purported appointment made by Cates as commissioner. To uphold plaintiff's asserted right to recover, under the circumstances, would be tantamount to a disregard of the clear provisions of the city charter. The purported appointment was a nullity and, in contemplation of law, plaintiff was not in the employ of the city. *Santa Cruz R. P. Co. v. Broderick*, 113 Cal. 628, 45 Pac. 863; *Times Publishing Co. v. Weatherby*, 139 Cal. 618, 73 Pac. 465. We therefore conclude the evidence justifies the finding attacked to the effect that plaintiff was not employed by defendant to perform service for it as alleged in the first count of the complaint.

As to the second count, it appears that Frank M. Cates, as commissioner of public affairs, had charge of the department of public charities of the municipality; that in such capacity he, on February 9, 1916, employed plaintiff for an indefinite period to perform services in connection with and incidental to the business thereof, at the rate of \$2 per day; and that between February 9, 1916, and March 22, 1917, she performed 288¼ days' service, amounting to \$576.50. It is the contention of plaintiff that authority for the act of Cates as such commissioner in employing her is found in ordinance No. B-100, adopted on January 28, 1916, and declared by the legislative body to be an emergency measure. Section 5 of this ordinance provided:

"That the commissioner of public affairs is hereby authorized to employ ten laborers, for such work as may be required in the department of public charities, or for any work that the commissioner of public affairs may deem necessary for the carrying on of the work of the charity department. * * * at a compensation not to exceed \$2.00 per day each."

That the services performed by plaintiff under this employment were those specified in section 5 of the ordinance is clearly shown. Nevertheless, respondent insists that, though the ordinance was adopted on January 28th and contained a declaration of its urgency, by reason whereof under the provisions of section 3 of article 22 of the charter it became immediately effective, it did not in fact become operative until thirty days after its passage, as provided in cases where ordinances are adopted without a declaration of urgency. Its contention is that at the time of the adoption of the ordinance no facts existed showing that it was necessary for "the immediate preservation of the public peace, health and safety"; and hence the mere declaration of urgency by the commissioners, when there was no urgency, is insufficient to render such an ordinance immediately operative.

[2, 3] We quite agree with respondent that, in the absence of facts showing urgency, the mere declaration of a city council so declar-

ing in an ordinance will not render it immediately operative. In *re Hoffman*, 155 Cal. 114, 99 Pac. 517, 132 Am. St. Rep. 75; *Wheeler v. Chubbuck*, 16 Ill. 361. In the absence of evidence to the contrary, however, we must assume that the council acted upon sufficient inquiry as to whether or not an emergency existed. The declaration is prima facie evidence of such fact. In the instant case, other than the fact that at the time of the adoption of ordinance No. B-100 there existed an ordinance relating to the charity department of the city, which was repealed by the later ordinance, no evidence whatever is presented tending to show that no facts existed constituting a reason for the declaration of the commissioners as to the declared urgency. Under the old ordinance, No. B-8, a department of public charities was created, in which provision was made for the appointment of a secretary of charities, who, under the supervision and direction of the commissioner of public affairs, had charge of charities, and whose salary was fixed at \$50 per month. The new ordinance enlarged the functions of the department, provided for the disposition of charity donations received and the disbursement thereof, and authorized the commissioner of public affairs to employ such persons, not exceeding ten, as he might deem necessary in conducting the work of the department. The nature of the conditions in Long Beach at the time of the adoption of the ordinance might have been such as to render it immediately expedient to adopt these measures, and particularly to provide for an increase in the number of employees in conducting the affairs of the department. We cannot say by a mere comparison of the two ordinances that no facts existed which were sufficient to warrant the act of the municipal legislative body in declaring the urgency measure. However this may be, and assuming, as claimed by respondent, that no facts existed justifying the declaration of urgency contained in the ordinance, it was not void by reason of such fact, but, at most, its operative effect was postponed until thirty days had elapsed, to wit, until February 28th. *Michelson v. City of Sacramento*, 173 Cal. 108, 159 Pac. 431. Hence, since under the ordinance the commissioner of public affairs was authorized to employ plaintiff in the department of charities at \$2 per day, and did employ her, she would in any event be entitled to recover compensation for the services rendered at the per diem specified, based upon the number of days' work performed after the ordinance became operative, and this right would be unaffected by the fact (if it be a fact) that at the time she entered upon the employment the ordinance was not in effect. As stated, the employment was for an indefinite period at \$2 per day, and conceding the ordinance did not go into effect

until February 28th, her continuance in the work thence on, with the knowledge and consent of the commissioner of public affairs, who at such time was, by a valid ordinance, authorized to employ her, entitled her to recover for the services rendered.

Our conclusion is that the finding of the court upon the issue presented by the second count of the complaint is not supported by the evidence.

The judgment is reversed.

We concur: CONREY, P. J.; JAMES, J.

Opinion of Supreme Court in Bank, Denying Hearing.

PER CURIAM. The petition for a rehearing in this court is denied.

[4, 5] The judgment being reversed and a new trial in the court below being necessary, the defendant should have leave to amend its answer, and should be allowed to prove such facts as may exist tending to show that there was no foundation in fact for the statement in the ordinance of January 28, 1916, that the ordinance "is urgently required for the immediate preservation of the public peace, health and safety." If the court should find that there was no such foundation, the declaration would be ineffectual to bring about the immediate taking effect of the ordinance, and it would not take effect for 30 days after its passage, in which event any contract made within the 30 days would be unauthorized. Any contract, whether express or implied, made thereafter in pursuance of the ordinance, would be valid.

SHAW, C. J., and LAWLOR, WILBUR, LENNON, SLOANE, and SHURTLEFF, JJ., and RICHARDS, Justice pro tem., concur.

(57 Cal. App. 191)

SMITH v. ROSS et al. (Civ. 3653.)

(District Court of Appeal, Second District, Division 2, California. March 27, 1922.)

1. Costs $\S$ 199—As affecting claim for costs judgment is not rendered until entered in clerk's minute book.

Under Code Civ. Proc. $\S$ 1063, providing that a successful party claiming costs must deliver to the court and serve on the adverse party within five days after the verdict or notice of the decision of the court a memorandum of items of his costs and necessary disbursements, where findings of fact were waived, the entry of the court's decision in the clerk's regular minute book—not in the courtroom clerk's so-called rough minutes—constituted the rendition of the judgment.

2. Costs $\S$ 199—"Decision" as used in statute relating to memorandum of costs defined.

Under Code Civ. Proc. $\S$ 1033, providing that a party in whose favor a judgment is ren-

dered in claiming costs must deliver to the court and serve upon the adverse party within five days after the verdict or notice of the decision of the court a memorandum of the items of his costs and necessary disbursements, and defining the "decision of the court" to mean the signing and filing of the findings of fact and conclusions of law, where written findings have not been waived, the "decision" referred to means the signing and filing of the findings of fact and conclusions of law, but where findings are waived, as permitted by section 634, a minute order, directing judgment for one of the parties, constitutes the "decision."

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Decision.]

3. Costs — 199—Party not required to file cost bill until five days after notice of minute entry of clerk.

Under Code Civ. Proc. § 1033, requiring a party in whose favor a judgment is rendered to serve or file his memorandum of costs "within five days after * * * notice of the decision" in a case in which findings were waived, as permitted by section 634, there was no decision until the clerk made his minute entry, and the winning party was not required to serve and file a cost bill before receiving notice of the minute entry.

4. Costs — 199—Memorandum of costs held filed in time.

Under Code Civ. Proc. § 1033, providing that a party in whose favor a judgment is rendered must serve or file his memorandum of costs within five days after notice of the decision, in a case in which findings were waived, as permitted by section 634, though the trial court orally announced from the bench "that in its opinion judgment should be for plaintiff," there was no entry of judgment until an order directing judgment was entered in the minute book, and though this was under date of November 30th, the day of the statement by the trial court, where plaintiff did not receive a notice of the entry of judgment on the clerk's minute book until December 20th, a memorandum of costs, served December 21st and filed December 22d, was within five days after notice of the decision, as required by section 1033.

Appeal from Superior Court, Santa Barbara County; S. E. Crow, Judge.

Action by Hazel Smith against James Ross and others. Judgment for plaintiff. From an order striking out plaintiff's memorandum of costs, plaintiff appeals. Reversed.

Preisker, Preisker & Goble, of Santa Maria, for appellant.

C. U. Armstrong and Fred A. Shaeffer, both of Santa Maria, for respondents.

FINLAYSON, P. J. This is an appeal from an order striking out plaintiff's memorandum of costs. The sole question is: Was the memorandum served and filed in time?

The action was brought to recover possession of an automobile. It appears from the

bill of exceptions that at the conclusion of the trial on November 30, 1920, "the court announced that in its opinion judgment should be for the plaintiff for the return of said property or the value thereof, found to be \$750, and for costs of suit." It further appears that findings were waived by defendant. Thereafter, but how soon does not appear, the clerk made an entry in the minute book, under date of November 30, 1920, which, after reciting that the cause had been tried, argued, and submitted, and that the court had duly considered the evidence, states that—

The court "now renders its decision from the bench and orders that judgment be entered herein in favor of the plaintiff and against the defendant for the recovery of the possession of the automobile described in the complaint or \$750 in lieu thereof, and for costs of suit. Findings waived in open court. Let judgment be entered accordingly."

The entry mentioned in the final sentence of this minute entry refers, of course, to an entry of the judgment in the judgment book. The formal judgment which was signed by the trial judge, was filed on December 4, 1920, and was entered in the judgment book on December 6, 1920. Plaintiff's memorandum of costs, in due form, was served on December 21, 1920, and was filed December 22, 1920. Within five days thereafter defendants served and filed a notice of motion to strike the memorandum of costs from the files on the ground that it was not filed within the time allowed by law. From an affidavit filed by one of plaintiff's counsel it appears, without contradiction, that not until December 20, 1920, did plaintiff or her counsel have any knowledge of the minute entry of the order directing that a judgment be entered in favor of plaintiff.

Respondents contend that appellant had notice of the "decision" when the court, in the presence of appellant's counsel, orally announced from the bench "that in its opinion judgment should be for plaintiff." For appellant it is claimed that, because findings were duly waived in open court, no judgment was "rendered" and no "decision" was made until the clerk had made his minute entry of the order, directing that a judgment be entered in the judgment book in favor of plaintiff; also that she had no notice of the "decision" until December 20, 1920, when, for the first time, her counsel learned of the entry of the minute order directing that judgment be entered in her favor. This information came to appellant's counsel within five days prior to the time when her cost bill was served and filed. We think appellant's contention must be sustained.

Section 1033 of the Code of Civil Procedure provides:

"The party in whose favor the judgment is rendered, and who claims his costs, must deliver

to the clerk, and serve upon the adverse party, within five days after the verdict, or notice of the decision of the court * * * a memorandum of the items of his costs and necessary disbursements. * * * By the decision of the court * * * is meant the signing and filing of the findings of fact and conclusions of law."

It will be noted that, according to the wording of this Code section, it is only the party in whose favor "the judgment is rendered" who is entitled to costs; also that one so entitled, if the case be tried without a jury, is not required to serve or file his cost bill until "after * * * notice of the decision of the court."

[1] Where, as in the present case, findings are waived, the entry of the court's decision in the clerk's minutes constitutes the rendition of the judgment. Until the minute order is entered in the clerk's regular minute book—not in the courtroom clerk's so-called "rough minutes"—no judgment is "rendered." *Crim v. Kessing*, 89 Cal. 488, 26 Pac. 1076, 23 Am. St. Rep. 491; *Brownell v. Superior Court*, 157 Cal. 703, 109 Pac. 91. In *Crim v. Kessing*, the court said:

"* * * Under the provisions of the Code of Civil Procedure, whenever findings are required there can be no 'rendition of the judgment' until they are made and filed with the clerk. Findings of fact, however, are required only 'upon the trial of a question of fact,' and they may in all instances be waived. Whenever they are waived or are not required, the entry of its decision in the minutes of the court constitutes the 'rendition of the judgment' in the same manner as it did under the former system."

[2] So, also, with respect to the "decision." Where written findings have not been waived, the "decision" referred to in section 1033 means the signing and filing of the findings of fact and conclusions of law. But findings may be waived (section 634, Code Civ. Proc.); and where they are waived, as they were in the present instance, a minute order, directing judgment for one or the other of the parties, constitutes the "decision." Until such entry has been made in the minute book there is no "decision," as that word is employed in section 1033 of the Code of Civil Procedure. *Collins v. Belland*, 37 Cal. App. 139, 173 Pac. 601.

[3, 4] Since section 1033 does not require

the party in whose favor the judgment is rendered to serve or file his memorandum of costs until "within five days after * * * notice of the decision," and since in this case there was no "decision" until the clerk had made his minute entry, it follows that plaintiff was not required to serve and file her cost bill until she had received notice of that minute entry. It does not follow that plaintiff's counsel had notice of the "decision" simply because they were present when the court orally announced from the bench that "in its opinion judgment should be for the plaintiff." No findings being required (they having been waived), and the court having merely made an oral statement that it was its *opinion* that judgment should be for the plaintiff, it might have changed its opinion at any time before the clerk's entry in the minute book of the order directing judgment for plaintiff. Until such entry, the oral order or announcement from the bench was in the breast of the court and subject to change. *Brownell v. Superior Court*, supra.

It is possible that some days may have elapsed between the time when the court orally announced that it was of the opinion that judgment should pass for plaintiff and the time when the clerk entered in his minute book the order directing that a judgment for plaintiff be entered in the judgment book. Such lapse of time is possible notwithstanding the fact that the minute entry bears date as of the day of the court's oral announcement—November 30, 1920. It required some time for the clerk to record the day's proceedings in his minute book. So that, assuming, for the purpose of this decision only, that plaintiff would have been charged with notice of the "decision" if her counsel had been present when the clerk made his minute entry and had actually seen it entered, still there is nothing here to indicate that plaintiff or any of her counsel had any knowledge or notice of the minute entry until, as stated in the affidavit of one of her attorneys, the latter received a copy of the formal judgment from a court attaché on December 20, 1920, which was less than five days before the cost bill was served and filed. For these reasons we think appellant's memorandum of costs was served and filed in time, and that the order striking it from the files should be reversed. It is so ordered.

We concur: WORKS, J.; CRAIG, J.

57 Cal. App. 340

MESSICK v. SUPERIOR COURT OF CALIFORNIA, IN AND FOR SAN JOAQUIN COUNTY. (Civ. 2460.)

(District Court of Appeal, Third District, California. April 12, 1922.)

1. Indictment and Information ☞110(34)—Sufficient to charge destruction or injury of fence in language of statute.

Pen. Code, § 602, subd. 8, as amended by St. 1917, p. 319, making it a misdemeanor to willfully open, tear down, or otherwise destroy any fence on the inclosed land of another, states every material element of the crime, and a complaint following its language is sufficient, notwithstanding the word "malicious" in the headnote to the section.

2. Indictment and Information ☞110(34)—Complaint in language of statute held to sufficiently charge opening and destruction of fence was malicious; "malice."

In view of Pen. Code, § 7, subd. 4, defining "malice" as an intent to do a wrongful act, a complaint charging, in the language of Pen. Code, § 602, subd. 8, as amended by St. 1917, p. 319, that defendant did willfully and unlawfully open, tear down, and destroy a fence sufficiently charged malice if a material element of the charge.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Malice.]

Chester W. Messick was convicted of an offense, and the judgment was affirmed by the Superior Court of California in and for San Joaquin County, and he applies for a writ of certiorari. Alternative writ discharged, and peremptory writ denied.

Walter F. Lynch, of Stockton, for petitioner.

Edward Van Vranken, of Stockton, for respondent.

BURNETT, J. Petitioner was convicted in the justice court of Douglas township, county of San Joaquin, of the offense charged in a complaint as follows:

"The said Chester W. Messick did, at and in the county and state aforesaid, willfully and unlawfully open, tear down and destroy a fence on the inclosed land of another, to wit, a line fence between the lands of Chester W. Messick and one Edward J. Hughes, situate, lying, and being in the northwest one-quarter of section 3, township 2 north, range 8 east, Mt. Diablo base and meridian."

[1] He was sentenced to pay a fine of \$50, and, in case of default in the payment, to be imprisoned in the county jail until the fine should be satisfied at the rate of \$2 per day. He appealed upon questions of law alone to the superior court of said county wherein the judgment was affirmed. Thereafter he petitioned this court for a writ of certiorari, claiming that no offense was stated in said

complaint by reason of the failure to allege that the act was done maliciously. It is to be observed that the charge is in the language of subdivision 8 of section 602 of the Penal Code, as amended in 1917 (Stats. 1917, p. 319), but it is the claim of petitioner that the "headnote to the section (malicious injury to freehold) must be deemed a part of the substance of the act, and accorded the same effect as though written into the body of the law." This is a rule of general application recognized by the authorities, and ordinarily there is no question about its pertinency in order to determine the intention of the Legislature, but herein there are nine subdivisions of said section embracing various acts, some of which are not injuries to the freehold at all; and it may be doubted whether the said headnote was intended to be anything more than an arbitrary generalization of the scope of the section. It is not unreasonable to say that what the Legislature meant is that the various acts enumerated should be deemed equivalent to a "malicious injury" to the freehold, and to charge said offense it would be sufficient to follow the language of the particular subdivision under which the case should fall. Some of these acts, indeed, were assuredly intended to be penalized although not done maliciously, such as "entering any inclosure belonging to, or occupied by another, for the purpose of hunting, shooting, killing, or destroying any kind of game within such inclosure, without having first obtained permission from the owner of such inclosure." It is proper to observe also, that in only one of these various subdivisions is the term "maliciously" employed to characterize the offense, and from this, under a familiar rule of construction, it might be plausibly argued that it was not intended as a qualification of the other acts.

The true situation seems to be that every material element of the crime committed by petitioner is comprehended by this expressive language of said section: "Every person who willfully commits any trespass by * * * willfully opening, tearing down, or otherwise destroying any fence on the inclosed land of another * * * is guilty of a misdemeanor"—and it is sufficient by appropriate allegations in the complaint to set forth that condition.

[2] This was assuredly done, but, if it be conceded that malice is a material element in the charge, then such requirement is satisfied by the terms that were employed in the complaint. The word malice implies "an intent to do a wrongful act." Subdivision 4, § 7, Pen. Code; *People v. Ah Toon*, 68 Cal. 326. The expressions "willfully and unlawfully" used in the complaint are equivalent to an allegation that the act was done with such intent. It was so expressly held in the

matter of Application of Ahart, 172 Cal. 762, 159 Pac. 160, wherein it is said:

"Turning next to the complaint: It alleges that the defendant 'willfully and unlawfully' transported the intoxicants. 'Willfully,' of course, imports no more than a design to do the specific act. But the charge is also that the act of transportation was unlawfully performed. This employment of the word is not merely epithetical but is sufficient to charge the defendant with the performance of this act with a wrongful intent, and is thus sufficient to justify his being placed upon trial."

In *Bise v. United States*, 144 Fed. 374, 74 C. C. A. 1, 7 Ann. Cas. 165, it was declared by the Circuit Court of Appeals, Eighth Circuit, that the words, "unlawfully and feloniously" mean "that the act which they characterize proceeded from a criminal intent and evil purpose and thus exclude all color of right and excuse for the act," citing cases.

Petitioner refers to certain decisions from other jurisdictions apparently in conflict with the foregoing, but they are not controlling herein. As the question was directly decided by the highest court of this state in the Ahart matter it is unnecessary to discuss the subject further.

The alternative writ is discharged, and the peremptory writ denied.

We concur: FINCH, P. J.; HART, J.

57 Cal. App. 343

GROFF et ux. v. DU BOIS et al. (Civ. 4205.)

(District Court of Appeal, First District, Division 1, California. April 13, 1922.)

Limitation of actions — **Action for miscarriage resulting from attempted eviction is barred in one year.**

An action by a tenant and his wife to recover damages for miscarriage of the wife, resulting from an attempt by the landlord to evict the tenants from the premises, in which no physical violence was employed toward the wife, is an action for personal injury caused by the wrongful act of another, which is barred if not commenced in one year by Code Civ. Proc. § 340, subd. 3.

Appeal from Superior Court, Lake County; M. S. Sayre, Judge.

Action by W. C. Groff and wife against E. B. Du Bois and others, to recover damages for personal injuries growing out of an alleged trespass. Judgment for plaintiffs, and named defendant appeals. Reversed.

H. V. Keeling, of Lakeport, and Edgar D. Peixotto, of San Francisco (Cleveland R. Wright, of San Francisco, of counsel), for appellant.

W. H. Hazell, of Lakeport, for respondents.

TYLER, P. J. This action was one brought to recover damages for injuries growing out of an alleged trespass on the part of defendants. The complaint was filed on the 13th day of March, 1920, and it alleges that about the 1st day of August, 1917, and while plaintiffs were in lawful and peaceful possession of certain real property, defendants unlawfully, and in a malicious and offensive manner, attempted to evict them therefrom, together with their personal belongings. The complaint contains an allegation that at such time plaintiff Helen E. Groff was in a delicate physical condition, and that such act on the part of defendants caused her to suffer a miscarriage. No actual damage was alleged, but plaintiffs claimed exemplary damages in the sum of \$5,000. A demurrer was interposed pleading the statute of limitations. It was claimed that, the action being one for injury caused by wrongful act of another, it should have been commenced within one year as prescribed by subsection 3 of section 340, Code of Civil Procedure. The demurrer was overruled, and defendants, answering, denied plaintiffs' allegations, and alleged that the defendant Du Bois was the owner of the premises, and that he and the other defendants lawfully entered thereon, and that the plaintiff Helen E. Groff without cause or reason threatened to shoot them unless they departed. Denial is made that plaintiffs suffered any damage, and it was prayed that they take nothing by their action. Trial was had by jury.

From the evidence it appears that defendant Du Bois was the owner of a fruit ranch in Lake county, and that plaintiff W. C. Groff and his family were located thereon under a working arrangement. On the 1st day of August, 1917, defendant Du Bois, in company with the other defendants, went upon the premises and removed certain personal property out of a shed and from the porch of the house occupied by plaintiffs. Helen E. Groff, the wife of plaintiff, came out of the door with a shotgun and ordered defendants to refrain from removing any of the property. Defendants desisted, and they then left the premises. Subsequently, on August 13, 1917, Helen E. Groff suffered a miscarriage. It further appeared that defendants were civil and respectful upon the occasion, and that no force or violence whatever was used by them. As before stated, no actual damage was prayed for, and none was proven. At the conclusion of the trial a verdict was rendered in favor of plaintiffs for \$100 actual and \$2,500 exemplary damages. Defendant Du Bois moved for a new trial. The motion was denied in the following language:

"It appearing to the court that the judgment in the case is excessive, but the plaintiff having offered to remit \$1,686.60 of the amount of the

verdict rendered and the judgment entered for plaintiff herein, and the defendant having failed to accept such offer, it is ordered that the defendant's motion for a new trial herein be, and the same is hereby, denied."

Defendant appeals from the judgment. As grounds for reversal it is alleged: (1) That plaintiff's cause of action is barred by the statute of limitations; (2) that plaintiff was not entitled to recover exemplary damages, for the reason that the acts of defendant were not malicious or wanton, and because of the fact that no actual damages were pleaded or proven; (3) that the court believing the verdict excessive, it was its duty to grant a new trial.

We are of the opinion that appellant's first contention disposes of the case. The action is clearly one brought for injury to the person caused by wrongful act, and exemplary damages are prayed for by reason of this alleged injury. The only evidence upon the subject is that plaintiff Helen E. Groff suffered a miscarriage. There is no evidence in the record to show that the acts of defendant caused such injury. Even if we assumed that the miscarriage was brought about through the acts complained of, it is clearly a case within the purview of subdivision 3 of section 340, Code of Civil Procedure, requiring such actions to be brought within one year. Defendants by demurrer and answer interpose the statute as a shield. These pleadings should have been sustained.

This conclusion makes it unnecessary to discuss the other questions raised. The judgment is reversed.

We concur: KERRIGAN, J.; KNIGHT, Justice pro tem.

57 Cal. App. 257

EMPLOYERS' LIABILITY ASSUR. CORPORATION, LIMITED, OF LONDON, ENGLAND, et al. v. INDUSTRIAL ACC. COMMISSION et al. (Civ. 4080.)

(District Court of Appeal, First District, Division 1, California. April 5, 1922. Rehearing Denied May 3, 1922.)

Master and servant — 419—Disability held "new and further disability" within Compensation Act, and not continuing illness.

Where, as a result of an employee's efforts to work following his disability, for which he had received compensation, new complications in his physical condition, traceable to the original injury set in, and his nervous system was broken down so that he was incapacitated for his duties, his condition constituted a "new and further disability," within Workmen's Compensation Act, § 11c, and not a mere "continuing illness."

Application by the Employers' Liability Assurance Corporation, Limited, of London, England, and the C. N. Whitmore Company for certiorari to review an order of the Industrial Accident Commission awarding compensation for injuries to J. T. Souza. Award affirmed.

Redman & Alexander, of San Francisco, for petitioners.

A. E. Graupner, of San Francisco (Warren H. Pillsbury, of San Francisco, of counsel), for respondents.

KNIGHT, Justice pro tem. This is a proceeding to review and annul an award of \$267.81 granted by the Industrial Accident Commission to J. F. Souza on account of injuries sustained by him while in the course of his employment. The issue presented is whether or not Souza's claim is barred by the period of limitation prescribed by the Workmen's Compensation Act (St. 1913, p. 279, as amended by St. 1917, p. 831), and the determination of that question depends upon whether or not the disability for which the claim is presented was a "new and further disability" within the meaning of that term as it is used in said act.

On September 10, 1920, Souza fell from a wagon and sustained a fractured skull. Medical and hospital treatment were supplied by the insurance carrier, and on November 22, 1920, Souza returned to work for his former employer at apparently as good wages as he had previously received, but, on account of a still weakened condition, he was assigned to lighter work. On November 26, 1920, a payment of compensation was made to Souza by the insurance carrier in the sum of \$44.27. About January 1, 1921, Souza complained to his employer that he was unable to continue the work, and was thereupon, by the direction of the physician who had previously treated him, placed in the hospital for 10 days. He was incapacitated for work this second time on account of his injury until about the end of March, 1921.

On June 4, 1921, Souza filed this application for an award, which was granted, in the sum of \$267.81, upon the ground, as respondent contends, that the original injury to Souza had caused "new and further disability."

Section 11 (c) of said Workmen's Compensation Act provides, among other things, that an injured employee "may institute proceedings for the collection of compensation within 245 weeks after the date of the injury upon the grounds that the original injury has caused new and further disability," but in said section it is further provided that "proceedings * * * must be commenced within six months from the date of the injury * * * or * * * six months from the date of the * * * last payment of * * *

compensation." If, therefore, on January 1, 1921, at the time Souza was again compelled to quit his employment, he was suffering from a "new and further disability" resulting from the original injury, his claim was filed within 6 months of date of the new disability, and consequently is not barred.

We are entirely satisfied, after examining the record before us, that Souza's case comes within the "new and further disability" clause above mentioned. When Souza was discharged from the hospital the first time he was released and required to resume his work too soon after the injury. He was subject to spells of dizziness. In this respect his physician testified:

"As a matter of fact he never had done his full quota of work since he had been out of the hospital, from his first injury, and I will say, in justice to the man, that I turned him loose too soon. I think I had him report back to work too soon. Mr. Whitmore is a good man to work for and I didn't want to put the insurance company to any more expense than possible, and Mr. Whitmore has favored him or did favor him in his work, but Mr. Whitmore has told me since that he wasn't able to do his full quota of work."

The evidence may be further fairly summarized as showing that after Souza was sent back to work his dizziness increased to such an extent that his nervous system was finally broken down and he virtually suffered a relapse. His physician further testified that, on January 1, 1921, the trouble with Souza was dizziness, and that "he was inclined to have an autointoxication, fill up with toxins, poisons"; that "his nervous system was pretty badly shot to pieces at that time, too," and that such a condition very often follows a fracture of the skull or concussion of the brain; that "you get these traumatic conditions, and it shocks the nervous system, upsets the nervous system very much."

The petitioners contend that Souza's case merely shows a "continuing illness," from which it is argued that no "new and further disability," is shown. In this respect we think the petitioners are confusing the meaning of the word "illness" with the word "disability." The purpose of the Compensation Act is to give compensation for "disability" proximately caused by injury. Under the provisions of section 9 (b) of said act, compensation is not due for temporary disability after an employee returns to work at full wages, and it follows that when Souza returned to work at full wages there was no "compensable disability." As a result of his efforts to work from November 22, 1920, to January 1, 1921, new complications in his physical condition set in, his nervous system was broken down, and he was finally compelled to quit work. These facts are appar-

ent from the testimony of the physician as hereinabove quoted.

Under these circumstances, we are of the opinion that the situation here presented fully and fairly comes within the intent and meaning of the "new and further disability" clause of said Workmen's Compensation Act, and for that reason the award is affirmed.

We concur: TYLER, P. J.; KERRIGAN, J.

ROYAL GROCERY CO. v. OLIVER. (Civ. 4135.)

(District Court of Appeal, First District, Division 1, California. April 7, 1922.)

Landlord and tenant §86(2)—Option to renew if notice "within" 90 days prior to expiration is given requires 90 days' notice.

In a provision of a lease giving the lessee the option to renew if notice of intention to exercise the option was given within 90 days prior to the expiration of the term, the use of the word "within" does not entitle the lessee to give the notice at any time less than 90 days before the term expired, as it might if the provision read "within 90 days of the expiration," since the word "within," when used in connection with the word "before" or "prior" can be construed as meaning not later than, or at any time not less than.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Within.]

Appeal from Superior Court, Alameda County; A. F. St. Sure, Judge.

Action by the Royal Grocery Company against Lillie F. Oliver, as executrix of D. Franklin Oliver, deceased, for specific performance of a contract. Judgment for defendant, and plaintiff appeals. Affirmed.

O. G. Foelker, of Oakland, for appellant. Morrison, Dunne & Brobeck, and J. F. Shuman, all of San Francisco, for respondent.

KNIGHT, Justice pro tem. This is an appeal by plaintiff from a judgment sustaining a demurrer to plaintiff's complaint, without granting leave to amend, in an action brought for specific performance growing out of an option for the renewal of a lease of real property.

On January 15, 1919, the defendant, as lessor, entered into a lease with plaintiff, as lessee, whereby defendant leased to plaintiff a store in the city of Oakland, for the term of two years commencing on February 1, 1919, and ending on January 31, 1921. The lease gave the lessee an option to renew the same, with changed rentals, for a further period of three years, the new term to commence on January 31, 1921, but with respect to this renewal the lease provided:

"It is further agreed and understood, however, that, in the event the lessee herein shall fail to give the lessor herein a written notice of its election to exercise this option for a 3-year renewal of this lease within 90 days prior to the expiration of this lease, this option for a 3-year renewal shall thereafter be and become null and void, and of no further force and effect, without notice from the lessor."

Notice of the exercise of the option to renew the lease was given to the lessor on November 13, 1920, which was 79 days before the lease expired.

The controversy between the parties arises over the construction which shall be given to the term "within 90 days prior to the expiration of this lease." Appellant's contention is that it had the right at any time during the 90 days next preceding the expiration of the lease to serve the notice of the exercise of the option. Respondent's claim is that said notice should have been served at least 90 days prior to the expiration of the lease.

Viewing the option in the light of other options such as are customarily used in leases, we can arrive at no other conclusion than that it was the intention of the parties here that the lessee should give the lessor at least 90 days' notice of its intention to continue the tenancy. To hold otherwise would, in our opinion, be giving the option an unreasonable and unjust interpretation.

The usual purpose of requiring the lessee in any case to give notice of the exercise of an option to renew the lease is that the lessor may not be compelled to wait until the last day of the term of the lease before he may know whether or not the lessee desires to continue to occupy the premises for a further term, and thereby take the risk of having his premises remain idle for an indefinite period in the event that said option to renew the lease is not exercised. If appellant's contention be sustained, it would mean that appellant was not permitted to notify the landlord at any time during the year and nine months it occupied the premises that it desired to and would continue its tenancy after the original term fixed in the lease, but that it was required to wait until 90 days of the expiration of the lease before it could serve such notice. Such a limitation would obviously be to the disadvantage of both parties to the lease, and there appears to be no reason in law or fact why such a provision should have been made. If the option had read "within 90 days of the expiration of the lease," then there would be some force in appellant's contention; but the presence of the words "prior to" clearly indicates, we believe, that it was the clear intention of the parties that the notice should be served at least 90 days prior to the date on which the lease expired.

The question of such a pleonasm as ap-

pears in this option has been before the courts of other jurisdictions in a few cases, and the rule of those cases is that the word "within," when used in connection with the word "before," should be construed as meaning "not later than" or "at any time not less than." *United States v. Sena*, 15 N. M. 187, 106 Pac. 384; *Hammond v. Connolly*, 63 Tex. 62; *Colonial Trust Co. v. Wallace* (C. C.) 183 Fed. 897. We are of the opinion that such a construction must be adopted here.

Judgment affirmed.

We concur: TYLER, P. J.; RICHARDS, J.

188 Cal. 727

HIGHFIELD v. BOZIO et al. (S. F. 10244.)

(Supreme Court of California. May 16, 1922.)

Executors and administrators — 97—**Executor not bound to employ attorney designated in will.**

Amendment to Code Civ. Proc. § 1616, providing that an attorney for an administrator or executor on notice to the interested parties may apply for and obtain an order that his compensation be paid by the executor or administrator out of the estate in his hands, does not prevent the executor of an estate from employing an attorney other than the one designated in the will, since the executor is liable for acts of the attorney.

In Bank.

Application by Frank Highfield for a writ of mandamus to compel the Superior Court of San Francisco County to direct the executor of the estate of Orlando E. Bozio, Sr., to employ the petitioner as attorney in the business of the estate. Writ denied.

Russell P. Tyler, of San Francisco, for petitioner.

SHAW, C. J. This is a petition for a writ of mandate, to compel the superior court to direct the executor of the estate of Orlando Bozio, Sr., to employ the petitioner as attorney for the said executor, in the administration of the said estate.

The petition is based on the fact that the will of the decedent, which has been admitted to probate, contained the following specific provision:

"I direct and specially request that my friend of many years Frank Highfield be the attorney of record and for the estate in the matter of the probating of my estate."

A similar provision was considered by this court in the case of *Estate of Ogier*, 101 Cal. 381, 35 Pac. 900, 40 Am. St. Rep. 61. In that case the executor, after his appointment, employed other attorneys, and the attorney designated in the will applied to the court for a revocation of the appointment and for an order that he be entered as attorney of record in the place of the other attorneys. The court below denied the application. This court affirmed this ruling and held that the direction in the will—

"did not constitute a selection which was binding on the executor but was simply an advisory provision which she could disregard if she chose to do so."

Among the reasons for this conclusion, the court said that—

"if the attorney employed should be derelict in his duty, and should receive and misappropriate funds of the estate, the executor would be liable therefor to the legatees under the will. This being so, it would seem to be neither reasonable nor right to hold that the executor of a will must necessarily accept the services of an attorney selected by the testator."

This decision is conclusive as to the right of the petitioner to the writ of mandate petitioned for, unless the rule is changed by reason of an amendment to section 1616 of the Code of Civil Procedure, which has been enacted since the decision in the *Ogier* Case. One of the reasons given in the *Ogier* Case for the conclusion of the court in that case was that, although the executor would be allowed as a part of his expenses the reasonable fees paid to the attorney and approved by the court, "still such allowance can be made only to him, and not to the attorney." The amendment to section 1616 provides that the attorney for the executor or administrator, upon notice to the interested parties, may apply for and obtain an order that his compensation be paid by the executor or administrator out of the estate in his hands. The petitioner claims that this removes the reasons given in the *Estate of Ogier* for this decision. We do not agree with this contention.

The amendment does not purport to take away the authority or power of the executor or administrator to select and employ an attorney to advise and assist him in the administration of the estate, nor does it purport to regulate, or affect in any manner, the exercise of that authority or power. It does not affect the principal reasons upon which the decision in the *Ogier* Case was predicated, nor change the sound policy on which it rests. It still remains true that the

executor is responsible for the misconduct, negligence, or want of skill of the attorney. Hence the executor, notwithstanding that amendment, should be allowed to make his own selection of attorney, and should not be bound by any direction contained in the will of the testator.

The petition for a writ of mandate is denied.

We concur: LENNON, J.; WILBUR, J.; SHURTLEFF, J.; LAWLOR, J.; SLOANE, J.; RICHARDS, Justice pro tem.

188 Cal. 722

NEFF v. UNITED RAILROADS OF SAN FRANCISCO. (S. F. 9430.)

(Supreme Court of California. May 15, 1922.)

1. Street railroads ☞ 117(10)—Negligence in failing to ring bell held for jury.

In an action for injuries to the driver of a wagon, struck by a street car at a street intersection, an instruction that the motorman's failure to ring the bell, was negligence in and of itself *held* erroneous, the question of negligence, under the circumstances, being for the jury.

2. Street railroads ☞ 85(3), 117(5)—Care required; negligence for jury.

The duty owed by a street railroad and persons otherwise using the streets is mutual, and each is held only to the exercise of ordinary care, and the question whether each performed his duty, under the circumstances presented, is ordinarily one for the jury.

3. Negligence ☞ 136(14)—Question for jury.

It is within the province of the trial court to declare that a certain state of facts constitutes negligence per se, only when the sole conclusion that can be drawn is that there was negligence on the part of one or both of the parties.

4. Street railroads ☞ 81(5)—Failure to ring bell not excused by excessive speed.

An emergency created by the negligence of a motorman, such as the operation of a car at an excessive rate of speed, does not excuse him from ringing the bell.

In Bank.

Appeal from Superior Court, City and County of San Francisco; George H. Cabaniss, Judge.

Action by John Neff against the United Railroads of San Francisco. From a judgment for plaintiff, defendant appeals. Reversed.

Wm. M. Abbott, Wm. M. Cannon, and Kingsley Cannon, all of San Francisco, for appellant.

Jay Monroe Latimer, of San Francisco (J. E. Pemberton and Frank M. Ayer, both of San Francisco, of counsel), for respondent.

LAWLOR, J. The defendant, United Railroads of San Francisco, appeals from a judgment in the sum of \$1,000 against it and in favor of plaintiff, John Neff, in an action tried by jury for damages for personal injuries, resulting from a collision between a bakery wagon, which Neff, as an employee of Langendorff Baking Company, was driving, and a street car of the defendant, which collision is alleged to have been caused by the negligence of defendant's servant in the operation of the car. Defendant denied the allegations of negligence on its part, and, in turn, alleged plaintiff to have been guilty of contributory negligence.

The accident, out of which the action arose, occurred at the intersection of Baker and Sutter streets, in San Francisco, on February 11, 1918. At this point Baker street is practically level, and Sutter street slopes toward the east. Respondent was driving north on the east side of Baker street, in a covered wagon drawn by a team of horses. Upon arriving at the Sutter street junction, he stopped the wagon to allow a west-bound Sutter street car to pass. At that time the horses' heads were about even with the southerly property line of Sutter street. Just before starting the team, after the west-bound car had passed, respondent looked to the west for approaching east-bound cars. His view in that direction was obstructed by a building on the southwest corner of the intersection, and was limited to about half a block. He saw no cars approaching and heard no bell or other warning, so he started north across Sutter street, driving his team at a walk or slow trot. When the team and wagon were upon the tracks, he discovered an oncoming east-bound car. He attempted to avert the collision by increasing the gait of the team, but was unsuccessful, and the car struck the left wheel of the wagon, upsetting it, and throwing the horses to the ground. Respondent sustained injuries from the impact and from being kicked by the horses.

There was evidence that the car was going 30 or 35 miles an hour, although the motorman testified it was not exceeding 8. The estimates of witnesses as to how far the car went after the collision before it could be stopped varied from 60 feet to half a block.

Appellant contends the trial court erred in refusing to direct a verdict in its favor, upon the ground that the evidence was insufficient to establish negligence on its part, but conclusively established contributory negligence on the part of respondent; in instructing the jury on the subject of "last clear chance," which doctrine, according to appellant, is not applicable to this case, and in giving an erroneous instruction on the subject of appellant's negligence, which it

is insisted constituted a charge on a question of fact.

[1] We are of the opinion that the charge on the subject of appellant's negligence was erroneous. The instruction complained of is as follows:

"The jury are instructed that if, from the evidence in this case, the jury believe that the defendant company, through its motorman or employee operating its street car, which collided with the bakery wagon driven by the plaintiff, Neff, as testified to in this case, operated its said street car on Sutter street when approaching and close to Baker street and about to cross said street, without ringing or sounding the bell or gong of said car, such a failure to ring or sound the bell or gong would be negligence in and of itself."

[2, 3] The duty owed by a street railway company and persons otherwise using the streets is mutual, and each is held only to the exercise of ordinary care, and, as in other cases, the question whether each performed his duty under the circumstances presented, is ordinarily one for the jury. It is within the province of the trial court to declare that a certain state of facts constitutes negligence *per se*, only when the sole conclusion that can be drawn is that there was negligence on the part of one or both of the parties. Appellant earnestly contends that the accident occurred so suddenly that it constituted such an emergency as would justify the motorman in devoting his entire energy and attention to stopping the car, and that, even if it were found the bell was not rung, such a failure would be excused under the circumstances.

The evidence as to the conduct of the motorman and the respondent at the time of the accident presents a sharp conflict. One of respondent's witnesses stated that the car was going 30, another 30 to 35 miles an hour, and a third that it was "coming at a most terrific rate of speed." These three witnesses and respondent stated they heard no warning from the car. On the other hand, the motorman testified the car was not traveling over 8 miles an hour, and that he rang the bell while the car was coming down the hill, the latter statement being corroborated by the testimony of one of the passengers on the car. The motorman also testified he discovered the team just before the car arrived at the crossing; that respondent's appearance indicated he intended to stop and let the car pass; that the motorman supposed he would do so, and that, when respondent, apparently oblivious of the car's approach, drove on the track, the motorman did all he could to stop the car.

From this state of the evidence, it cannot be said, as matter of law, that the motorman either was or was not negligent, or that any one act on his part, such as failing to ring the bell, constituted negligence *per se*. The case is therefore clearly one where the jury should have been allowed, from all the evidence, to find whether or not appellant was negligent. It may have been, as argued by appellant, that an emergency existed in which the exercise of ordinary care demanded an immediate stopping of the car, and not the sounding of a warning. The jury might have so found, if they concluded respondent was free from negligence, in determining whether any act of the motorman, which was a contributing cause of the injury, constituted negligence. Such a situation might also have been found to have existed, assuming, as claimed by appellant, that respondent was guilty of contributory negligence, in deciding whether or not the motorman exercised ordinary care to avail himself of a possible last clear chance to avoid the accident. In neither case was the jury given an opportunity to determine whether such an emergency existed, for they were in effect told by this instruction that, no matter what the circumstances were, a failure to ring the bell was in and of itself negligence. It was therefore a charge on a question of fact. Inasmuch as the jury may have relied on this instruction in reaching the verdict, it cannot be said appellant was not prejudiced by it.

[4] Since there must be a new trial of the action it may be well to call attention to certain other matters. No attempt was made to prove any local ordinances covering either the lawful rate of speed or of the ringing of the bell on street cars. As the evidentiary situation may be different upon the retrial, it will not be necessary to pass upon the contentions of appellant that the trial court erred in refusing to direct a verdict in its favor, upon the ground of the insufficiency of the evidence, and in charging the jury on the doctrine of the last clear chance. Appellant argues that, because of the emergency of the situation with which the motorman was confronted, he was excused from ringing the bell. But this would have no force if it was found the emergency was created by the negligence of the motorman, such, for instance, as the operation of the car at an excessive rate of speed. *Davis v. Durham Traction Co.*, 141 N. C. 134, 53 S. E. 677, 53 S. E. 617.

Judgment reversed.

We concur: SHAW, C. J.; WILBUR, J.; LENNON, J.; SLOANE, J.; SHURTLEFF, J.

188 Cal. 739

(207 P.)

Ex parte Y. AKADO. (Cr. 2443.)

(Supreme Court of California. May 16, 1922.)

1. Aliens ⇐13—Treaty held not to permit acquisition of agricultural land by foreign-born Japanese.

Under Initiative Alien Land Act 1920, §§ 1, 2, declaring that no alien who is not eligible to citizenship may acquire real property except as provided by the treaty between the United States and the country of which such alien is a citizen, and the treaty between the United States and Japan providing that citizens of Japan residing in the United States may lease land for residential and commercial purposes only, but containing no provisions authorizing an alien to lease or acquire land for agricultural purposes, a native-born subject of Japan cannot acquire agricultural land in the state.

2. Conspiracy ⇐23—An agreement that, if carried out, would effect a transfer in violation of Alien Land Act is a conspiracy.

An agreement between two persons which, if it were valid, and if it were carried out, would effect a transfer of land in violation of the provisions of Initiative Alien Land Act 1920, § 10, would be a conspiracy, and would be a violation of the act.

3. Conspiracy ⇐23—That Alien Land Act did not punish acquisition of land by alien immaterial in prosecution for conspiracy to effect transfer.

The acquisition of land by an alien ineligible to citizenship being forbidden by Initiative Alien Land Act, 1920, it is immaterial, in a prosecution for conspiracy forbidden by section 10, that each acquisition was not made a punishable offense, it being reasonable and proper to provide that an act to make a transfer or an agreement to conspire to do so should be punishable as a crime, regardless of the question whether the transfer would be valid or effective if the intention of the persons were actually carried to the point of execution by a conveyance.

4. Conspiracy ⇐23 — In indictment under Alien Land Act, immaterial that arrangement for alien's use of land would create an unenforceable trust.

The purpose of Initiative Alien Land Act 1920, § 10, prohibiting conspiracies to violate the act, was to prevent attempts to create relations between ineligible aliens and other persons whereby the title to land would be taken by any other person and the use enjoyed by the alien; and, in a prosecution under such section, it was immaterial that the agreement on which the indictment was based created a trust in favor of the alien which could not be enforced.

5. Aliens ⇐10—States can forbid holding of land by aliens ineligible to citizenship.

Const. art. 1, § 17, leaves to the Legislature the power to forbid the taking or holding of property by aliens ineligible to citizenship within the state's limits; and Initiative Alien Land Act 1920, in terms allowing aliens to take and hold agricultural land to the extent that such

taking or holding is prescribed by treaty with the country of which the alien is subject, is valid.

6. Conspiracy ⇐23—Alien Land Act declares a public offense enforceable in the courts.

Initiative Alien Land Act 1920, § 10, punishing conspiracy to violate other sections of the act, declares a public offense which may be enforced by the courts.

In Bank.

Original application of Y. Akado, also known as S. Ikada, for writ of habeas corpus against the Sheriff of Sonoma County. Writ denied.

Algernon Crofton, of San Francisco, Charles A. Wetmore, Jr., of Marysville, and J. C. Meyerstein and Gillogley, Crofton & Payne, all of San Francisco, for petitioner.

G. W. Hoyle and Ross Campbell, both of Santa Rosa, and U. S. Webb and Frank English, both of San Francisco, for respondent.

SHAW, C. J. The petitioner is in custody upon a warrant of arrest issued upon an indictment charging him with a violation of section 10 of the act adopted by initiative at the November election of 1920 (St. 1921, p. lxxxiii), forbidding the acquisition of agricultural lands in this state by any alien who is not eligible to become a citizen of the United States. Claiming that section 10 of the act is invalid, and that the indictment states no public offense, he seeks release by a writ of habeas corpus.

Section 1 of the act provides that all aliens eligible to citizenship under the laws of the United States may acquire real property in the same manner as citizens of the United States.

Section 2 provides that all aliens other than those mentioned in section 1 may acquire, possess, enjoy and transfer real property "in the manner and to the extent and for the purpose prescribed by any treaty now existing between the government of the United States and the nation or country of which such alien is a citizen or subject, and not otherwise."

[1] This, in effect, declares that no alien who is not eligible to citizenship under the laws of the United States may acquire real property, except as provided by the treaty existing between the United States and the country of which such alien is a citizen or subject. 37 Stat. 1504. Persons of the Japanese race who are native-born subjects of Japan cannot become citizens of the United States. The result is that the acquisition by such an alien of land situated in this state is unlawful, unless the treaty between his government and the United States allows such acquisition. The treaty between the United States and Japan provides that citizens of Japan residing in the United States

may lease land for residential and commercial purposes, but it contains no provision authorizing an alien of the Japanese race to lease or acquire land for agricultural purposes. Consequently the Initiative Alien Law aforesaid prohibits the acquisition by such alien of any agricultural land situated in this state.

[2] Section 10 of the act is as follows:

"If two or more persons conspire to effect a transfer of real property, or of an interest therein, in violation of the provisions hereof, they are punishable by imprisonment in the county jail or state penitentiary not exceeding two years, or by a fine not exceeding five thousand dollars, or both."

The indictment charges that on September 19, 1921, in Sonoma county, Cal., the petitioner and one W. A. Cockrill did "willfully, unlawfully, and feloniously conspire together to effect a transfer of agricultural and farming real estate, land and property, in the county of Sonoma, state of California, and an interest therein, and did so willfully, unlawfully, and feloniously take and enter into an agreement to purchase certain agricultural and farming real estate, land and property, from Bartholomeu C. Souza and Mary C. Souza, in the name of said defendant, W. A. Cockrill, for the use, benefit, enjoyment, possession, occupation and control of said Y. Akado, also known as S. Ikada, and paid thereon, on the purchase price thereof, the sum of \$150," which said money was paid by said Akado, who was then and there an alien subject of Japan and not eligible to citizenship in the United States, and that said land was and is not acquired in the enforcement or satisfaction of any lien thereon, and said agreement to purchase the same was taken in the name of Cockrill for the use of Akado with the intent and purpose to prevent, evade and avoid the escheating of said land to the state of California, said Cockrill not having then and there any interest in said lands in fee or otherwise.

It is clear that the indictment charges an agreement between the two persons charged, which, if it were valid, and if it were carried out, would effect a transfer of land in violation of the provisions of the Alien Land Act. Such an agreement would be a conspiracy and would be a violation of section 10 aforesaid.

[3] The petitioner contends that, because of the fact that no provision of the Alien Land Law makes it a crime or public offense for any person to transfer land to an alien ineligible to citizenship, therefore, for some reason, the cogency of which we are not able to perceive, the section declaring it to be a crime for two or more persons to conspire to bring about such a transfer is ineffective for any purpose. This result would not follow. The act forbids such transfer, and this makes it impossible for any person to convey land to an alien ineligible to citizenship

by any transfer that would be valid as against the state of California, although it might be valid with respect to all other persons. We must assume that the people in adopting this statute believed that the state of California could protect itself against the alien who had received a conveyance of such land whenever its officers became advised of the fact, without any provision making the execution of the conveyance itself a crime. But it is entirely reasonable to suppose that in many cases the state might not obtain information of such fact. Furthermore, it is to the interest of the state that all persons owning land should be effectively deterred from attempting to evade or frustrate the provisions of the act forbidding the acquisition of such land by such alien, by means of colorable conveyances and unrecorded trusts. It was therefore reasonable and proper to provide that the attempt to make such transfer, or an agreement or conspiracy to do so, should be punishable as a crime, regardless of the question whether the transfer would be valid or effective if the intention of such persons were actually carried to the point of execution by a conveyance. We can perceive nothing in the conditions which would make such penal statute ineffective. The acquisition of such land by an alien ineligible to citizenship is positively forbidden by the act. It is immaterial that such acquisition is not made a punishable offense. The framers of the act deemed it a sufficient protection to the state to make it a public offense for any person to conspire to effect such a transfer. The fact that the act creates no other crime does not affect the validity of the section which defines the offense charged against the petitioner.

[4] For like reasons it is immaterial whether the arrangement between Akado and Cockrill that the price should be paid by Akado and that the title should be taken by Cockrill would operate to create a valid trust in Cockrill in favor of Akado with respect to the land and the use thereof or not. The purpose of the section was to prevent any attempts to create relations between such aliens and other persons whereby the title to land would be taken by any other person and the use thereof would be enjoyed by the alien. Such purpose is sufficient to uphold the penal statute, and the fact that the trust could not be enforced is not material to the effectiveness of the provision forbidding a conspiracy to make a formal attempt to create such invalid trust.

[5] It is not claimed that the Alien Land Act is contrary to the state or federal Constitution in respect to the provision forbidding the acquisition of agricultural land. It is well settled that, in the absence of a treaty to the contrary, a state may forbid the taking or holding of property within its limits by aliens. *Blythe v. Hinckley*, 127 Cal. 436, 59 Pac. 787. Our Constitution leaves to the

Legislature this power with regard to all aliens ineligible to citizenship. Article 1, § 17. The provisions of the act in terms allow such aliens to take and hold agricultural land to the extent that such taking or holding is prescribed by any treaty with the country of which such alien is subject. The treaty with Japan does not prescribe or secure to its citizens the right to take or hold agricultural land situated in this state. Hence the act does not violate the treaty in that respect. In the recent case of *Estate of Yano* (Cal. Sup.) 206 Pac. 995, the court held that the provision of the law preventing the appointment of such aliens as guardians of their minor children born in this country was not a violation of the treaty, but that it was discriminative, and therefore violative of the Constitutions of this state and of the United States. That case is not at all inconsistent with the case at bar. There the child was born here, and is a citizen of this country, with the same right to take and hold property that any other citizen possesses. Here the persons forbidden to take and hold property are aliens who have not become citizens, and who are ineligible to become such. Since the statute makes it unlawful for such aliens to acquire agricultural land within this state, it is clear that there is also power to make it a crime to conspire to bring about such acquisition.

[6] We are therefore of the opinion that section 10 of the act declares a public offense which may be enforced by our courts, and that the indictment sufficiently states the offense described in that section.

The petition for a writ of habeas corpus is denied.

We concur: SLOANE, J.; WILBUR, J.; SHURTLEFF, J.; LENNON, J.; RICHARDS, Justice pro tem.

LAWLOR, J. I concur, but adhere to the views I expressed in *Estate and Guardianship of Yano* as to the constitutionality of the provision of the Alien Land Law relating to guardianship.

188 Cal. 729

WEILER et al. v. SUPERIOR COURT IN
AND FOR SAN MATEO COUNTY et al.

KAVANAUGH et al. v. SAME.

(S. F. 10182, 10195.)

(Supreme Court of California. May 16, 1922.)

4. Eminent domain §70 — Constitution providing for compensation on taking private property must be strictly followed.

Const. art. 1, § 14, providing for compensation for property taken, must be strictly followed.

2. Eminent domain §76—Deposits for damages for taking highway by county must secure owners separately.

While Code Civ. Proc. § 1244, subd. 5, provides that all parcels of land sought to be condemned for public use may be included in the same action, under Const. art. 1, § 14, providing that a county may take immediate possession of rights of way for public use by first commencing eminent domain proceedings, and thereupon giving security for adequate compensation to the owners and incidental damages, an order for a separate deposit for each owner must be made.

In Bank.

Applications of Jacob Weiler and another and of Moses F. X. Kavanaugh and another, each against the Superior Court in and for the County of San Mateo and George H. Buck, Judge thereof, for writs of certiorari to review orders of the Superior Court condemning certain land for highway purposes. Order annulled.

Tum Suden & Tum Suden, of San Francisco, for petitioners.

Franklin Swart and John H. Machado, both of Redwood City, for respondents.

SHAW, C. J. Each cause above entitled is a proceeding by the plaintiffs therein to review and annul an order of the superior court of San Mateo county on the ground that it is in excess of the jurisdiction of the court.

The two proceedings involve the same order and the same proposition of law. The order affects the respective rights of the parties in the same manner. They will therefore be considered together.

On November 14, 1921, the county of San Mateo began an action in said court to condemn for a highway a strip of land through and over three separate tracts of land in said county, belonging to different parties. The first tract belonged to William Weiler and Jacob Weiler, the plaintiffs in case S. F. No. 10182, and the third tract belonged to the plaintiffs in case S. F. No. 10195. The second tract is owned by Madaline Zanone and six other persons as tenants in common, none of whom is a party to either of these two proceedings.

Thereafter, on February 8, 1922, and prior to the service of any summons on any of the parties to these two proceedings, the affidavit of Joseph J. Phillips was filed in said action, wherein he states that he is acting as agent to secure rights of way for the proposed highway; that he is familiar with the property sought to be acquired in said action, and "is informed as to the value thereof, and as to the extent of the damage that will accrue to the defendants by reason of such condemnation and taking," and that "in his judgment the total value of all the property

sought to be acquired, together with all the damage by reason of the severance thereof, and all other damage of whatsoever kind and nature, to accrue to all of the defendants herein will not exceed \$1,720."

Thereupon, on the same day, and without notice of any kind to any party to said action, or the taking of any evidence other than said affidavit, and in the absence of said parties, the court made the following order:

"It appearing to the satisfaction of the court that plaintiff herein, County of San Mateo, a political subdivision of the state of California, has filed an action in eminent domain:

"It is therefore ordered that the plaintiff take immediate possession and use of the property sought to be condemned, and that the sum of \$1,720 be, and is hereby, fixed as the amount reasonably adequate to secure to the owners of the property sought to be condemned immediate payment of just compensation for such taking and any damage incident thereto, including damages sustained by reason of an adjudication that there is no necessity for taking the property as soon as the same can be ascertained; that such possession be taken upon deposit by said plaintiff with the clerk of this court of said sum."

The defendant herein claims that such order is authorized by the provisions of section 14, art. 1, of the Constitution, as amended on November 5, 1918.

The material provisions of the section, as amended, are as follows:

"Private property shall not be taken or damaged for public use without just compensation having first been made to, or paid into court for, the owner, and no right of way shall be appropriated to the use of any corporation, except a municipal corporation or a county, until full compensation therefor be first made in money or ascertained and paid into court for the owner, irrespective of any benefits from any improvement proposed by such corporation.
* * * Provided, that in an action in eminent domain brought by the state, or a county, or a municipal corporation, or a drainage, irrigation, levee, or reclamation district, the aforesaid state or political subdivision thereof or district may take immediate possession and use of any right of way required for a public use, whether the fee thereof or an easement therefor be sought upon first commencing eminent domain proceedings according to law in a court of competent jurisdiction and thereupon giving such security in the way of money deposits as the court in which such proceedings are pending may direct, and in such amounts as the court may determine to be reasonably adequate to secure to the owner of the property sought to be taken immediate payment of just compensation for such taking and any damage incident thereto, including damages sustained by reason of an adjudication that there is no necessity for taking the property, as soon as the same can be ascertained according to law. The court may, upon motion of any party to said eminent domain proceedings, after such notice to the other parties as the court may prescribe, alter the amount of such security so required in such proceedings."

The plaintiffs herein claim that this amendment is in violation of the provisions of the Constitution of the United States that no state shall deprive any person of property without due process of law. Article 14, § 1.

[1] We do not find it necessary to consider this proposition, for we are of the opinion that the order in question does not conform to the requirements of the aforesaid amendment to section 14 of article 1 of our Constitution. Inasmuch as the provision authorizes an invasion of private property—that is, the taking possession thereof without the consent of the owner—it is obvious that the general principle that such provisions in a statute or Constitution must be strictly followed applies to and governs its interpretation and effect.

[2] The plaintiffs urge that by the order attacked in this case they do not receive the protection against injury which the first clause of section 14 entitles them to. We think this must be admitted. The language of the section with respect to the security to be given, and with respect to the owner thereof, is in the singular number throughout with one significant exception. The court may make the order in question provided the political subdivision which is maintaining the condemnation suit shall give such security in the way of money deposits as the court may direct, "and in such amounts as the court may determine to be reasonably adequate to secure to the owner of the property sought to be taken immediate payment of just compensation for such taking and any damage incidental thereto." Also, that, "upon motion of any party" to the cause, and "after such notice to the other parties as the court may prescribe," the court may "alter the amount of such security so required in such proceedings." In a case such as the present, where the property sought to be condemned consists of a highway running through many parcels of land belonging to different persons, the damages and the value of their respective parcels of property sought to be taken may, and often will, differ widely. The damage to one will in no particular depend upon the damage to the others. Neither party will be interested in any allowance for damages except his own. The Code provides that all the parcels of land sought to be condemned and required for the same public use may be included in the same action at the option of the plaintiff, and that the court may consolidate or separate them to suit the convenience of the parties. Code Civ. Proc. § 1244, subd. 5. The action with respect to each party is of the same character as if he was the sole defendant.

The constitutional provision recognizes the separate interests of the several parties, and therefore declares that the "money deposits" shall be "in such amounts" as may be found adequate "to secure to the owner" payment of his compensation and damages. The word

"amounts" is in the plural, and the word "owner" in the singular, thus implying that a different amount may be necessary for each owner. It is also significant that the provision for a subsequent change of amount runs to "any party," and provides that the court, on his motion, may "alter the amount"; the words being in the singular number. This implies the fixing of a separate amount for the security of each party. We think, under these circumstances, the true construction of the amendment of the Constitution is that, where several parcels of land belonging to different owners are sought to be condemned in the action, the security to the owner of the property to be required to be given to authorize an order for the taking of immediate possession thereof must consist of a separate and distinct sum of money deposited for the security of each owner. If this were not the case, it is easy to perceive that the development of the case might have the effect of depriving some of the parties of any security whatever. The method pursued in this action is a good illustration of this proposition. The order was made on the affidavit of one person stating that in his judgment \$1,720 will be sufficient security for the total damage that may accrue to all the parties. Upon the deposit of this sum the plaintiff in the action, under the order, will be entitled to immediate possession, and the defendants will thereupon, and at that moment, be deprived of all future use of their property. In effect the property is then taken from them if the action proceeds to a successful conclusion. Opinions in regard to values vary more, perhaps, than upon any other subject. Each party is entitled to a trial by jury. The court may in the subsequent progress of the case order that separate trials be had with respect to each party, or some of them. It is not improbable that the total damage may far exceed the estimate of the single witness who fixed the amount without a hearing or notice to either of the parties. It may happen that the damage to the person whose case is first tried may exceed that amount. In any case, whenever the amount deposited is exceeded by any verdict, and the person who obtains such verdict receives his damage out of the deposit, as he has the right to do, the other parties to the action will have no security whatever. In view of these circumstances it is our opinion that the deposit of a single sum of money as security for each separate owner of property sought to be condemned is a condition precedent to the authority and power of the court to make any order for the delivery of immediate possession, and that an order made without such separate security is in excess of the jurisdiction of the court, and void.

The order of the court above set forth is

annulled. This order shall be made in each of said proceedings.

We concur: LENNON, J.; WILBUR, J.; SHURTLEFF, J.; LAWLOR, J.; SLOANE, J.; RICHARDS, Justice pro tem.

188 Cal. 717

Ex parte DREW. (Cr. 2470.)

(Supreme Court of California. May 13, 1922.)

1. Habeas corpus ☞92(1)—Inquiry is limited to question of jurisdiction.

The scope of inquiry upon habeas corpus is precisely the same as upon a writ of review, and cannot go beyond the question of jurisdiction.

2. Habeas corpus ☞94—Decision on writ of review court had jurisdiction to commit for contempt is conclusive.

A decision on writ of review that the court had jurisdiction to commit for contempt is an adjudication of a question of jurisdiction which is conclusive in habeas corpus.

3. Execution ☞393—Court can appoint non-resident referee for hearing in supplementary proceedings.

Code of Civ. Proc. §§ 714, 715, providing that in proceedings supplementary to execution the debtor cannot be required to attend before a referee out of the county in which he resides, creates an exception to section 640, providing for the appointment of referees generally, and requiring them to reside in the county in which the action is triable, so that in supplementary proceedings the court could appoint a referee who resided in another county in which county the debtor also resided.

4. Habeas corpus ☞3—Decision as to jurisdiction on former writ of review is conclusive as to objections which might have been raised.

A decision on writ of review that the court had jurisdiction to commit for contempt is conclusive in subsequent proceedings for habeas corpus against objections to the jurisdiction which might have been raised, but were not, on writ of review.

In Bank.

Application by Frank C. Drew for a writ of habeas corpus, prayed to be directed to the Sheriff of Mendocino County, to secure the release of petitioner from custody on commitment for contempt. Writ denied.

Lewis F. Byington and Maxwell McNutt, both of San Francisco, for petitioner.

SHAW, C. J. The petitioner applies for a writ of habeas corpus to discharge him from custody under an order of arrest issued by the superior court of Mendocino county upon a judgment of that court declaring him guilty of contempt of court, and imposing a penalty of five days' imprisonment and \$500 fine.

The judgment of contempt was based on an affidavit showing that in an action entitled *Phil Lobree v. L. E. White Lumber Co. et al.* (Cal. App.) 199 Pac. 821, judgment had been duly rendered and entered against said lumber company; that thereupon proceedings supplementary to execution had been duly instituted and an examination had been ordered before one Ornbaum, who was appointed referee for that purpose; that Drew had been ordered to appear before said Ornbaum in the city and county of San Francisco, at a specified time and place, for the purpose of being examined in pursuance of said proceeding, and that he had failed to appear in obedience of the order of the court. The judgment of contempt recites the facts upon which it was based.

In his present petition for a writ of habeas corpus the petitioner claims that there are many technical defects in the affidavit and proceedings upon which he was adjudged guilty of contempt and in the proceeding supplementary to execution upon the judgment aforesaid. None of these, except those hereinafter mentioned, is of any consequence, as they do not go to the jurisdiction of the court to institute the proceedings in contempt and render the judgment thereon. The main points of the petition are: (1) That the order of examination before the referee was void because the examination was to be held in San Francisco, and the judgment was rendered in Mendocino county, and also because the referee, Ornbaum, resided in San Francisco county, that not being the county in which the judgment was rendered; (2) because prior to the beginning of the action in which the judgment against the L. E. White Lumber Company was rendered the said lumber company had ceased to exist as a corporation by reason of its having failed to pay its annual license tax as required by law, and that in consequence of that fact no valid judgment could be rendered against it.

This matter has been before the courts many times. The order of commitment for contempt was made on January 9, 1920. Up to this time the petitioner has succeeded in avoiding the imprisonment adjudged. Prior to the proceeding in contempt here attacked the petitioner had been adjudged guilty of contempt for refusing to obey a previous order of the court directing him to appear for examination in a previous proceeding supplementary to execution. In May, 1919, he applied to this court for a writ of certiorari to review and annul said order. The application was duly heard, and this court on July 8, 1919, duly rendered its judgment, declaring that the petitioner was in contempt of court for refusing to obey the order, and affirming the judgment punishing him for contempt. *Drew v. Superior Court*, 180 Cal. 711, 182 Pac. 417. In that proceeding he did not claim that the defendant corporation had

ceased to exist before the action was begun. Thereafter another supplementary proceeding was begun in the same action, and in that proceeding the judgment of imprisonment here attacked was made. An order of examination was duly made therein, and again the petitioner refused to appear for examination. He was again cited to appear upon a charge of contempt for such refusal, whereupon, before the hearing, he applied to the District Court of Appeal of the Third District for a writ of prohibition on the general grounds that the superior court had no jurisdiction to hear and decide the charge of contempt. The cause was decided against him by the District Court of Appeal on October 18, 1919, and upon petition to this court a rehearing was denied. *Drew v. Superior Court*, 43 Cal. App. 651, 185 Pac. 680. In his petition he made some claim that the judgment in the main case was void by reason of some extrinsic circumstances, but the opinion of the district court does not show the precise ground. The contempt proceeding in the superior court of Mendocino county then proceeded to a hearing, and on January 9, 1920, the judgment in contempt here involved was made. Thereupon the petitioner herein filed his petition in the District Court of Appeal of the Third District for a writ of review to annul said judgment of contempt. One of the grounds of this petition was that the judgment against the L. E. White Lumber Company upon which the proceedings supplementary and in contempt were based was void, because of the fact that prior to the beginning of said action said corporation had ceased to exist because of the forfeiture of its charter aforesaid. Thus the same contention which he makes now to this court was presented to that court for adjudication, and the record of the judgment was presented to that court for review. It was there held on April 19, 1920, that the judgment was valid; that the finding therein that the corporation was in existence is final and conclusive and not open to attack in a proceeding in certiorari. *Drew v. Superior Court* (Cal. App.) 190 Pac. 374. Its existence was not legally impossible, for it may have been a corporation de facto, or it may have had its corporate charter restored as provided in section 14 of the act. Stats. 1915, p. 427. A petition to the Supreme Court for rehearing was denied, and that judgment thereupon became final. It declared, in effect, that the judgment on the charge of contempt was valid.

[1, 2] The scope of inquiry upon a writ of review extends only to the question of the jurisdiction of the court which rendered the judgment sought to be reviewed. The scope of inquiry on habeas corpus is precisely the same. It cannot go beyond the question of jurisdiction. The decision of the district court in that case was therefore an adjudication by that court, and also by this court on

petition for rehearing, of the precise matter upon which the petitioner here claims that the contempt judgment is void. Even if we were of the opinion that the decision in that case was erroneous, it would now be conclusive. It follows that there is no merit in the contention that the contempt judgment is void because of the alleged nonexistence of the L. E. White Lumber Company as a corporation.

[3] Upon the second point, section 714 of the Code of Civil Procedure provides that in a proceeding supplementary to execution the judgment debtor cannot be required to attend before a judge or referee out of the county in which he resides or in which he has a place of business. There is no other provision of the Code limiting the power of the court to appoint a referee in supplementary proceedings. Section 640, providing for the appointment of referees generally, provides that if the parties fail to agree the judge must appoint one or more referees "who reside in the county in which the action or proceeding is triable." We think the provision of section 714 must be considered as an enlargement of the power, if section 640 may be considered as requiring the appointment of a referee residing in the county in which the cause is tried. Section 714 authorizes the court to appoint a referee in supplementary proceeding, and at the same time does not authorize the party to be examined except in the county where he resides or has a place of business. This necessarily implies that where the party resides in another county the examination may be held in that county, since otherwise there could be no examination of such party. Section 715 authorizes an examination before a referee "at a specified time and place." It does not limit the place at which the examination may be had in proceeding under that section. It appears from the record that the petitioner was the president of the L. E. White Lumber Company; that he resided in San Francisco and had a place of business there, and that the said company also had its place of business there. In view of these provisions of the statutes we are of the opinion that the court had power to order an examination in San Francisco.

[4] We are also of the opinion that the point that the referee was not a resident of Mendocino county, and therefore, as it is claimed, not eligible to appointment as referee, does not affect the jurisdiction of the court, and therefore that it is not a ground for habeas corpus, certiorari, or prohibition, but that if it is material to any right of the party and is well taken, it must be presented on appeal. Furthermore, it may be said that this point also has been adjudicated against the petitioner. He sought to review the order before the District Court of Appeal, and

if he had other reasons for alleging the want of jurisdiction by the court he should have presented it there. The petitioner cannot be allowed to present his reasons against the validity of the judgment against him piecemeal by successive proceedings for the same general purpose. He has not only had his day in court to attack the validity of this judgment, but has had several such days, on each of which he could have urged this objection, but did not do so, and he is therefore barred as to that and all other objections to its validity. Code Civ. Proc. § 1908.

The petition for a writ of habeas corpus is denied.

We concur: WILBUR, J.; LAWLOR, J.; SLOANE, J.; LENNON, J.

188 Cal. 734

**MARIN MUNICIPAL WATER DIST. v.
CHENU, Chief of Division of Motor
Vehicles. (S. F. 10210.)**

(Supreme Court of California. May 16, 1922.)

1. Licenses — License fees for automobiles are in nature of tax.

Moneys collected under provisions of Motor Vehicle Act, § 3, and sections 7, 8, as amended by St. 1919, pp. 198, 199, are to be used for public purposes, and the license fees for automobiles therein provided are in the nature of a tax.

2. Licenses — (1) — Statute providing for payment of fees not applicable to state agencies, unless such intent expressed.

Words in a statute providing for the payment of fees are not deemed to apply to public agencies unless such intent is clearly expressed.

3. Statutes — Exceptions in statute imposing burdens liberally construed in favor of public.

Exceptions in a statute imposing burdens are to be liberally construed in favor of the public.

4. Licenses — (1) — Motor vehicle used by municipal water district not subject to license as "engaged in business."

Motor vehicle used by municipal water district in collecting and distributing water to the public without profit is not subject to license as being "engaged in business," under Motor Vehicle Act, § 2; the term being used therein in the narrower meaning applicable to occupations or employment for livelihood or gain, and to mercantile or commercial enterprises.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Engage.]

In Bank.

Application of the Marin Municipal Water District for writ of mandate directed to Charles J. Chenu, as Chief of the Division

of Motor Vehicles, requiring the issuance to petitioner of automobile plates and certificates without payment of the fees. Writ granted.

George H. Harlan, of San Rafael, for petitioner.

U. S. Webb, Atty. Gen., for respondent.

SHAW, C. J. The plaintiff applies to this court for a writ of mandate directing the defendant as chief of the division of motor vehicles of the department of finance of the state of California to issue to the plaintiff certain license plates, with the accompanying certificates, such license plates to be attached to certain automobiles owned by the plaintiff, as required by the Motor Vehicle Act. The plaintiff is a municipal water district, organized under the act of May 1, 1911, and amendments thereto. Stats. 1911, p. 1290; Stats. Ex. Sess. 1911, p. 92. By the act of April 16, 1915, the organization of said district was declared valid, and it was declared to be duly created as a public corporation. Stats. 1915, p. 84. The plaintiff has constructed and completed a large water collecting, storing, and distributing system, and is operating the same in accordance with said act by collecting, selling, and distributing water to the inhabitants of the district and others. In carrying out its public duties and obligations under the act, as required, it is necessary for it to use 13 motor vehicles, all of which are used exclusively by it in the discharge of its public duties. It applied to the defendant for the necessary licenses certificates, and license plates, as required by the Motor Vehicle Act from persons operating and owning motor vehicles. The defendant refused to issue the licenses, certificates, or plates except upon the payment of the license fees prescribed by the Motor Vehicle Act, amounting to \$133.60, whereupon the plaintiff began this proceeding in mandamus.

[1] Section 3 of the Motor Vehicle Act (Stats. 1915, p. 400) provides that "every owner of a motor vehicle which shall be operated or driven upon the public highways shall" cause the same to be registered with the motor vehicle department and shall deposit with his application for a certificate "the proper registration fee as provided in section 7 of this act." Section 7 of the act as amended (Stats. 1919, p. 198) specifies the fees to be paid to the motor vehicle department upon the registration of such motor vehicle. It is conceded that the amount demanded by the defendant was the proper amount for the vehicles belonging to the plaintiff if the plaintiff is liable therefor. The section also provides that a number plate shall be given to the person registering the vehicle upon the payment of such fees. Section 8 as amended (Stats. 1919, p. 199) provides that a certificate of registration shall also be

issued by the motor vehicle department showing the name of the registered owner and other particulars.

The act further provides that all moneys received by the department from such license fees shall be paid into the state treasury to the credit of a fund designated as the motor vehicle fund; that one-half of such fund shall be paid to the counties from which the moneys were received, as determined by the residence of the persons paying the same, for the benefit of the road funds of such counties; that the other one-half, after deducting certain moneys for the expenses of the department, shall be expended by the state department of engineering for the maintenance of roads, highways, and parks in this state. It will be seen, therefore, that the moneys are to be used for public purposes, and that the license fees are in the nature of a tax. *Madera v. Black*, 181 Cal. 310, 184 Pac. 397.

[2] The claim of the plaintiff is that it is a public corporation, municipal in character, established and organized for the purpose of carrying on within the district the public service of furnishing water to the public; that it is a state agency for that purpose, and that, under the well-established rule that words in a statute providing for the payment of fees or imposing burdens on property shall not be deemed to apply to public agencies or public property, unless such intent is clearly expressed, the language of this act providing for the payment of license fees cannot be considered as having been intended to include or apply to water districts organized under the act first referred to. This doctrine has been frequently expounded and applied in this state (*Balthasar v. Pac. Elec. Ry. Co.* [Cal. Sup.] 202 Pac. 37), where it was held that the provisions of the Motor Vehicle Act did not apply to or include motor vehicles belonging to the fire and police departments of municipalities of the state. Other illustrations of the rule are found in the citations and quotations made in that case.

[3, 4] The defendant claims that the rule is inapplicable in this case because of the provisions of section 2 of the Motor Vehicle Act. This section provides that:

"All motor vehicles owned and used in the transaction of official business by the representatives of foreign powers or by officers, boards or departments of the government of the United States, and all motor vehicles owned by and used in the operative work of such corporations as are taxed solely for state purposes under the provisions of the Constitution of this state, and such self-propelling vehicles as are used neither for the conveyance of persons for hire, pleasure, or business, nor for the transportation of freight, are hereby exempted from the payment of the fees in this act prescribed. The department shall furnish, free of charge, distinguishing plates for motor vehicles thus exempt."

The claim is that by this specification of vehicles which are to be exempt the statute evinces an intention to exclude all other vehicles and persons from the exemption.

We think that section 2, instead of justifying the position of the defendant, is positive evidence against the same. It excludes specifically all motor vehicles that are not used for the conveyance of persons for hire, for pleasure, or for business. There is a companion rule of construction to that above mentioned, to the effect that exceptions in a statute imposing burdens are to be liberally construed in favor of the public. Even without the aid of this rule, however, we think a motor vehicle owned and used by a municipal water district organized under the law for the purpose of collecting and distributing water to the public, and for the management of its works and system in discharging its public duties, is not used in "business" as that term is used in section 2 aforesaid. The municipal water district is not a commercial corporation. It does not operate for profit. It is not intended that it shall earn any money in excess of the necessary operating expenses of the plant devoted to the public use and for the acquisition of property necessary thereto. While the operations of such a public corporation are sometimes referred to as its "business," it is nevertheless true that the context indicates that the word was used in a narrower meaning in this section. The general definition of the word is "that which busies, or engages time, attention, or labor, as a principal serious concern or interest," but the word has a narrower meaning applicable to occupation or employment for livelihood or gain, and to mercantile or commercial enterprises or transactions. It is not to be presumed that the Legislature undertook to place public corporations of this character in the same class as private corporations engaged in ordinary business. The rule of construction we have already referred to forbids it. The passage evidently refers to ordinary business, and not to the operations of the public corporations of the state. The phrase "for the conveyance of persons for hire, pleasure, or business, nor for the transportation of freight," clearly indicates an intention to describe ordinary occupations engaged in by private persons or private corporations, either for business or pleasure, and, so far as it refers to business it would include private business, and not public business. If the word "business" was given the broader meaning contended for by the defendant, it would require the imposition of the license fees upon every municipality in the state, and even the state itself, as a condition precedent to the issuance of license plates and certificates for the operation of all the motor vehicles used by any of them in the public business of the state.

For these reasons we are of the opinion that the motor vehicle department must issue these license plates and certificates to the petitioner for the motor vehicles in question without charging the statutory fee therefor.

Let the writ issue as prayed for.

We concur: LENNON, J.; WILBUR, J.; SHURTLEFF, J.; LAWLOR, J.; SLOANE, J.; RICHARDS, Justice pro tem.

189 Cal. 52

TOWN OF MILL VALLEY v. MASSACHUSETTS BONDING & INS. CO.
(S. F. 10213.)

(Supreme Court of California. May 31, 1922.)

On Rehearing.

1. Appeal and error $\S$ 621(1)—Statute limiting time for relief from judgments inapplicable to delay in preparing transcript.

Code Civ. Proc. $\S$ 473, authorizing courts to relieve parties from judgments, etc., taken through mistake, inadvertence, etc., provided application is made within six months, has no application to delay in the preparation of the transcript on appeal under section 953a, so as to prevent filing of the transcript more than six months after the expiration of twenty days from the filing of notice therefor.

2. Appeal and error $\S$ 627(2)—Diligence in preparing transcript is matter for lower court, and not for Supreme Court, on motion to dismiss.

Under Supreme Court rule 2 (176 Pac. vii), providing that, when a notice for a transcript under Code Civ. Proc. $\S$ 953a, is filed, the time for filing the transcript shall not run until the transcript is approved and certified, or the proceeding to obtain it has been dismissed, or otherwise terminated, the proceeding may be dismissed for lack of diligence in preparing the transcript, but this is a matter for investigation and determination in the superior court, and not in the Supreme Court, on motion to dismiss.

3. Appeal and error $\S$ 622—Time for filing transcript does not run until approved and certified if appellant diligent and proceeding not terminated below.

Under Supreme Court rule 2 (176 Pac. vii), where the record shows no lack of diligence by appellant in procuring a transcript, and no termination below of the proceeding to procure it, the time for filing does not run, so far as a motion to dismiss the appeal is concerned, until the transcript is approved and certified by the judge of the lower court.

4. Appeal and error $\S$ 627(2)—Question on motion to dismiss for failure to file transcript is one of diligence as to which court has large discretion.

The primary question on a motion to dismiss for failure to file transcript within the

time prescribed by a rule of the Supreme Court is whether the appeal has been diligently prosecuted, and in the decision of such question the court has a very large discretion.

In Bank.

Appeal from Superior Court, Alameda County; J. S. Koford, Judge.

Action by the Town of Mill Valley against the Massachusetts Bonding & Insurance Company. From a judgment for plaintiff, defendant appeals. On motion to dismiss appeal. Motion denied.

Kirkbride & Gordon, of San Mateo, and Thomas, Beedy & Lanagan, of San Francisco, for appellant.

H. C. Symonds, of San Francisco, for respondent.

PER CURIAM. Motion to dismiss appeal denied.

On Rehearing.

PER CURIAM. The respondent has applied for a rehearing of the order denying its motion to dismiss the appeal in this case. The rehearing is asked on the ground that the default of the appellant occurred on October 2, 1921, which was the expiration of 20 days after he had filed his notice under section 953a, Code of Civil Procedure, requesting a transcript of the record and proceedings in the cause for use on appeal; that the transcript was not filed in pursuance of said notice until April 27, 1922; that no extensions of time had been granted by the court; and that after April 2, 1922, no relief from such default could be granted under the provisions of section 473, Code of Civil Procedure. The facts shown by the affidavit of the appellant are that the delay was caused by the extreme length of the transcript, which made it impossible for the reporter, although diligently at work thereon, to complete its preparation until April 27, 1922. This was not the default of the appellant, even if it had been shown that the official reporter was negligent in the preparation of the transcript.

[1] When proceeding under section 953a the appellant must rely on the official conduct of the officers of the court. Their delay or default is not his delay or default. It is not a case for the application of section 473.

[2] There is no provision of the Code which fixes the time, after the taking of an appeal, within which the transcript must be filed. That matter is regulated by the rules of this

court. Rule 2 (176 Pac. vii) requires a transcript to be filed within 40 days after the appeal is perfected—that is, after the filing of notice of appeal—except among other things, that when a notice requesting a transcript under section 953a is filed, the time to file a transcript in the Supreme Court shall not begin to run “until such transcript is approved and certified as required by law,” or until the proceeding to obtain it “has been terminated in the court below by dismissal or otherwise.” If there is lack of diligence on the part of the officers of the lower court in preparing the transcript, the respondent may obtain a dismissal of that proceeding, where it is proper to do so, by applying to that court. It is not the theory upon which rule 2 was adopted that the matter of such diligence in the preparation of the record on appeal should ordinarily be subject to investigation and determination in this court on a motion to dismiss the appeal. Such matters can more properly be adjudicated in the superior court. There has been no termination of the proceeding to obtain a typewritten transcript in the court below, by dismissal or otherwise. The transcript was not filed with the clerk as required by section 953a until April 27, 1922, and the time for settlement thereof was then fixed for May 2, 1922, of which notice was duly given.

[3] Hence, for the purposes of the consideration of this court on a motion to dismiss, where the record shows no lack of diligence by appellant on his own part and no termination below, the time for filing the transcript will not begin to run until such transcript is approved and certified by the judge of the court below. At the time of the hearing, therefore, the time for filing a transcript had not yet begun to run. The motion was denied for these reasons.

[4] The primary subject of investigation upon a motion to dismiss for failure to file a transcript within the time prescribed by our rule, whatever the technical aspect of the case may be, is always the question whether the appeal has been diligently prosecuted. In the decision of that question the court has a very large discretion. It is seldom that the facts of any case will form a precedent for the determination of another upon a question of that character.

The petition for a rehearing is denied.

SHAW, C. J., LAWLOR, WILBUR, SLOANE, LENNON, and SHURTLEFF, JJ., and RICHARDS, Justice pro tem., concur.

57 Cal. App. 267

PEOPLE v. WILLIAMS. (Cr. 613.)

(District Court of Appeal, Third District, California. April 7, 1922.)

1. Burglary — 41(6)—Evidence held sufficient to warrant finding that defendant committed the burglary.

In a prosecution for burglary in the first degree, evidence held sufficient to warrant the jury in finding that the defendant committed the burglary.

2. Burglary — 41(5)—Evidence held sufficient to warrant finding the burglary was committed in the nighttime.

In a prosecution for burglary in the first degree, evidence that the building burglarized was in a densely populated section, and that the burglary was committed between the hours of 8:30 in the evening and 8:30 the next morning, held sufficient to warrant the jury in finding the burglary was committed in the nighttime.

Appeal from Superior Court, Sacramento County; Malcolm C. Glenn, Judge.

George Williams was convicted of burglary in the first degree, and appeals. Affirmed.

Charles F. Metteer, of Sacramento, for appellant.

U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

FINCH, P. J. The defendant was convicted of the crime of burglary of the first degree and appeals from the judgment of conviction and from the order denying his motion for a new trial.

The building burglarized is on Fourth street, between L and M, in the city of Sacramento, in what the appellant describes in his closing brief as "the densely populated oriental section of the city." The owner left the building on Saturday evening, October 1, 1921, at 8:30, and on his return the next morning at 8:30 he discovered that the place had been entered from the rear and 15 pairs of trousers, 8 or 9 coats, and between 50 and 60 shirts stolen. The defendant was arrested October 5. Prior to his arrest the defendant sold two of the stolen shirts to a man on the street and a pair of the stolen trousers at a secondhand store, signing the name "Harry Wilson" instead of his own at the latter place. At the trial he denied having sold the two shirts, but admitted that he sold the trousers. He denied having signed the name "Harry Wilson." In explaining his possession of the trousers, he testified that on the 4th day of October there were 10 or 12 men gambling under the Yolo end of the M street bridge, and that one of them "went broke in the game, and he asked several fellows if—who wanted to buy the pants; by me being a little ahead of the game, he asked

me, and I paid him a dollar and a half for the pants." W. M. Hallahan, detective sergeant of the police department of Sacramento, testified that he interviewed the defendant prior to his arrest, and that the defendant at first denied having sold any trousers at a secondhand store, but later admitted that he had sold a pair, not involved apparently in this case, at a secondhand store October 3; that witness "asked him where he got them. He says he was shooting crap or playing cards with a bunch of fellows down along the river front there. A fellow sold them to him for a dollar and a half."

[1, 2] A reversal of the case is asked on two grounds: (1) That there is no evidence connecting the defendant with the commission of the crime. (2) That there is no evidence tending to show that the burglary was committed in the nighttime. There can be no doubt that the evidence is sufficient to warrant the jury in finding that the defendant committed the burglary. The only evidence, other than that stated, tending to show that the burglary was committed in the nighttime, is that of a witness who saw two men in the alley near the place where the entry was made at 10:30 in the evening. One of them was about the height of the defendant, and the other was small. The witness was within about 12 feet of them but could not tell whether they were white or colored. The defendant is a colored man. The witness did not testify to any suspicious or unusual conduct on the part of these men and his testimony must be treated as of slight value.

Appellant correctly states that the burden is on the prosecution to prove beyond a reasonable doubt that the burglary was committed in the nighttime, and he contends that this burden has not been sustained. In support of his contention he cites a number of cases. In some of them the circumstances proved are less convincing than those of the instant case. In others the surrounding facts and circumstances are not stated. That of *People v. Griffin*, 19 Cal. 578, was tried prior to the enactment of the statutory definition of the term "nighttime." The court said that at the time of the entry "there was light enough out of doors to discern a man's features across the street. * * * The presence of sufficient daylight to discern a man's features has long been adopted as a criterion to determine whether or not the act was done in the nighttime within * * * the law applicable to burglary." In *State v. Gunderson*, 56 Wash. 672, 106 Pac. 194, 21 Ann. Cas. 350, the ship burglarized was in sole charge of a keeper who was absent all day and returned in the evening. On arising the next morning he for the first time discovered that a burglary had been committed. In *Waters v. State*, 53 Ga. 567, the burglary "was com-

mitted within a period of about 40 or 45 minutes, one-half of which was day, and one-half was night." In *State v. Gray*, 23 Nev. 301, 46 Pac. 801, the defendant entered a barn and took a saddle therefrom between the hours of 6 o'clock in the evening of June 4 and 7 o'clock the next morning. The defendant left town early in the morning of June 5—how early does not appear—starting from the residence of a woman who lived in the same block in which the barn was situated. The opinion does not disclose whether the vicinity was thickly or sparsely settled. In *Leisenberg v. State*, 60 Neb. 628, 84 N. W. 6, the burglary was committed March 29th between 6:30 p. m. and 9 o'clock of the same evening, the surrounding circumstances not appearing from the decision. In *Ashford v. State*, 36 Neb. 38, 53 N. W. 1036, the evidence showed that the burglary was committed between the hours of 2 a. m. and 9 a. m. of the same day. The court said:

"There is also a lack of evidence as to the location of the Reynolds house [the place burglarized], as to whether it was situated in the quiet or busy portion of the city and as to whether there were other residences or houses in the same vicinity. If located in the heart of the city, the probabilities that the entry was made before daylight would be greater than if situated in a more sparsely settled portion."

In all of the cases thus far considered the evidence was held insufficient to show an entry in the nighttime.

In this case the burglary was committed in a densely populated part of the city and the articles stolen were of considerable bulk. It is highly improbable that the defendant would take the risk of breaking into the building and carrying away these bulky articles in broad daylight in a populous section of the city. In *People v. Dupree*, 98 Mich. 28, 56 N. W. 1047, the court said:

"When a merchant enters his store in a city at the usual hour in the morning, though it be after daylight, and finds that it has been broken open and entered from the front door or window, it is contrary to good sense to say that the crime might have been committed after daylight, and therefore the court must direct an acquittal. Such crimes are not committed in broad daylight, but in the nighttime. The question was one for the jury, and not for the court."

In *People v. Tracy*, 121 Mich. 318, 80 N. W. 21, a barn was burglarized. The court said:

"The property stolen consisted of two large horse blankets, a set of single harness, a bridle, and a pair of hoppers. * * * The owner of

the property was a farmer. Another farmer lived within 20 rods on one side, and another within 40 rods upon the other side. * * * The property was bulky, and it is not probable that one would run the risk of breaking into a building situated as these were, in daylight, and of carrying away property of this character. The chance of detection would be too great. The question was for the jury."

In *Simon v. State*, 125 Wis. 439, 103 N. W. 1100, the burglary was committed between twilight of August 22 and the afternoon of August 25, the owner of the house being absent in the meantime. The court said:

"The entry of the house was through a basement window, which, except for darkness, was in plain sight from the street and other residential grounds and residences in the vicinity. * * * The house was located in a residence locality. Other houses were close by. In the daytime people were accustomed to frequently pass by on the sidewalk and street in front thereof. * * * The place where the entry was effected, as regards opportunity for seeing the offender in the act, and the disturbance of things in the house were such as to render it highly unreasonable to suppose that the event could have occurred in the daytime without attracting the attention of some one while it was in progress; and highly unreasonable that any one would attempt such a thing, under the circumstances, except under cover of darkness, since opportunity for choosing such an occasion was ample. The verdict on this point is well supported by the evidence."

See, also, *State v. Bancroft*, 10 N. H. 105.

In the case of *People v. McCarty*, 117 Cal. 65, 48 Pac. 984, where the burglary was committed June 13, the court said:

"The defendant and others constructed a tunnel some 120 feet in length from the cellar of a certain saloon to a point immediately beneath the floor of a certain bank building in the city of Los Angeles, for the purpose of committing larceny. Upon the day set for the actual entry through the floor into the building the defendant and his confederates, some time during the afternoon, entered the cellar, one of them emerging therefrom at 7 o'clock p. m. * * * The others came out of the cellar at 12 o'clock that night. The burglary was committed by these men at some time during these hours. The finding of the jury on this question was a matter peculiarly within its province; and upon this evidence the court will not disturb the verdict in this regard."

Under the foregoing authorities, there can be no doubt that the evidence is sufficient to sustain the verdict.

The judgment and order are affirmed.

We concur: HART, J.; BURNETT, J.

57 Cal. App. 271

PEOPLE v. JOHNSON. (Cr. 593.)

(District Court of Appeal, Third District, California. April 7, 1922.)

1. Robbery — Information held to sufficiently express intent.

An information, charging that defendant made an assault to steal, necessarily carries the implication that his purpose or intent was to steal, etc., though the word "intent" is not used.

2. Robbery — Information not defective in omitting "against his will."

An information for assault with intent to commit robbery was not defective in omitting the words "against his will" as contained in Pen. Code, § 211, the terms "force and fear" entirely covering the situation.

3. Criminal law — Defects in information held not reversible error.

Where the evidence was sufficient to establish every element of the offense charged, and the hearing proceeded as though the allegations of the information were complete, the cause should not be reversed on account of omissions from the information, in view of Const. art. 6, § 4½.

4. Criminal law — Instruction must be considered in connection with entire charge.

In determining whether or not an instruction was erroneous, it must be considered in connection with the entire charge.

5. Criminal law — Instruction, invading province of jury, cured by remainder of charge.

An instruction: "The defendant is charged with assault with intent to rob. This charge includes the smaller offense of simple assault, and he may be found guilty of either of said offenses"—if invading the province of the jury, was not ground for reversal, where, considering the instructions together, the jury could not fail to understand that, unless convinced by the evidence beyond a reasonable doubt of the guilt of the defendant, they could not convict him of any crime.

6. Criminal law — Permitting correction of record after certification held not error.

It was not error for the trial court on motion of the district attorney, after the trial was completed and the record on appeal was certified, to permit the record to be corrected by adding averments to the information, which averments had been a part of the information as originally filed, but had been stricken on motion of the people and by consent of the defendant; correction being made to show a complete history of the trial.

7. Criminal law — Correction of record without prejudice.

If it was error for the trial court to permit a correction of the record after its certification on appeal, it was entirely without prejudice to the accused, where the correction

was made only to show a complete history of the trial and proceedings.

8. Criminal law — Objection to reading statement of accused held not to raise objection to certain questions and answers therein.

Where accused's attorney, when the court assented to the reading by the district attorney of a statement made by accused, objected that: "If the court please, we object to this procedure. The witness has a right to see the entire paper before counsel reads anything from it at all. Then he can ask him as to it"—was not a sufficient objection that some of the questions and answers contained in the statement were objectionable.

9. Criminal law — Objection to reading of statement of accused held not opportune.

Where with the consent of the court prosecuting attorney read a statement made by accused, and then asked the defendant if it was not a correct copy of the statements made by him, an objection of accused's attorney, "It is incompetent, irrelevant, and immaterial, and I assign now the reading of the document as misconduct on the part of the district attorney, and I ask the court to strike it from the record and to request this jury to disregard every question and answer read to the defendant," was not opportunely presented.

10. Criminal law — Objections to reading of statement of accused should specify objectionable matter therein.

An objection to the reading of a statement of the accused and a motion to strike it from the record should specify the particular portions of the statement deemed objectionable.

11. Criminal law — Injury of remark of district attorney obviated by instruction.

Any possible injury from a remark of the district attorney, "I suppose the district attorney and all of the officers, including the reporter, are all crooks and only the defendant is innocent," was obviated by an instruction of the court for the jury to disregard it.

12. Witnesses — Cross-examination of defendant as to details of his visit to a certain place held proper to test his veracity.

In a prosecution for an assault with intent to commit robbery, where accused on direct examination testified that he came to the city for the purpose of buying wine for a certain third party, it was entirely proper to test his veracity for the district attorney to ask on cross-examination as to whether he was being paid by such third person for buying the wine.

13. Witnesses — Proper to ask accused if ever convicted of felony.

Under Code Civ. Proc. § 2051, it was not improper to ask defendant on cross-examination if he had been convicted of a felony.

14. Robbery — Evidence held to warrant conviction of assault with intent to commit robbery.

Evidence held sufficient to warrant conviction of an assault with intent to commit robbery.

Appeal from Superior Court, Napa County; Percy S. King, Judge.

Orville Johnson was convicted of assault with intent to commit robbery, and appeals. Affirmed.

W. C. Cavitt, of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and J. Chas. Jones, Deputy Atty. Gen., for the People.

BURNETT, J. The defendant was convicted of assault with intent to commit robbery and the appeal is from the judgment and the order denying his motion for a new trial.

The first point made is that the information states no offense against the defendant, or at least no offense of which the superior court has jurisdiction. The particular criticism is that there is no allegation of the intent with which the "assault" was made. The charging part of the information, as certified by the clerk, is as follows:

"That said Orville Johnson on the 16th day of April, A. D. 1921, at the said county of Napa, and before the filing of this information, did willfully, unlawfully, and feloniously, violently, and forcibly make an assault upon the person of one H. R. Hill, with the felonious then and thereby to steal, take, and carry away from the person, possession, and immediate presence of said H. R. Hill the goods and personal property of the said H. R. Hill, and to accomplish the said stealing, taking, and carrying away by means of force then and there used upon and against the said H. R. Hill by the said defendant, and by then and there putting the said H. R. Hill in fear."

[1] The omission of the word "intent" was probably an inadvertence in the preparation of the transcript, as in the reporter's transcript certified by the trial judge the word appears. But, be that as it may, it is quite apparent that if the intent with which the assault was made was not directly expressed it was clearly implied by the use of the terms which were employed. To charge that a defendant made an assault to steal, take, and carry away certain goods necessarily carries the implication that his purpose or intent in making the assault was to steal, etc. If it were stated that A. went to Washington to see the President, it would not be open to dispute that his purpose in going to the capital was to see Mr. Harding.

[2] It is also suggested that the information was defective in omitting from the definition of robbery the element "against his will," as contained in section 211 of the Penal Code. The terms "force and fear," however, entirely cover this consideration. *People v. Riley*, 75 Cal. 98, 16 Pac. 544; *People v. Ah Sing*, 95 Cal. 654, 30 Pac. 796.

[3] Moreover, after trial, wherein the evidence was sufficient to establish every element of the offense of assault with intent to

commit robbery, and wherein the hearing proceeded as though the allegations of the information were complete, in contemplation of section 4½ of article 6 of the state Constitution, the cause should not be reversed on account of any such alleged defect. *People v. Bonfanti*, 40 Cal. App. 614, 181 Pac. 80.

[4, 5] The next asserted error relates to the action of the court in giving this instruction:

"The defendant is charged with assault with intent to rob. This charge includes the smaller offense of simple assault, and he may be found guilty of either of said offenses."

This instruction must be considered in connection with the entire charge, and, as thus viewed, it is not to be condemned. The court thereby did not attempt to define fully the crime with which the defendant was charged, but the offense was characterized in general terms to indicate that it embraced two separate offenses. Standing alone, it possibly might be subject to the criticism that it invaded the province of the jury in suggesting that they should convict the defendant of one or the other of these offenses, but it was immediately followed by these plain directions:

"If you find to a moral certainty and beyond all reasonable doubt that the defendant committed an assault on H. R. Hill with the intent of robbing said Hill, as charged in the information, you should find defendant guilty of assault with intent to rob.

"If you entertain a reasonable doubt as to the defendant's intent in the matter, but find to a moral certainty and beyond all reasonable doubt that he assaulted said Hill, as charged in the information, you should find defendant guilty of assault.

"And if you entertain a reasonable doubt as to whether defendant assaulted said Hill, you should find the defendant not guilty."

And in the beginning of the charge the court stated:

"I instruct you that in considering this case you must not act upon any outside influences or reports, if any have come to your notice. If the defendant is guilty such guilt must be determined by you from the evidence which has been introduced before you at this trial, and upon that evidence alone you must be guided in rendering your verdict."

Again:

"I instruct you that the law raises no presumption whatever against the defendant, but, on the contrary, every presumption of the law is in favor of his innocence; and in order to convict him of the crime alleged in the information, or of any lesser crime which may be included in it, every material fact necessary to constitute such crime must be proved beyond a reasonable doubt; and, if you entertain any reasonable doubt upon any single fact or element necessary to constitute the crime, it is

your duty to give the defendant the benefit of such doubt and acquit him."

Considering these instructions together, the jury could not fail to understand that, unless convinced by the evidence beyond a reasonable doubt of the guilt of the defendant, they could not convict him of any crime.

[6, 7] After the trial was completed and the record on appeal was certified the trial court permitted, on motion of the district attorney, the record to be corrected by having added to the information the following averment:

"That the defendant, before the commission of the offense charged in this information, was in a general court-martial of the United States army convicted of a felony."

It is not questioned that this was a part of the information as filed by the district attorney, but, when the cause was called for trial, on motion of the people and by consent of the defendant that part was withdrawn, and it was not read to the jury. If the record is to show a complete history of the trial and proceedings it is entirely proper for it to exhibit the information as it was filed. That a portion of it was afterward stricken out or withdrawn is no reason why the actual condition at the time it was filed with the clerk may not be shown. Moreover, if the action of the court in correcting the record was irregular, of course it is entirely without prejudice as far as this appeal is concerned. It has no effect upon the judgment and does not concern at all the merits of the verdict of conviction.

[8-10] Complaint is made of the action of the court in permitting the district attorney to read what purported to be a statement of appellant made to the officers after his arrest. It seems that on direct examination he was interrogated about the statement, and the record shows the following on cross-examination:

"Q. Was the reporter present in the sheriff's office when you made your statement there? A. Sir? Q. Was the reporter present in the sheriff's office when you made your statement? A. Statement to you? Q. Yes, sir. A. Yes, sir. Q. The reporter was taking it down in shorthand? A. Yes, sir. Q. I will show you what purports to be a transcript made by the shorthand reporter, as to what transpired in the sheriff's office, and I will ask you if that is the statement you made? A. No, sir; this is not a correct statement of what I done in the sheriff's office. Q. Wait a minute, let me have an answer 'Yes' or 'No' to the question, if you will.

"Mr. Riggins: I am going to read to him the statement; I am going to ask him now the questions and answers as I have them here. I might take a short cut and take this statement as a whole; of course, I am going to ask him separate questions.

"The Court: Go ahead and do it.

"Mr. Cavitt: One moment, if the court please,

we object to this procedure. The witness has a right to see the entire paper before counsel reads anything from it at all. Then he can ask him as to it."

The court permitted the district attorney to proceed with the questions and answers. We can see no merit in appellant's objection to the proceeding. It was the right of appellant to see the statement, which had been reduced to writing, before he was questioned concerning it (section 2052, Code Civ. Proc.), but that is the exact course which was pursued. The district attorney showed him the statement, and we must presume that he examined it sufficiently to satisfy himself as to its contents. Nothing appears to indicate that he was not allowed ample time to do so. It is apparent therefore that the only objection made by appellant to this line of examination is entirely untenable. No doubt some of the questions and answers contained in said statement were objectionable, but appellant did not direct specific attention to them, and it is now too late to complain. After reading the document the district attorney asked this question:

"I ask you now, if that is not a correct copy of the statement you made that night in the presence of the people you have already mentioned?"

To which counsel for appellant responded:

"Don't answer that question. If the court please, I object to that on the ground it is incompetent, irrelevant, and immaterial, and I assign now the reading of the document as misconduct on the part of the district attorney, and I ask the court to strike it from the record and to request this jury to disregard every question and answer read to the defendant."

The court overruled the objection and denied the motion. The ruling was correct. If there was any merit in the objection, the matter was not opportunely presented to the court. Besides, the objection and motion were addressed to the statement in its entirety rather than to certain particular portions which alone might be deemed objectionable.

[11] Fault is found with the following remark of the district attorney made in response to a provocative statement of counsel for appellant:

"I suppose the district attorney and all of the officers, including the reporter, are all crooks, and only the defendant is innocent."

It is altogether improbable that such statement would have any effect upon the verdict, but any possible injury was obviated by the instruction of the court for the jury to disregard it.

[12, 13] The district attorney on cross-examination of the defendant asked this question: "Were you to be paid anything by Mr. Dozier for buying the wine?" On the direct

examination he had testified that he came from Vallejo to Napa for the purpose of buying wine for Mr. Dozier, and it was entirely proper to test his veracity for the district attorney to probe the surrounding circumstances of that asserted engagement. We may add that it was not improper to ask the witness if he had been convicted of a felony. Section 2051, Code Civ. Proc.

[14] We think there is no merit in the contention that the evidence did not warrant the conviction. The argument of appellant is apparently grounded upon the assumption that the jury should have accepted his statement of the affair, and that it was little less than an outrage for them to believe the prosecuting witness and other witnesses for the people. Giving full credit, as we must, to the testimony of H. R. Hill, we cannot escape the conclusion that appellant was justly convicted. The former was walking after dark in a certain alley in the city of Napa, and, in his own language:

"I felt somebody put his hand on my shoulder, and I looked around on this side (illustrating), and I saw something come around this way; somebody put something in my face. * * * It was the defendant. * * * He had a pistol. He stuck it up in my face, and told me not to holler. Then he grabbed me, and we went down, and as we were going down he kicked me in the mouth. * * * He kicked me hard enough that he pretty near come getting me, and he was going to try to do it again, and I kept him from doing it."

It further appears that the witness called for help while struggling with the defendant, and an officer and others came and appellant was taken into custody.

Other circumstances appear in the record indicating that the purpose of the defendant was to rob Mr. Hill, but we need go no further.

We are satisfied that no reason has been shown for disturbing the verdict, and the judgment and order are affirmed.

We concur: FINCH, P. J.; HART, J.

57 Cal. App. 329

TETER v. THOMPSON. (Civ. 3709.)

(District Court of Appeal, Second District, Division 1, California. April 11, 1922.)

1. Sales §479(6)—Transfer by defendant of possession lawfully acquired before claim and delivery is begun does not defeat action.

Where the property for which an action of claim and delivery was begun was lawfully acquired by defendant under a conditional contract of sale so that the common-law action would have been detinue and not replevin, the fact that defendant had transferred possession of the property to another before the action

was begun does not bar plaintiff's right to maintain the action and have a judgment for return of the property or its value, though such an action could not be maintained if the original taking were tortious and the property was not in defendant's possession when the action was begun.

2. Sales §479(4)—Demand for possession and action to recover is sufficient notice of election to rescind conditional sale.

Where a conditional sale contract authorized the seller to retake possession of the property upon the exercise of his right to declare the agreement null and void, it was not necessary for plaintiff to make a declaration of intention in the language of the contract, but his demand of possession of the property after default in making a payment thereon and his institution of an action to recover the property was a sufficient manifestation of his election to rescind.

Appeal from Superior Court, Los Angeles County; Lewis R. Works, Judge.

Action by F. M. Teter, doing business under the fictitious name of Teter Motor Car Company, against L. R. Thompson, for claim and delivery of personal property. Judgment for defendant, and plaintiff appeals. Reversed.

C. E. McDowell, of Los Angeles, for appellant.

James W. Miller and John E. Carson, both of Los Angeles, for respondent.

CONREY, P. J. Action to recover possession of personal property, or the reasonable value thereof in case delivery of the property cannot be had, together with damages for the unlawful detention of the property. The plaintiff appeals from the judgment entered in favor of defendant.

On the 8th day of June, 1918, pursuant to the terms of a contract of conditional sale, plaintiff delivered to the defendant a certain truck described in the contract. The purchaser paid \$500, and agreed to pay the further sum of \$200 on the 5th day of July, 1918. By the terms of the contract, the purchaser agreed:

"That if he fails to make any of the above payments when due, or within ten days thereafter, or violates any of the terms of this contract, then the seller at his option and without notice may elect to declare the whole purchase price due and payable, or the seller may declare this agreement null and void, and in that event the seller may take possession of said automobile, and the purchaser agrees to forfeit all payments made thereon and also forfeit all right and interest in said automobile, time being of the essence of this agreement. * * * The second party acquires no interest in or title to said property until all payments as agreed shall be made; when the first party agrees to execute to the second party a bill of sale to said property. * * * Time is expressly made of the essence of this contract."

[1] Nothing was paid by the purchaser on account of this contract after the initial payment. In August, 1919, plaintiff made demand on the defendant for possession of the truck, but the defendant refused to comply with that demand. The fact was that prior to that time the defendant had sold and delivered the truck to a third party; since which time it never has been in possession of or under control of the defendant. By reason of these proved facts it was found by the court (contrary to the allegations of the complaint) that the defendant did not have possession of the truck either at the time of commencement of this action or thereafter. Counsel for appellant and counsel for respondent seem to agree that the judgment in favor of defendant rests upon the proposition that the plaintiff cannot maintain this action because the personal property sought to be recovered was not in defendant's possession at the time of commencement of the action. This presents the question upon which the appeal may be determined.

The principal decisions relied upon by respondent are *Richards v. Morey*, 133 Cal. 437, 65 Pac. 886, and *Riciotto v. Clement*, 94 Cal. 105, 29 Pac. 414. In *Richards v. Morey*, the court said:

"This is an action to recover possession of personal property which, it is alleged, the defendant took against the will of the plaintiffs, and now detains from their possession. But the finding shows that the property sought to be recovered was not in the possession of the defendant when the action was commenced, nor within his power to deliver, and therefore said finding would not have sustained a judgment in favor of the plaintiffs for the delivery of the buildings, or for the value of them in case a delivery could not be had."

Riciotto v. Clement was an action to recover possession of personal property belonging to the plaintiff, which had been seized by the defendant as constable acting under a writ of attachment against one Smith. At the time of commencement of this possessory action against the constable the goods had passed out of his possession. The court held that the action was one brought to obtain the benefit of a statutory remedy, the action being designated by the court as "an action of claim and delivery." The court held that neither "the action of replevin in the detinue," nor "the action of claim and delivery," can be supported against a defendant not in possession at the time of commencement of the action.

It should be noted that in the cases mentioned above the cause of action had its origin in a wrongful taking, or tortious seizure of property by the defendant. In *Faulkner v. First Nat. Bank*, 130 Cal. 258, 62 Pac. 463, it was held that where the defendant obtained possession lawfully under a contract of bailment, but detained the property unlawfully, an action may be maintained to

recover possession of the property or its value from the bailee, even though prior to the commencement of the action the bailee has wrongfully transferred the property to other persons. The court said that this was just the kind of wrong for which at common law the action of detinue was especially appropriate; and that it was no defense to an action of detinue to plead that the defendant before the commencement of the action had wrongfully disposed of the property and therefore was not in possession of it. After citing sundry authorities, the court said:

"The principles declared in the foregoing authorities are eminently just, and are founded on the maxim that no one can take advantage of his own wrong; and they are as applicable now to an action based on a contract of bailment as they were to such an action when it had to be brought under the special form of detinue. The usual judgment in such action is in the alternative—that is, that the plaintiff recover possession of the property, or its value in case delivery cannot be had; but where it appears that the property cannot be delivered the defendant is in no way prejudiced by a judgment for the value only; and the fact that the judgment is not in the alternative is no ground for reversal."

The court also sustained the plaintiff's right of action in that case for another reason:

"There is another feature of the case, however, which disposes of this technical point adversely to appellant. The averments in the complaint of the demand by respondent of the appellant that it deliver to her the property, and appellant's refusal to do so, are sufficient averments of conversion; and the action may therefore be considered in the nature of trover, and thus considered there can be no objection to the form of the judgment."

The judgment was for recovery of the value of the property wrongfully detained.

In *New Liverpool, etc., Co. v. Western, etc., Co.*, 151 Cal. 479, 91 Pac. 152, it appeared that the defendant was in possession of a quantity of salt as bailee; that prior to the commencement of the action the plaintiff had become entitled to possession upon demand. Demand was made by plaintiff and delivery of possession was refused by defendant. The action was brought to recover possession of the property, or its value if possession could not be obtained. Following the decision in *Faulkner v. Bank*, supra, the court held that the fact that a defendant had before the demand or before the action was begun parted with the possession of the salt was no defense, and approved the declaration that such an action is of the character formerly known as an action in detinue, and that the rights of the parties are to be determined by the principles of the common law applicable to that form of action. We are of the opinion that the fact that defendant had transferred the truck to

a third person, and did not have it in possession at the time of commencement of this action, does not deprive the plaintiff of the right to maintain this action.

[2] Finding III states:

"That it is not true that the plaintiff herein subsequent to the 15th day of July, 1918, or at any other time or at all declared said agreement null and void or null or void, or became at such time entitled to the possession of said automobile; that it is not true that at all the times since this plaintiff has been and now is, or has been or now is, the owner and entitled or the owner or entitled to the possession of said automobile."

Since the defendant was in default by reason of nonpayment of the amount due from him under the contract, and also by reason of his transfer of the property contrary to the terms of the contract, the plaintiff became entitled to possession of the property, upon the exercise of his right to "declare this agreement null and void." Such declaration need not have been made in the very terms of the contract. When the plaintiff demanded possession and (upon defendant's refusal to comply with that demand) commenced this action to recover the property or its value, he thereby elected to put an end to the contract and waive his claim for the unpaid balance of the purchase price as definitely as if he had used the formula, "I hereby declare said contract null and void."

The judgment is reversed.

We concur: SHAW, J.; JAMES, J.

57 Cal. App. 281

MORRIS et al. v. SIERRA & SAN FRANCISCO POWER CO. (Civ. 2422.)

(District Court of Appeal, Third District, California. April 8, 1922. Hearing Denied by Supreme Court June 5, 1922.)

1. Electricity ☞19(2)—Complaint for burning plaintiff's building held sufficient, though not mentioning intervening wire strung under which current was transmitted.

In an action against an electric power company for the burning of plaintiff's building, a complaint alleging the cause of the damage to be the negligent construction and maintenance of defendant's high-tension line was sufficient to sustain recovery on the theory that the power from the high-tension line was negligently permitted to enter a telephone wire strung under the high-tension wire, and that the telephone wire came in contact with plaintiff's wire, causing the fire, though the complaint did not mention the telephone wire.

2. Pleading ☞428(3) — Failure to object to evidence held to cure omission of issue from complaint.

The failure of defendant to object at the trial to evidence showing how the accident occurred is sufficient to cure the deficiency in the

allegations in the complaint as to the manner in which it occurred.

3. Telegraphs and telephones ☞14—Regulation by State Railroad Commission as to distance between crossing lines held valid.

The regulation of the State Railroad Commission fixing the clearance between telegraph and telephone lines at crossings with similar lines was not unreasonable and was within the power of the Commission granted by St. 1911 (Ex. Sess.) p. 18, § 30, which was authorized by Const. art. 12, §§ 22, 23.

4. Electricity ☞18(1)—Violation by plaintiff of order fixing distance between crossing wires is contributory negligence in law.

Where plaintiff maintained a telephone wire crossing under a telephone wire of a power company with a clearance less than that prescribed by the Railroad Commission, he was contributorily negligent as a matter of law, and cannot recover for a fire started by a high-tension current entering his wire through the telephone wire which had been short-circuited with the high-tension line.

5. Electricity ☞19(5)—Extension of time for complying with requirements of Railroad Commission held not to disprove prior negligence.

In an action against a power company for a fire caused by its negligence, proof that after the fire the Railroad Commission extended the time within which the defendant should reconstruct its lines to comply with St. 1911, p. 1037, as amended by St. 1915, p. 1058, without proof as to the date of the order originally fixing the time for such compliance, does not show that the maintenance of the company's lines prior to the time of the fire in violation of the statutes and regulations was not negligence as a matter of law.

6. Electricity ☞16(1)—Extension of time to reconstruct power lines does not excuse failure to maintain proper distance between telephone lines.

An extension of time granted to a power company within which to reconstruct its power lines to comply with the statutory requirements does not excuse the maintenance by the power company of a telephone line on the same poles as its power line, in violation of regulations of the commission prescribing the clearance between telephone and telegraph lines at crossings.

7. Electricity ☞16(7)—Negligent construction of telephone line held cause of damage.

The maintenance by a power company of a telephone wire on its power poles without the clearance required by the Railroad Commission at a crossing above a telegraph wire of plaintiff was the proximate cause of damage to plaintiff resulting from a high-tension current transmitted to his telegraph wire through the telephone wire, regardless of the cause of the short-circuiting elsewhere of the telephone wire with the defendant's high-tension line.

8. Electricity ☞19(13)—Negligence of both plaintiff and defendant maintaining illegal crossing of lines proximately causes injury by fire.

Where plaintiff's telegraph wire and defendant's telephone wire were maintained at a

crossing without the clearance required by the Railroad Commission, the negligence of both plaintiff and defendant concurred in proximately causing the damage resulting to plaintiff from contact between the wires, and a verdict for plaintiff cannot be sustained as a finding by the jury that plaintiff's negligence was not the proximate cause of the injury.

9. Electricity ☞18(1)—Prior construction of plaintiff's line does not relieve it of negligence in maintaining illegal construction at crossing of other lines.

The fact that plaintiff's telegraph line was constructed before defendant's telephone line which crossed it does not relieve plaintiff from the imputation of negligence as a matter of law in maintaining his telegraph wire at the crossing without the clearance between it and the telephone wire required by the Railroad Commission.

10. Electricity ☞18(1) — Interference with highway does not excuse maintenance of illegal crossing of telegraph over telephone wire.

The fact that plaintiff's telegraph wire could not be lowered at the point where defendant's telephone line crossed above it without interference with the highway does not excuse plaintiff's maintenance of his line with insufficient clearance between it and the telephone line overhead.

11. Electricity ☞19(4)—Evidence of repairs after accident is incompetent.

In an action against a power company for damage caused when its telephone wire, which had become short-circuited with its power line, came in contact with plaintiff's telegraph wire, evidence as to repairs and improvements made by defendant upon its wires subsequent to the date of the accident was incompetent.

12. Trial ☞84(2)—Objection question called for opinion does not raise objection it was incompetent as subsequent repair after injury sued for.

An objection that questions asked by plaintiff called for the opinion of the witness was insufficient to raise the question of the competency of the evidence called for, because it related to repairs and improvements made by defendant since the accident.

13. Trial ☞91—Motion to strike unavailable where proper objection to question was not made.

Where the objection was insufficient to raise the question that the evidence called for was incompetent as evidence of improvements after the accident, a motion to strike the testimony on that ground was unavailable to defendant.

Appeal from Superior Court, Tuolumne County; George W. Nicol, Judge.

Action by Saul Morris and another against the Sierra & San Francisco Power Company. Judgment for plaintiffs, and defendant appeals. Reversed.

Chickering & Gregory, of San Francisco, for appellant.

Goodfellow, Eells, Moore & Orrick, of San Francisco, and John B. Curtin, of Sonora, for respondents.

HART, J. This is an action in tort, and the appeal is by the defendant from a judgment entered upon the verdict of a jury in favor of the plaintiffs for the sum of \$8,564.38, as compensatory reimbursement to the plaintiff Morris for damage alleged to have been sustained by him through the alleged negligent act of the defendant in causing the store building and its contents of said Morris at Chinese Camp, Tuolumne county, to be destroyed by fire.

The general facts are: It appears that in the year 1885 Morris constructed, and down to the time of the fire causing the destruction of the property in question continuously maintained and operated, a telegraph line extending from his store at Chinese Camp to the city of Sonora, via the town of Jamestown, in Tuolumne county, the latter town being situated a short distance only from the town of Chinese Camp. This telegraph line was dedicated to the public service and consisted of one line of poles and a single wire. A number of years (some of the witnesses approximate the number at about 15 years) after said telegraph line had been established and in operation, the defendant power company, or rather, its predecessor in interest and grantor, installed in Tuolumne county an electric power line carrying 16,500 volts of electricity. This high-power line extended from what is known as Phoenix dam, "down past Jamestown, passing through the outskirts" of the last-named place and on to the Rawhide mine, in said county. The power line crossed the state highway at Jamestown, or on the outskirts thereof, and for a distance of several hundred feet passed through or over the bottom of a ravine to a point very near to a small body of water known as "Leland's fishpond." Said line, between the highway and said pond, was supported by three poles, the distance between which was from 125 to 150 feet. The high-power wires were on cross-arms located at the tops of the poles, and thereunder there had been placed smaller cross-arms, carrying two wires (one at each end thereof) used by appellant as a telephone system. At a point between the highway and the "fishpond," and about 200 feet distant from the highway, the Morris telegraph line, which, as seen, consisted of but one wire, crossed or passed underneath the power company's wires; and at this point the wire of the Morris line was held by two poles, so placed that one was at the top of each side of the ravine at about the same elevation, and the span of said line where it crossed underneath the power line was between 250 and 300 feet, being much longer than the span of the power company lines at that point.

On the morning of July 12, 1918, the general merchandise store of the plaintiff Morris at Chinese Camp caught fire, which partially destroyed the building and completely destroyed the stock of merchandise and fixtures contained in said building. Morris carried insurance on the building and stock of goods with his coplaintiff, three different policies, aggregating the sum of \$3,200, having been at some time previously to the fire so issued to the said Morris. At this point it may be stated that the plaintiff Fireman's Fund Insurance Company, upon adjusting the loss, paid to Morris the total amount called for by the three several policies referred to, and that said company is in the case here claiming subrogation to such proportion of any rights established herein by the plaintiff Morris as is represented by the amount paid by it to Morris under said policies of insurance.

The building in which Morris carried on the merchandise business and which was in part destroyed by the fire in question was made of brick, with iron doors, and of the dimensions of 25 feet in width by 50 feet in length. The walls of the building were 18 inches in thickness. The height of the building was 12 feet, with a 4-foot fire wall. The roof was made of dirt and bricks with a tin covering, and the windows and the doors had iron shutters. Early in the evening preceding the morning of the fire Morris personally closed the store by locking the doors. On the morning of the fire, while he was still in bed, his attention in some manner was called to the fact that a fire had broken out in his store, and he immediately arose and hastened thereto. He found the doors and windows closed and locked as he had left them the previous evening. He looked through a hole in one of the walls of the building through which letters and other mail were deposited in the store and discovered that the fire was in the north end of the building, in close proximity to the point where the telegraph instrument was located. There was considerable smoke in the building, and it was apparent that the fire had already obtained considerable headway. He, with others, attempted to arrest the progress of the fire, but to no purpose.

After the building and contents had been destroyed, Morris, believing that the fire had been caused by the emission of electric sparks from his telegraph instrument and that this was in turn caused by the surcharge of his wire with an unusual voltage of electricity by reason of its contact with some high-power wire, proceeded, with others, to make an inspection of his line. They reached the point where the lines of the defendant and his line crossed each other as above described, and there he found that one of the telephone lines of the defendant had been broken, the end of said line falling to the ground and setting the dry weeds there-

abouts on fire, burning a space of about 30 or 40 feet. His own line had been loosened from its insulation and dropped against a cottonwood tree and there grounded. The theory is that the telephone line of the defendant had, through some cause, come in contact with its high-power line, became overcharged with electrical energy, and was thereby caused to sever and fall on the line of the plaintiff Morris and so charge it with an unusual voltage, sufficient to cause the trouble at his store which resulted in the fire.

[1] The first point urged by the defendant is that the verdict cannot be supported by any of the alleged negligent acts set forth in the complaint. This point grows out of the proposition that the complaint nowhere mentions the telephone line, and alleges that the cause of the fire was through the negligent construction and maintenance of the defendant's high-power wire, by reason whereof electricity of high and dangerous voltage escaped from the said line and into the telegraph line, thereby causing the fire, etc.

[2] We think the complaint sufficiently alleges negligence against the defendant to meet the test of a general demurrer and even the demurrer upon the special grounds urged against it by the defendant. At any rate, there was no objection at the trial to evidence showing how the accident occurred, and this is itself sufficient to cure the deficiency of the complaint, even if it be conceded that there was any such deficiency in the particular referred to. *Boyle v. Coast Improvement Co.*, 27 Cal. App. 714, 720, 151 Pac. 25; *Slaughter, Adm'x, etc., v. Goldberg, Bowen & Co. et al.*, 26 Cal. App. 318, 147 Pac. 90; *Ruth v. Krone*, 10 Cal. App. 770, 779, 103 Pac. 960.

There is no controversy between the parties as to how the fire was caused. Counsel for the defendant, both in their briefs and in their oral argument before this court, expressly admitted that the fire in the Morris store was due to the fact that the indirect contact of the high-power wire of the defendant with the wire of the Morris telegraph line overcharged the latter wire with such a high voltage of electricity as to produce the disastrous result of which complaint is here made. In the oral argument by the attorney for the defendant it was stated:

"The fire occurred in this manner: About three or four miles distant from the point of this crossing at a place known as Sullivan's creek a crane flew into the high-power wires of the Sierra & San Francisco Power Company. That caused a short circuit in the high-power system, allowing the wires to drop, or at least one, which brought the high-power wire into contact with the telephone wires. By means of the telephone wires the electricity was conducted to the particular crossing where the telephone wires of the Sierra & San Francisco Power Company and the Morris telegraph line came in contact, burning off the telephone

wires of the Sierra & San Francisco Power Company, due to the short circuit, and thereby shunting the electricity over the Morris line into the store at Chinese Camp."

But, while the defendant, through its counsel, makes this admission, and, indeed, has not denied that the fire was caused in the manner indicated by the foregoing statement, nevertheless contends that the plaintiff Morris was guilty of negligence which directly contributed to the commission of the alleged wrong for which he here seeks redress. In support of this position the appellant calls attention to the fact that the evidence disclosed that both the poles supporting the telegraph line over the ravine and at the point where the lines of the defendant crossed the former line were in an oblique position in the ground, and slanting in an opposite direction from each other. As to this, the theory of the appellant was and is that the poles had been driven or moved from a vertical position in which they were originally erected to the slanting position by some external cause, as by a heavy wind or contact of some heavy object therewith, and that the effect of the falling over of the poles was to take up the slack of the telegraph line and raise it nearer to or within a very short distance of the telephone line. It is claimed that this theory is sustained by evidence which tended to show that at the time that the telephone wire of the defendant had been repaired and thus placed in its original condition immediately after the fire occurred the space between the said wire and the telegraph wire of the plaintiff Morris was approximately an inch only. It is hence argued that, the telephone wire being restored to exactly the same condition in which it had always been maintained down to and at the time of the contact which produced the trouble, and the evidence failing to show that the telegraph wire was in any other condition than that in which it was at the time the telephone wire was repaired and restored to its original condition, the conclusion is irresistible that at some time prior to the fire the slanting of the poles upon which the telegraph wire was strung had caused the slack in said wire to be taken up or the wire itself to be stretched so as to become tense, thereby bringing said wire within the distance of an inch from the telephone wire. There was, however, evidence to the effect that the telegraph poles at the time of the inspection immediately following the fire were in a solid position in the ground, as though they were in the same condition as when originally placed there, and therefore, if the fact of the slanting position of the poles was to be regarded as significant in the determination of the question whether the plaintiff Morris was by reason thereof guilty of contributory negligence in the maintenance of his line, we would perhaps be required to say that the jury impliedly found,

and were justified in so doing, that the poles were erected in slanting positions in the first instance, and that the condition as to said wire at the time of the collision between the two wires which caused the damage was no different from what it had always been.

As to the contact between the wires, the theory of the defendant is, as we have seen, that a crane, while in flight, at a point some three or four miles distant from where the wires in question crossed, attempted to pass between the telephone and the high-power wires, collided therewith, and so at the same time came in contact with both, and that thus the voltage from the power line was conducted into the telephone wire, causing a short circuit on the former wire, the result of which was to cause the telephone wire to fall upon and overcharge the telegraph wire of plaintiff and so produce the fire. The testimony of two of the witnesses for the plaintiffs supports this theory, and, upon the hypothesis that the cause of the contact between the wires is thus accounted for, counsel for defendant vigorously maintain that the damage resulted from a cause or an act beyond the control of human agency; that is to say, that the damage was entirely due to an act of God.

The plaintiffs contend, however, that, it having been shown that the fire was caused by the contact between the telegraph wire and the high-voltage wire through the telephone wire, the latter two wires belonging to the defendant, a prima facie case of negligence was thus established against the latter, and that thus a sufficient case was made to entitle them to a recovery, in the absence of a showing by the defendant that it was not guilty of negligence in the maintenance of its wires which contributed proximately to the damage (*res ipsa loquitur*), and that the verdict is conclusive against the defendant upon any matter of defense it set up or attempted to sustain.

But we may waive further consideration of all the above-stated propositions, since we are of the opinion that the contention of the appellant that the plaintiff was guilty of negligence as a matter of law must be sustained. Indeed, we think it is clear that both the plaintiff Morris and the defendant, in the maintenance of their said wires at the point indicated, were equally culpable and likewise guilty of negligence as a matter of law, and that such concurring negligence constituted the efficient or proximate cause of the fire and its disastrous results. It appears that there were at the time of the commission of the damage complained of herein and had been for a long time prior thereto authoritative regulations fixing or prescribing the distance which should exist between crossing wires carrying electricity, and which regulations it incontrovertibly appears from the evidence—indeed, it is admitted—were violated by both said plaintiff and the de-

fendant in the maintenance of their respective wires at the point where the same crossed and where the direct cause of the destruction of the Morris building by fire occurred.

[3] On the 14th of December, 1912, the State Railroad Commission, in the exercise of the powers conferred upon it by several acts of the Legislature, adopted what said body designated as its "general order No. 26," entitled, "Regulations governing clearances and construction at crossings of railroads, street railroads, telegraph, telephone, signal, trolley and power lines, with each other and with streets and public highways; also other overhead and side clearances of railroads, street railroads and wire lines." Section 3 of said order is under the subhead "Telegraph, Telephone and signal lines," and provides, among other things, that—

"Telegraph, telephone and signal lines, at crossings with other telegraph, telephone or signal lines, shall have a minimum clearance, above or below such lines, of 2 feet, unless suitably supported to prevent contact."

We presume it will not be questioned that the Legislature, in the exercise of the power conferred upon it by the provisions of sections 22 and 23 of article 12 of the Constitution, may rightfully invest the Railroad Commission with plenary power to regulate the manner in which railroad corporations and other public utilities shall maintain and conduct their business and the essential appliances thereof, and that said Commission may prescribe such regulations with respect to the carrying on of such utilities as may be necessary to safeguard and protect any rights of the public which may be affected thereby. And it will not be doubted that, upon the adoption of such regulations as it is within the legal competence of the Railroad Commission to promulgate with respect to public utilities and the maintenance of the essential equipments thereof, such regulations immediately acquire the force of law. Indeed, it is so declared by the Legislature itself in section 30 of an act of the extra sessions of the Legislature of 1911 (page 18), entitled, in part:

"An act to provide for the organization of the Railroad Commission, to define its powers and duties and the rights, remedies, powers and duties of public utilities," etc.

Said section reads:

"Every public utility shall obey and comply with each and every requirement of every order, decision, direction, rule or regulation made or prescribed by the commission in the matters herein specified, or any other matter in any way relating to or affecting its business as a public utility, and shall do everything necessary or proper in order to secure compliance with and observance of every such order, decision, direction, rule or regulation by all of its officers, agents and employees."

Nor can it justly be said that the regulations contained in order No. 26 with respect to telegraph, telephone, and power lines and the clearances which must be maintained between them where they cross each other are unreasonable or not in complete harmony with the powers with respect to such utilities with which the Constitution and the statutes passed in pursuance thereof have invested the Railroad Commission.

[4] Order 26 of the Railroad Commission became effective January 1, 1913, and it was served upon the plaintiff Morris, according to his own admission, a short time after it was adopted. Morris testified that continuously for some four or five years before the 12th day of July, 1918, when the fire occurred, there was a distance between his wire and the telephone wire of the defendant at the point where the two wires crossed and where the contact occurred of approximately one foot only. It is true that Morris stated that his measurement of the space between the two wires was not actual, but was based upon his judgment founded on his observation of the wires as he frequently passed along the highway near which the two wires crossed; but there is absolutely no other testimony in the record contradicting this statement or that is inconsistent with it. It is, in fact, the only testimony received which tended to show the distance which was maintained between the telegraph and the telephone wires, and, since it comes from the plaintiff himself, it must be accepted as the established fact in the case that the two wires mentioned were maintained continuously for several years down to and including the time at which the fire occurred at a distance only of one foot apart. Obviously this was in violation of order 26, above referred to, prescribing the minimum clearances between telegraph and telephone wires where the same cross each other, in the absence of the equipment of the line with such support as would prevent contact between it and the other wire. That neither the telegraph nor the telephone wire was furnished with such support is indubitably evidenced by the fact that a contact between the two wires actually occurred.

[5] As to the defendant, it is contended by its counsel that the corporation cannot be held to have been negligent as a matter of law, in that it violated the provision of order No. 26 of the Railroad Commission with respect to the clearances between telegraph and telephone lines, for this reason: That on the 20th day of November, 1918, said Commission adopted and issued an order extending the time allowed by a previous order within which the defendant should reconstruct its overhead electric lines so as to comply with the requirements of chapter 499 Laws of 1911 (Stats. 1911, p. 1037), as amended by chapter 600, Laws 1915 (Stats. 1915, p. 1058). There are, however, several an-

swers to this contention. The first is that it does not appear from the record when "decision 3701" referred to in the order purporting to extend the time to the defendant for the purpose stated was rendered or filed. It will be observed that the order purporting to extend the time and which is in the record before us was issued after the fire occurred, and, so far as this record discloses, the original order might have been made at some time subsequently to the date of the fire, to wit, July 12, 1918.

[6] But, assuming that the courts may take judicial notice of the orders or decisions of the Railroad Commission, and so ascertain and determine when decision No. 3701 was rendered by said Commission, there is still another reply to the contention, viz.: That the order purporting to extend the time within which the defendant was required to reconstruct its electric lines has reference to subdivision (c) of section 1 of the statute of 1915, which entirely deals with high-power lines, and not with telephone and telegraph lines. It follows, therefore, that even if the defendant has, by virtue of the order of extension referred to, until June 30, 1919, within which to reconstruct its power lines in conformity with the requirements of said order and the statute of 1915, it must, nevertheless, be held that it violated the regulation with respect to the clearance which should exist between telegraph and telephone lines crossing each other by maintaining its telephone wire a distance of one foot only from the telegraph wire of the plaintiff Morris, and that it was therefore, equally with said Morris, guilty of negligence as a matter of law. This being true, it also follows that it was the concurring negligence of Morris and the defendant which was the efficient, proximate cause of the damage complained of. It may be argued, though, that since the primary cause of the trouble was in the high-voltage wire, the determination of whether the defendant was negligent as a matter of law must rest upon the determination of the question of fact as to the distance between the high-power wire and the telegraph wire, and that, so determining the question whether the defendant was or was not negligent, we are required to fall back upon the order of the Railroad Commission extending to the defendant further time within which to reconstruct or readjust its power line, and that the conclusion therefrom must be that, although the power line was, in violation of the regulations above mentioned, within four feet of the telegraph line, the defendant is immune from the imputation of negligence as a matter of law because of said order.

[7] First, we may observe in this connection that, if the order purporting to give the defendant further time would have the effect, as probably it would, of relieving it of the imputation of negligence as a matter of law because of maintaining its high-power

wire nearer the telegraph wire than is allowed by the regulations of the Railroad Commission, we would not be prepared to say that said order, notwithstanding that it was not specifically granted to the plaintiff Morris, would not also have the effect of relieving Morris of the imputation of negligence as a matter of law, since it would be a very anomalous, if, indeed, not an unjust, rule which would in effect declare that one of the parties so maintaining wires carrying electricity would, because violating the rule as to clearances between such wires, be guilty of negligence as a matter of law while the other would not. But this question does not arise here. The proposition is this: That the defendant maintained its telephone wire, which, as we have seen, does not come within the purview of the order of extension, nearer in proximity to the telegraph line of Morris than is permitted by the regulations of the Railroad Commission with respect to such wires, and that the telephone wire of the defendant was the direct instrumentality through which the telegraph wire became surcharged with electricity, thus causing the fire, and that but for said telephone wire so situated, whatever might have been the remote cause of the fire—that is, the cause of the contact between the wires, even assuming that the cause of the contact was correctly explained upon the theory of the flying crane—no damage would probably have occurred.

[8] The contention that the finding of the jury in favor of the plaintiffs necessarily involved an implied finding that it was the negligence of the defendant which constituted the efficient, proximate cause of the damage, even though both were negligent as a matter of law, and that such finding is conclusive upon this court, is in effect answered by the foregoing views and the conclusion following therefrom. Obviously, if both were guilty of negligence as a matter of law, such negligence being concurrent, the one is equally culpable with the other as to any injury which might proximately result therefrom. In other words, it would be contrary to the plainest precepts of logic to hold that, where injury follows from the maintenance of two electric wires in nearer proximity to each other than the law permits, the efficient, proximate cause of such injury may be imputed to one of the parties alone while the other is to be held free from blame. This conclusion follows from the proposition that, as in ordinary cases, where two parties own independent electric lines, each is charged with the duty of so maintaining his line as that the danger to the public of injury flowing from its maintenance will be reduced to the lowest reasonable minimum, so, where the maintenance of such wires so owned is within a distance prescribed by the law, it is as much the duty of the one to see that his wire is removed and maintained beyond

the interdicted distance from the other wire as it is the duty of the other to do so. In other words, speaking concretely, the duty was no less upon Morris to see that his line was not within the inhibited distance from the defendant's telephone wire as it was the duty of the defendant to see that its telephone wire was not within such distance of the telegraph wire, and, as above suggested, if this duty was overlooked by either or both, necessarily any damage which may directly result from the contact of the two wires because of the fact of their being in too close proximity to each other under the law must be held to be proximately caused by the concurrent negligence of the owners of the two wires. *Dow v. Sunset Tel. & Tel. Co.*, 157 Cal. 182, 106 Pac. 587; *Electric R. Co. v. Shelton*, 89 Tenn. 423, 14 S. W. 863, 24 Am. St. Rep. 614. See, also, *Harrington v. L. A. Ry. Co.*, 140 Cal. 514, 74 Pac. 15, 63 L. R. A. 238, 98 Am. St. Rep. 85; *Stein v. United Railroads*, 159 Cal. 368, 113 Pac. 663; *Cook v. Miller*, 175 Cal. 497, 166 Pac. 316. If a third party had suffered damage as the direct result of the contact between the two wires, maintained, as they were, at a distance from each other prohibited by law, no one would be found to say that the proximate cause of such injury was not the concurrent negligence of both the defendant and the plaintiff, Morris. In other words, if the Morris wire had not grounded in the cottonwood tree, but had sent the high voltage to the place in Jamestown or the place in the town of Sonora where the telegraph line ended, equipped with the usual telegraph instruments, and had set either of the buildings in which it was there maintained on fire, destroying the building, the property of another, it could not be doubted that both the defendant and Morris would be joint tortfeasors, and that the party so damaged could maintain an action against them jointly for the injury thus inflicted.

[9] The fact is also emphasized by the plaintiffs that the telegraph wire was the first in point of time to be installed where the two lines crossed; the contention in effect being that thus the negligence of the defendant in so placing its wires in dangerous proximity to the telegraph wire constituted the proximate cause of the damage. This proposition, however, is not only answered by the above considerations, but also by the authorities, among which may be noted *Dow v. Sunset Tel. & Tel. Co.*, supra. In that case, which involved an action against two distinct corporations for an injury occurring to the plaintiff by reason of a contact between the respective wires of said corporations, due to the nearness in proximity of said wires, the point here suggested was made. Replying thereto, the court said:

"It matters not that the telephone wire was the last placed, and that this company therefore became in the first instance directly re-

sponsible for the negligent work. With knowledge upon the part of the appellant that the wire was thus dangerously close and liable to sag, the continued maintenance of the wires in this position was negligence upon the part of both companies"—citing a large number of cases from foreign jurisdictions.

[10] In this case, as we have shown, the plaintiff Morris had actual knowledge of the existence of the regulations as to the distance between telephone and telegraph wires as prescribed by the Railroad Commission; and it may be, although it is not necessary so to decide here, that he was bound by the regulations, whether he had actual knowledge of their existence or not. As above stated, it was his duty, as it was also that of the defendant, to exercise such vigilant inspection of his wire as would enable him to keep it the legal distance from the wires of the defendant. It is stated, though, in the brief of the respondents that Morris testified that he could not have lowered his telegraph line below the point where it was strung on his poles without interfering with the use of the road which passed through the ravine and under the wires where they crossed each other, and upon this it is in effect contended that Morris cannot be charged with contributory negligence as a matter of law or at all where it was impossible for him to comply with the regulations or remove his wire below where it was stretched on the poles without interfering with the use of said road. In the first place, we remark that we have not been able to find any testimony in the record, either from Morris or any other witness, to the effect that the lowering of the telegraph wire would have materially or at all interfered with the traffic over the road running under said wires at the point where they crossed each other. In the second place, if it be true that such a condition existed and that the telegraph wire could not be lowered without interference with the use of the road, the duty would still be upon Morris to maintain the distance between his wire and that of the defendant in accordance with the regulations prescribed by the Railroad Commission.

[11] There are certain assignments of error involving the action of the court in admitting certain evidence over the objection of the defendant and in the giving of certain instructions and in refusing to allow another which was proposed by the defendant. Under the view that we have taken of this case, as indicated above, it is hardly necessary to consider these assignments. But we do not deem it amiss, since possibly there may be another trial of the cause, to express the opinion that the refusal to give defendant's proposed instruction No. 10 involved prejudicial error; also we think that the testimony which the court allowed the plaintiff Morris to give as to the repairs and improvements made by the defendant up-

on its wires subsequent to the date of the fire was incompetent. *Helling v. Schindler*, 145 Cal. 303, 311, 312, 78 Pac. 710; *Sappenfield v. Main St., etc., Co.*, 91 Cal. 48, 27 Pac. 590; *Hager v. Southern Pac. Co.*, 98 Cal. 309, 311, 33 Pac. 119; *Turner v. Hearst*, 115 Cal. 394, 401, 47 Pac. 129; *Limberg v. Glenwood*, 127 Cal. 598, 604, 60 Pac. 176, 49 L. R. A. 33; *Nalley v. Hartford Carpet Co.*, 51 Conn. 524, 50 Am. Rep. 47.

[12] But the ruling of the court permitting this evidence was not erroneous for the reason that the only objection urged by counsel for the defendant against it was that the questions eliciting said testimony called for the opinion of the witness.

[13] It is true that counsel for the defendant, after the testimony had been received against his objection upon the ground just stated, moved to strike out all the testimony on the ground that the facts and circumstances so testified to occurred after the happening of the fire, but his motion could not avail him, since it was not in accord with the ground upon which he made the objection. At any rate, the ruling denying the motion was not erroneous.

For the foregoing reasons, the judgment is reversed.

We concur: FINCH, P. J.; BURNETT, J.

57 Cal. App. 338

PEOPLE v. RYAN. (Cr. 1021.)

(District Court of Appeal, First District, Division 2. California. April 12, 1922.)

Criminal law — §1070½, New, vol. 11 Key-Number Series—Appeal by state from order dismissing prosecution, taken after order sustaining demurrer to information, was taken in time.

In prosecution for violation of Medical Practice Act, where a demurrer to an information was sustained, and later, on failure of district attorney to file an information according to form required by the court order sustaining the demurrer, the action was dismissed, pursuant to Pen. Code, § 1008, on announcement by the district attorney in open court, according to section 1240, that the state would appeal, the appeal was taken in time; an announcement of an appeal from an order sustaining a demurrer to the information being merely surplusage.

Appeal from Superior Court, Santa Cruz County; Benj. K. Knight, Judge.

In an appeal by the State from an order dismissing a prosecution against Al Ryan for violating the Medical Practice Act, defendant moves to dismiss the appeal. Motion denied.

U. S. Webb, Atty. Gen., and John H. Riordan, Deputy Atty. Gen., for the People.

Lucas F. Smith, Lucas F. Smith, Jr., and

Stanford G. Smith, all of Santa Cruz, for respondent.

LANGDON, P. J. This matter comes before us upon a motion by respondent to dismiss the appeal.

The transcript shows that the district attorney for the county of Santa Cruz filed an information for misdemeanor, to wit, violation of Medical Practice Act (St. 1917, p. 93), against the defendant on September 23, 1921. Defendant demurred to the information. The demurrer was sustained on September 26, 1921, and the district attorney was granted one week's time within which to file an amended information. On September 29, 1921, the district attorney presented an amended information to the court, which was substantially the same as the original information, and did not amend said original information in the respect required by the previous court order sustaining the demurrer. The court, thereupon, denied the district attorney leave to file the amended information in the form presented and informed him that unless an information amended in the manner indicated be filed by October 3, 1921, the action would be dismissed pursuant to the provisions of section 1008, Penal Code. The district attorney then stated that the prosecution did not desire to amend and "that the prosecution gives notice of appeal from the judgment of the court sustaining the demurrer."

On October 3, 1921, the parties appeared in court and the district attorney again refused to amend, whereupon the court ordered the action dismissed, pursuant to the provisions of section 1008 of the Penal Code. The district attorney then announced, in open court, that the prosecution appealed from the order made on September 26, 1921, sustaining the demurrer to the information, and also from the order made dismissing the action. Respondent now makes a motion to dismiss this appeal, upon the ground that the same was not taken in the time provided by section 1240, Penal Code.

The recent case of *People v. Apple* (Cal. App.) 206 Pac. 487, is directly in point. It is there said:

"Since section 1008 of the Penal Code was amended, * * * there is no reason why the rule as to appeals in civil cases for the purpose of having the order of the court sustaining a demurrer reviewed, should not be applicable in criminal cases, and that the appeal in such instances should be from the judgment entered upon the order sustaining the demurrer and not from the order itself."

Under the ruling of this recent case, it was not necessary for the district attorney to appeal from the order of September 26, 1921, sustaining the demurrer. The judgment of dismissal which was entered under the provisions of section 1008, Penal Code,

upon the failure of the district attorney to amend within a reasonable time, was the judgment entered on the order sustaining the demurrer and was the order from which the appeal should have been taken by the district attorney.

The order that the action be dismissed, pursuant to section 1008, Penal Code, was not made until October 3, 1921. At that time, the district attorney announced in open court, in accordance with section 1240, Penal Code, that the prosecution appealed from the order dismissing said action. It is true, he also announced that he appealed from the order sustaining the demurrer, theretofore made on September 26, 1921, but that announcement was merely surplusage and of no effect. The controlling fact is that at the time the order dismissing the action was made, which was the judgment entered upon the order sustaining the demurrer, the district attorney did, in open court, announce that the people appealed from the same. The appeal was taken in time, therefore, and is properly before this court.

The motion to dismiss the appeal is denied.

We concur: NOURSE, J.; STURTEVANT, J.

57 Cal. App. 377

BEARDEN et al. v. BANK OF ITALY.
(Civ. 4210.)

(District Court of Appeal, First District, Division 1, California. April 18, 1922.)

Banks and banking — 143(7)—Bank held not liable for arrest of drawer of check wrongfully dishonored.

In an action by a drawer against a bank, for damages for wrongfully refusing to pay his check drawn upon it, after the payee of the check had informed the bank that the drawer would be arrested unless the check was paid, the subsequent arrest and incidental indignities suffered by the drawer was caused by an independent human agency, and hence was an intervening cause for which the bank was not liable.

Appeal from Superior Court, City and County of San Francisco; E. P. Shortall, Judge.

Action by Tempest Bearden and husband against the Bank of Italy. From an order sustaining a demurrer to the complaint, plaintiffs appeal. Affirmed.

I. M. Peckham, of San Francisco, for appellants.

Louis Ferrarl and Richard Fitzpatrick, both of San Francisco, for respondent.

KERRIGAN, J. Appeal from a judgment in favor of the defendant entered following

an order sustaining a demurrer to the complaint without leave to amend.

The action was for damages in the sum of \$25,000, the gravamen of the complaint being that the plaintiff, Tempest Bearden, as the result of the wrongful refusal of the defendant to honor a check drawn by her, was at the instance of the payees of the check arrested and imprisoned and subjected to indignities incidental to such arrest. The complaint contains an allegation to the effect that, after a first refusal of the defendant to pay said check, upon the ground of lack of funds to meet it, the payees "personally presented said check to said defendant and told said defendant that, unless said check was paid, they would cause the arrest of said plaintiff, Tempest Bearden, but notwithstanding said knowledge and in spite thereof the said defendant negligently willfully, and maliciously refused to honor said check, * * *" and the only question in the case, as is stated in the brief of the appellants is whether the quoted allegation takes the case out of the rule laid down in *Hartford v. All Day and All Night Bank*, 170 Cal. 538, 150 Pac. 356, L. R. A. 1916A, 1220.

That also was an action for damages for arrest and imprisonment upon the alleged wrongful refusal of a bank to pay a check drawn upon it, and it was held that the plaintiff could not recover, for the reason that the refusal to honor the check was not the proximate cause of the arrest. Upon this point the language of the court is as follows:

"The second legal principle which necessarily works a reversal of this judgment is that the damages claimed are in no legal sense the proximate result of the act of negligence complained of. It did not necessarily follow that the plaintiff would be arrested and charged with a felony because of the bank's act. There was no direct causal connection between the two things. There was an interruption and the intervention of an entirely separate cause, which cause was an independent human agency acting with an independent mind."

The same may be said of the case at bar; and the only difference in the two cases is that, in the one under consideration, a threat of arrest was communicated to the bank, thus bringing pointedly to its attention a probable consequence of its refusal to pay the check. That such a consequence might follow the refusal, however, was known to the bank official in the case of *Hartford v. All Day and All Night Bank*, supra, since the issuance of a check upon a bank without funds or credit to meet it is a public offense which notoriously frequently results in the arrest and imprisonment of the drawer of the check. The case cited emphasizes the factor present therein of the "independent human agency acting with an independent mind," which it

holds to be an intervening and separate cause, and to which the plaintiff's damage must be attributed rather than to the refusal of the bank to pay the check. We think the difference between the two cases is not of such a nature as to call for the application of a different rule of decision.

Several cases cited by the appellants strongly support their argument that the refusal to pay the check ought to be considered as the proximate cause of the arrest, but the argument was equally applicable to the Hartford Case, and was not there found to be of sufficient force to compel the adoption of the rule advocated by the appellants.

The judgment is affirmed.

We concur: TYLER, P. J.; KNIGHT, Justice pro tem.

57 Cal. App. 297

Ex parte CAREY. (Cr. 614.)

(District Court of Appeal, Third District, California. April 10, 1922.)

1. Criminal law ☞1218—Police court may commit offenders to reformatories.

Police and justice courts may commit offenders to reformatories.

2. Criminal law ☞1208(9)—Police court can commit offender to reformatory for indeterminate sentence.

Police courts can commit offenders to reformatories for indeterminate sentence.

3. Criminal law ☞1213—Commitment to California Industrial Farm for Women not punishment but for purposes of reformation.

The detention provided by St. 1919, p. 246, creating California Industrial Farm for Women, is not, within purview of the Constitution, punishment at all, but is for purposes of reformation, and does not constitute cruel and unusual punishment.

4. Constitutional law ☞205(2)—Criminal law ☞1206(1)—Statute giving right to confine fallen women not unconstitutional as denying privileges given men.

St. 1919, p. 246, creating a home for and confining fallen women for purposes of reformation, is not invalid as denying privileges and immunities under Const. U. S. Amend. 14, even though the act is directed only to women as a class.

5. Constitutional law ☞205(2)—Criminal law ☞1206(1)—Prostitution ☞1—There is no discrimination in confining women for "soliciting for prostitution"; men being punished for pandering.

"Soliciting for prostitution" is the act of a fallen woman in hailing passers-by and soliciting them to patronize her business; and, since under San Francisco county ordinance a woman only can be so charged, there is no discrimination in confining one found guilty in California Industrial Farm for Women (St.

1919, p. 246), the punishment for men for "pandering" being under Pen. Code, § 318.

Application of Betty Carey for a writ of habeas corpus directed to the superintendent of the California Industrial Farm for Women to secure release of petitioner. Writ discharged.

C. E. McLaughlin and C. P. McLaughlin, both of Sacramento, for petitioner.

U. S. Webb, Atty. Gen., and J. Chas. Jones, Deputy Atty. Gen., for respondent.

PREWETT, Justice pro tem. Betty Carey, in whose behalf this proceeding is instituted, was, by a judgment of the police court of the city and county of San Francisco, committed to the California Industrial Farm for Women in conformity with the provisions of section 8 of an act establishing said farm. Stats. 1919, p. 246. She will be referred to in this opinion as the petitioner.

An ordinance of said city and county provides as follows:

"Section 1. It shall be unlawful for any person on any public street or highway or elsewhere to solicit * * * for the purpose of prostitution.

"Sec. 2. Any person violating the provisions of this ordinance shall be guilty of a misdemeanor, and upon conviction thereof, shall be punished by a fine not to exceed \$100 or by imprisonment not more than fifty days, or by both such fine and imprisonment."

The petitioner was convicted of the offense denounced in said ordinance, and upon appearing for sentence the following judgment was entered:

"The court renders its judgment: That whereas, the said defendant having been duly convicted in this court of the crime of misdemeanor, to wit: Soliciting prostitution, * * * it is ordered and adjudged that the said defendant be committed to the California Industrial Farm for Women under section 8, chapter 165, Statutes 1919."

The petitioner is detained at said farm under said judgment on a commitment that amounts, in effect, to an indeterminate sentence. She claims that the judgment in question is void, and she assigns in support of this contention a number of reasons, among which are that it is beyond the jurisdiction of the police court to sentence a defendant to the farm upon an indeterminate sentence, which might amount to a detention for the period of five years; that the punishment is cruel and unusual; that the act is discriminatory, in that it applies only to women; and that the Legislature cannot, by general enactment, modify an ordinance of said city and county.

Those portions of the act that are material to the points under examination read as follows:

"Section 1. There shall be established within this state an institution for the confinement, care and reformation of delinquent women, to be known as the California Industrial Farm for Women.

"Sec. 2. The purpose of said institution shall be to provide custody, care, protection, industrial and other training and reformatory help for delinquent women."

"Sec. 8. When any woman, eighteen years of age or over is found guilty by any court within this state of prostitution, soliciting for prostitution, keeping a house of ill fame or residing in such house, frequenting any dance hall, hotel, rooming house, or other public place, for the purpose of prostitution, or of vagrancy because of being a common prostitute or a common drunkard, she shall, in lieu of any other sentence or disposition provided by law, be committed by the court in which she is so found guilty to said institution for an indeterminate period of not less than six months nor more than five years."

"Sec. 14. Every woman received by said institution shall be examined mentally and physically and shall, if retained by said institution, be given the care, treatment and training adapted to her particular condition. Such care, treatment and training shall be along the lines best suited to develop her mentality, character and industrial capacity to a point where she can be honorably discharged from the institution with reasonable safety and benefit to herself and to the public at large. Upon her reaching such point, in the judgment of the board of trustees, she shall be honorably discharged from the institution. * * *

Further provision is made that the person must, in any event, be discharged from the institution upon the expiration of the period for which she was committed.

The following provisions of the federal and state Constitutions are cited by petitioner in support of her writ:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction equal protection of the laws." Section 1, art. 14, Federal Const.

"Sec. 11, art. 1. All laws of a general nature shall have a uniform operation." Cal. Const.

"Sec. 13, art. 1. No person shall be * * * deprived of life, liberty or property without due process of law." Cal. Const.

"Sec. 25, art. 4. The Legislature shall not pass local or special laws in any of the following enumerated cases, that is to say: * * * Second—for the punishment of crimes and misdemeanors. * * * Thirty-third,—In all other cases where general laws can be made applicable." Cal. Const.

It is clear that the petitioner is held under a commitment for an indeterminate period. Such a commitment, after an extended exam-

ination of the question, was upheld by the Supreme Court in *Re Lee*, 177 Cal. 690, 171 Pac. 958, wherein the court says:

"It is generally recognized by the courts and by modern penalologists that the purpose of the indeterminate sentence law, like other modern laws in relation to the administration of the criminal law, is to mitigate the punishment which would otherwise be imposed upon the offender. These laws place emphasis upon the reformation of the offender. They seek to make the punishment fit the criminal rather than the crime. They endeavor to put before the prisoner great incentive to well-doing. * * * It has uniformly been held that the indeterminate sentence is in legal effect a sentence for the maximum term."

The Police Court Judgment.

[1] It is insisted that, although a superior court might commit a prisoner for an indeterminate period, such power is not vested in the police court. But the power of police and justices' courts to commit offenders to reformatories, in cases authorized by the Legislature, is upheld in the cases herein-after cited. This power is so clear that we would abandon further examination of the matter, if no other points were involved.

[2] It is further claimed, however, that, even though a commitment to a reformatory might be upheld, still the police court could not commit the offender for a longer period than the longest period for which she might be committed to the county jail. This claim is equally untenable. In truth, every point urged in support of this writ has been decided adversely to the contentions of the petitioner, save one. This point will be noticed further along.

In one case in which a minor was committed to the industrial school by the police court of said city and county, the Supreme Court, in commenting upon the case, says:

"The action of the police judge here in question did not amount to a criminal prosecution, nor to proceedings against the minor according to the course of the common law, in which the right of trial by jury is guaranteed. The purpose in view is not punishment for the offense done, but reformation and training of the child to habits of industry, with a view to his future usefulness when he shall have been reclaimed to society, or shall have attained his majority. * * * The restraint imposed upon him by public authority is in its nature and purpose the same which, under other conditions, is habitually imposed by parents, guardians of the person, and others exercising supervision and control over the conduct of those who are by reason of infancy, lunacy, or otherwise, incapable of properly controlling themselves." *Ex parte Ah Peen*, 51 Cal. 280.

John Liddell, a minor, was found guilty of the crime of petit larceny and was sentenced by a justice's court to serve one year in the reform school. The court, in upholding the action of the justice's court, says:

"There can be no question as to the power of the Legislature to provide for the detention and education of juvenile offenders, as it has done in this act; and the provisions of the act are not obnoxious to the criticism that it prescribes unjust or unequal penalties. It is true, the term of detention at the reform school may be made greater by the judgment of the court than the term of imprisonment in the county jail or in the state prison for the same offense would be; but it cannot be said that the punishment inflicted is greater than could be put upon an adult for the same offense. The object of the act is, not punishment, but reformation, discipline, and education. * * * While detained for a longer period, perhaps, than he would be if sent to state prison or the county jail, the conditions surrounding the child are vastly different. He is given the opportunity and instruction to learn a trade, and qualify himself for the duties of citizenship, so that at the end of his term he will go out prepared to take care of himself, and those dependent upon him, without the odium which attaches to an ex-convict. * * * It is equally clear that the state may arrest the downward tendency of those who have offended against its laws, and manifested a disposition to follow a criminal career, by placing them in an institution where they will receive the care, education, and discipline necessary to prepare them for honorable citizenship." *Ex parte Liddell*, 93 Cal. 633, 29 Pac. 251.

"Petitioner assails the constitutionality of said statute mainly upon the grounds that it is unequal in its operation, because under it an adult can be punished for petit larceny * * * for only six months, while a minor may, for the same offense, be sent to said school for a much longer period; that a justice's court has no jurisdiction in such a case to impose imprisonment for more than six months; that the statute is a special law regulating jurisdiction of a justice's court, etc. These and similar objections to the statute are answered against petitioner's contention by the case of *Ex parte Liddell*, 93 Cal. 633." *Ex parte Nicholas*, 110 Cal. 651, 43 Pac. 9.

Ex parte Ah Peen, supra, was approved by this court in the Matter of O'Connor, 29 Cal. App. 234, 155 Pac. 115. In no case have we found any criticism of the foregoing authorities. They enunciate the principles that must govern this court in the disposition of this matter.

Cruel and Unusual Punishment.

[3] This claim may be dismissed with the statement that the detention provided for in the statute is not, within the purview of the Constitution, punishment at all. It is not a penalty. Indeed, it is wholly for purposes of assistance and reformation. Whether or not the detention is an unwarranted interference with personal liberty, it seems clear that it does not constitute cruel and unusual punishment. *People v. Oppenheimer*, 156 Cal. 733, 106 Pac. 74; *In re O'Shea*, 11 Cal. App. 568, 105 Pac. 776; *Wilkerson v. Utah*, 99 U. S. 130, 25 L. Ed. 345; *Ex parte*

Kemmler, 136 U. S. 436, 10 Sup. Ct. 930, 34 L. Ed. 519.

Unequal Privileges and Immunities.

[4] Petitioner points out that the statute denies to women certain privileges and immunities granted to men, thereby violating the Fourteenth Amendment and other constitutional guaranties. It is quite certain that the statute is applicable only to women, and if, in fact, it makes discriminations against them in particulars not warranted by natural or other conditions, it violates the constitutional guaranties of equal protection to all. It should be noted that the state has never claimed that it does not discriminate with reference to women; though, happily, it is believed that these discriminations are enacted mainly in their own interest. It is accepted, law that a state may discriminate in favor of women (or against them, according to the point of view) with reference to hours of labor. *Miller v. Wilson*, 236 U. S. 373, 35 Sup. Ct. 342, 59 L. Ed. 628, L. R. A. 1915F, 829. This case is found reported in 162 Cal. 687, 124 Pac. 427. It enunciates many important principles applicable to the case at bar. The following quotations are taken therefrom:

"Although this guaranty of the Constitution is apparently absolute and unqualified, yet it is well established that it is subject to the exercise, by the Legislature, of what are known as the police powers of the state. * * *

"The injury must be of such character and extent and to such a number of persons that it may be reasonably supposed that it will cause injury to others, that is, to the community in general, or, as it is expressed, to the public health and general welfare. * * *

"(Quoting) 'If, therefore, a statute purporting to have been enacted to preserve public health, the public morals or the public safety, has no real or substantial relation to these objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the court so to adjudge, and thereby give effect to the Constitution.' * * *

"So, also, it has been recognized that some occupations followed by women, though less arduous than those generally followed by men, may have such a tendency to injure their health, if unduly prolonged, that laws may be enacted restricting their time of labor therein to ten hours per day. The application of these laws exclusively to women is justified on the ground that they are less robust in physical organization and structure than men, that they have the burden of child-bearing, and, consequently, that the health and strength of posterity and the public in general is presumed to be enhanced by preserving and protecting women from exertion which men might bear without detriment to the general welfare. [Citing many cases.] * * *

"We must take this statute as a law intended for a police regulation to preserve, protect, or promote the general health and welfare."

This case, as exemplified by the Supreme Court of this state and the Supreme Court

of the United States on writ of error, establishes two very important principles, namely, that legislation may be directed to women as a class and that they may be segregated into groups or subclasses in the interests of public health, safety, or morals. And these two principles lie at the foundation of the legislation attacked by the petitioner.

However, we are not driven to the necessity of determining whether the Legislature may, in the exercise of its power to protect the general health, morals, or safety, provide one punishment for a man and another punishment or remedy as against a woman; for, as we shall show further along, the crime committed by the petitioner is one that cannot be committed by a man.

The question is narrowed down to this: Does the state have the lawful right to seize its fallen women and confine them for purposes of reformation and assistance? That it may seize and confine minors, morons, lunatics, criminals, and persons addicted to the excessive use of drugs, and liquors is not questioned. The first and last enumerated classes are confined solely for purposes of reformation and assistance. It is insisted that the state, if it confine its fallen women, for purposes of reformation, should make like provision for dealing with those of the opposite sex. But the difficulty is that men cannot commit the crime of carrying on the business of prostitution, except as accessories, and therefore no general rule on the subject could be made to apply to both sexes. The fallen woman alone carries on the traffic. If others prey upon her frailty, it is only with her co-operation—willing or unwilling.

The relation sustained by the fallen woman to her business and society at large is altogether unlike that sustained by her partner in crime. She follows a business that can be carried on only by women. The most casual observer cannot fail to see a vast difference between fallen women as a class and the balance of the human kind. They stand apart. No other body of malefactors constitute so distinctly a class as do the fallen women. They present a greater single element of economic, social, moral, and hygienic loss than is the case with any other single criminal class. Not only do they constitute a menace to the morals and social welfare of mankind, but they carry very unusually heavy pathological liabilities. In truth, from the standpoint of public health they are sometimes referred to as pestilential and their places of abode as pest houses. The law declares them to be a public nuisance. Altogether, they present the most perplexing problem with which modern penology and social legislation are called upon to deal. The fallen woman occupies a relation to society very analogous to that of the chronic typhoid carrier—a sort of clear-

ing house for the very worst forms of disease. The right to quarantine persons suspected of contact with infectious is uniformly upheld by both state and national governments. The right to quarantine at all implies the right to continue the isolation so long as the danger remains. That a woman carrying on the business denounced in the statute is a constant pathological danger no one would question. If this be true, the fact implies the right to seize the offender and detain her, not only for mere purposes of temporary quarantine, but for the laudable purpose of reclaiming her and destroying the probability of a subsequent renewal of the danger. Though her entry upon a life of shame may often be due to social maladjustments or to the abuse of her affections, still the statute in question does not purport to deal with her as an innocent person. On the contrary, the law appraises her as so steeped in crime and in so exceptional an environment that ordinary methods of reformation and escape are impossible. Every door is closed to her. Every avenue of escape is shut off. The state, realizing this, has undertaken to take forcible charge of this class of unfortunates and extend to them a home, education, assistance, and encouragement in an effort, otherwise hopeless, to restore them to lives of usefulness. The state combines both altruism and self-preservation. Of similar import, though devoid of the shocking features, are such measures as maternity bills and acts establishing houses of refuge for homeless women. The act is wholly identical in spirit with those provisions of law which authorize the detention and reformation of common drunkards, even though the latter, in terms, apply to all persons of either sex who are capable of becoming such. The statute assailed in this proceeding applies equally to every person who is capable of committing and who commits the offenses inhibited therein.

It is true that the statute provides that every woman carrying on the business of prostitution may be committed to the farm; but the statute would have meant exactly the same had it in terms applied to every person. The fact that the fallen woman carries on the business of commercialized vice justifies whatever discriminations may be found in the statute. The act of her partner in vice, while equally as nefarious, is neither commercialized nor continuous. It is proper enough to send him to jail for his offense, but it is doubtful if the scheme of impounding him for purposes of reformation would commend itself to the lawgiver. The conditions surrounding the two classes of offenders are so unlike that different methods of treatment are fully justified.

So superlative are the demands of civilization upon its women that discriminations in handling criminal cases may, as to them,

under some circumstances, be upheld without violation of the constitutional guaranties; especially where, as here, the discrimination, in her case, withholds the penal tax and affords a more humane and beneficent line of treatment. At least, it would seem that she cannot complain of such treatment.

The Charge in the Commitment.

[5] The specific charge against the petitioner is, not that of carrying on the business of prostitution, but of soliciting for prostitution. She insists that a man, as readily as a woman, may commit this offense, and that therefore no discrimination in punishment can be tolerated. Even if this premise were sound, we are far from conceding the soundness of her conclusion. But the premise is not sound. The ordinance, it is true, applies to "every person." For the offense, if he could commit it, he would be sent to jail. In her case she might be committed to the farm for purposes of reformation. But a man can no more commit the offense of soliciting for prostitution than that of carrying on the business of prostitution. In one sense, possibly, it may be said that a man who acts as a "capper" for a house of prostitution is guilty of the crime of soliciting for it. But the crime committed by others than the principal is known as "pandering" and the offender is known as a "panderer," "pimp," or "procurer." His punishment is provided for in section 318 of the Penal Code. The words "soliciting for prostitution" have a well-understood and distinct meaning. They are held to mean the act of a fallen woman in hailing passers-by and soliciting them to patronize her business. They are so understood by police officers and all others who are called upon to labor with this class of people. The various reasons which we have assigned for holding that the crime of carrying on the business of prostitution is confined to fallen women apply with equal force to the specific charge against the petitioner.

The charge is sufficient. The writ is discharged, and the petitioner remanded.

We concur: FINCH, P. J.; HART, J.

56 Cal. App. 758

CAVANAGH et al. v. SHAVER, Superintendent of Streets, et al. (Civ. 3972.)*

(District Court of Appeal, First District, Division 2, California. March 8, 1922. Hearing Denied by Supreme Court May 4, 1922.)

4. Municipal corporations $\S$ 581—Fifty per cent. redemption penalty on sale for taxes was not saved by repealing statute.

The provision of Pol. Code, $\S$ 3779, requiring payment to the county treasurer, for redemption from a sale to the county for taxes,

of the purchase money and 50 per cent. thereof, which was made applicable to assessments for the opening of streets by St. 1889, p. 73, $\S$ 16, was not saved as to the penalty from the repeal of that section by St. 1895, p. 19, $\S$ 8, and by St. 1895, p. 328, $\S$ 59, by the provision of St. 1895, p. 204, $\S$ 1, which provided all sales and redemption should be made in the manner such sales and redemption were made before that act, since the saving clause makes no reference to penalties.

2. Municipal corporations $\S$ 581—Fifty per cent. redemption penalty on sale for taxes not extended to street opening assessments.

In view of St. 1889, p. 73, $\S$ 16, imposing a 5 per cent. penalty on delinquent assessments for street openings, the provision of Pol. Code, $\S$ 3779, requiring payment of the purchase price of property sold for taxes to the county with 50 per cent. penalty in order to redeem, was not extended to street assessments by the provision in that section of the street assessment act extending to such assessments the provisions for the collection of delinquent state and county taxes not inconsistent with that act.

3. Pleading $\S$ 403(3)—Defective averment of receipt of money held cured by answer and finding.

The defective averment, in a complaint for money had and received, that the money in controversy was actually received by defendants, was cured, where defendants alleged the money had never come into their possession, and at the trial the court found the money had been received by defendants, and there was no showing that they were prevented by the trial court from making full and complete proof on that issue, so that they were not prejudiced by the complaint within Code Civ. Proc. $\S$ 475.

4. Appeal and error $\S$ 1030—Premature commencement of action does not require reversal.

That an action for money had and received was commenced before the actual receipt of the money by defendants does not require reversal of a judgment rendered against defendants after they had received the money.

5. Money received $\S$ 14—Judgment cannot be rendered against officer whose successor received the money.

A judgment cannot be rendered against a defendant either individually or as street commissioner for money had and received, where it was undisputed that the money was actually received by his successor in office, who was not made a party to the action.

6. Taxation $\S$ 710—Deposit to redeem from tax sale was made under duress.

A deposit to redeem property of plaintiffs from a tax sale, which was necessary to prevent the permanent loss of plaintiffs' title, was made under duress, although plaintiffs' title had already been clouded when the deposit was made.

7. Pleading $\S$ 347—Defendants in action for penalty erroneously deposited held not entitled to judgment on pleadings.

In an action by taxpayers to recover the amount of a penalty which they were errone-

ously required to deposit to redeem from a tax sale, the defendants were not entitled to a judgment on the pleadings notwithstanding a defective allegation of receipt of the money by defendants, where the answer alleging the money had not been received was deemed denied under Code Civ. Proc. § 462.

8. New trial — Court held to have jurisdiction to grant, after judgment for defendants who subsequently received money sued for.

Where the trial court had rendered a judgment for defendants in an action for money had and received after proceedings indicating a trial on the merits under Code Civ. Proc. § 582, because there was no showing at that time that defendants had ever received the money in controversy, the trial court had jurisdiction to grant a new trial after the defendants, before the judgment was signed or filed, had collected the money and had since retained it.

Appeal from Superior Court, Sonoma County; Emmett Seawell, Judge.

Action by J. E. Cavanagh and others against E. S. Shaver, individually and as Superintendent of Streets of the City of Petaluma, and against the City of Petaluma. Judgment for plaintiffs, and defendants appeal. Judgment reversed as to E. S. Shaver individually and as Superintendent of Streets, and affirmed as to the City.

See, also, 202 Pac. 470.

G. P. Hall, of Petaluma (E. J. Dole, of Petaluma, of counsel), for appellants.

W. T. Mooney, of Petaluma, for respondents.

STURTEVANT, J. The plaintiffs commenced an action against the defendants to recover a judgment for money. Although the plaintiffs' complaint is out of the ordinary, it may be said to be a complaint as for money had and received. The plaintiffs had judgment in the trial court, and the defendants have appealed, bringing up papers which they claim to be a judgment roll and a bill of exceptions. No motion to dismiss has been made, neither has a suggestion of the diminution of the record been made, and we therefore treat the record as sufficient.

[1] It was the theory of the plaintiffs in the trial court that they were called upon to pay, and that they did pay, without authority of law, a penalty of 50 per cent. to redeem from a sale had in a street opening proceeding. The appellants claim the right to collect the penalty by reason of some language contained in section 16 of that act (St. 1889, p. 70) read in connection with section 3779 of the Political Code as that statute was formerly worded. That part of section 16 referred to reads as follows:

"All provisions of the law in reference to the sale and redemption of property for delinquent state and county taxes in force at any given

time, shall also then, so far as the same are not in conflict with the provisions of this act, be applicable to the sale and redemption of property for delinquent assessments hereunder, including the issuance of certificates and execution of deeds."

Section 3779 of the Political Code at the same time was worded as follows:

"On filing the certificate with the county recorder, the lien of the state vests in the purchaser, and is only divested by the payment to him, or to the county treasurer for his use, of the purchase money and fifty per cent. thereon."

But section 3779 of the Political Code was repealed by Statutes of 1895, c. 11, § 8, and by chapter 218, § 59. However, the appellants claim that the appellants' rights to the penalty were saved by Statutes of 1895, c. 177, which provides:

"Section 1. All sales, and redemptions after sale, of any real property upon which the assessment levied and assessed to pay the damages, costs, and expenses of or incident to laying out. * * * any street, * * * shall be made and had in the same time and manner as such sales and redemption were required by law to be made and had on the first day of January, A. D. 1895."

It will be noted that the saving statute does not mention penalties at all. It will also be noted that the language used by the Legislature is quite different from the language used in the street opening act of 1889. The appellants make the claim as though the saving statute were worded as follows:

"All provisions of the law in reference to the sale and redemption of property for delinquent state and county taxes in force January 1, 1895, shall, so far as the same are not in conflict with the provisions of this act, be applicable to the sale and redemption of property for delinquent assessments, etc."

[2] But there is a patent difference between the language used and meaning which the appellants would attach to the language. The saving statute saves the procedure as to "time and manner," but does not purport to save a penalty of 50 per cent. It must at all times be borne in mind that tax proceedings are in invitum and purely statutory and afford no opportunity for invoking any of the principles of equity. *City of Petaluma v. Hughes*, 37 Cal. App. 473, 475, 174 Pac. 336. In the instant case the penalty is not specifically mentioned in the statute under which the appellant claims. In the case of *Collier v. Shaffer*, 137 Cal. 319, 70 Pac. 177, the court construed the provisions of sections 3756 and 3817 of the Political Code as those sections stood in 1889. Section 3756 expressly provided a 5 per cent. penalty. Section 3817 referred to a "twenty-five per cent. penalty, which may have accrued by reason of such delinquency and sale. * * *" The court held that section 3756 was the declarative

law as to what penalties were imposed and that section 3817 misused the number 25 for the number 5. The case shows that the courts have not gone out of their way to adopt a construction imposing penalties. That we should not do so in the instant case is further strengthened by provisions of section 16 of chapter 76 of the Statutes of 1889, which we have not heretofore referred to. The greater part of that section is taken up in providing for a 5 per cent. penalty which is imposed by the terms of the statute on each delinquent assessment. If the Legislature had meant to impose other penalties certainly apt words would have been used to express that meaning. On the other hand, it used language excluding such an intention. Having provided a 5 per cent. penalty, it then adopted statutes concerning delinquent state and county taxes, " * * * so far as the same are not in conflict with the provisions of this act. * * *" The two expressions are not harmonious. The appellants were not entitled to charge a 50 per cent. penalty and are not entitled to retain the same.

[3] The appellants in this court take the position that, whether the judgment of the trial court was just or otherwise, it should be reversed for certain alleged errors. They claim that the plaintiffs' complaint did not state a cause of action, that they raised the question by demurrer, and that their demurrer was improperly overruled. Their point is this that the complaint does not flatly allege that the defendants received the money. The complaint is certainly not very clear in this behalf, but after the demurrer was overruled the defendants filed an answer in which, among other things, they pleaded as follows:

"Defendants allege that the said sum of \$9,065.53 referred to in said amended complaint has never come to the possession of said defendants or to the possession of any official of said defendant, the city of Petaluma, or into the possession of any one for or on behalf of said defendants or either of them. * * *"

After the trial was had, the trial court made findings:

"That the said sum paid by plaintiffs to said defendant E. S. Shaver as such official, on said 22d day of October, 1915, to wit, the sum of \$9,065.53, was paid by them under protest and duress, and to prevent the clouding of their title to said lots; that all sums and amounts in excess of \$5,727.64 exacted by defendant E. S. Shaver as such official, of plaintiffs, and paid under protest by them to said defendant, were and are illegal."

And thereupon the trial court awarded judgment for the difference, to wit, \$3,337.85. In the bill of exceptions there is no showing or attempt to show that the trial court prevented the appellants from making a full and complete showing on the question of receiving or not receiving money. Conceding that

the plaintiffs' complaint was not as broad as it should have been, the defect was cured by the answer of the defendants, and the record shows that the defendants were not prejudiced. Code Civ. Proc. § 475.

[4] The record shows that the money was not received on October 22, 1915, but that it was received on July 6, 1918. The record does not show when the action was commenced; but it does show that the action was commenced before July 6, 1918. The appellants strenuously contend that the action was prematurely commenced, and that the judgment should be reversed. Conceding that the action was prematurely commenced, but examining the whole record, it is patent that the rights of the appellants were in no manner prejudiced because of that fact. We think that the judgment should not be reversed because of alleged errors which were not prejudicial. *Mahony v. Standard Gas Engine Co.* (Cal. Sup.) 202 Pac. 146.

[5] The appellants assert that the evidence does not show that the money alleged to have been deposited in bank ever came to the hands of the defendants, or either of them, or was ever claimed by them or either of them. In so far as E. S. Shaver, or E. S. Shaver, as superintendent of streets, is concerned, the contention is well founded. As to the city of Petaluma, the contention is not sustained by the record. The certificate of deposit was offered in evidence and on it appears the indorsement, "Paid 7/6/18," and also the indorsement, "James A. Potter, Superintendent of Streets and Street Superintendent of the City of Petaluma and Successor in Office to E. S. Shaver." During the second hearing the question of the payment of the certificate being under discussion, Mr. Hall, attorney for the appellants, admitted that the certificate of deposit had been paid after the judgment in the Hickey suit, which judgment held that the tender was good. It is therefore clear that the city of Petaluma received the money although it is equally clear that the defendant E. S. Shaver did not receive it. He had gone out of office and his successor in office received the money, but the successor in office has not been made a party to this litigation. As he has not been made a party, he has not had his day in court and no judgment should have been entered as against Potter. As the record does not show that Shaver received any part of the money, no judgment should have been entered as against him.

[6] The appellants claim that the deposit was not made under duress. We think they are mistaken. True, the title of the plaintiffs had already been clouded at the time of the tender. But in the absence of the payment, the plaintiffs' title would have been permanently lost.

[7, 8] The appellants claim that the trial court had no jurisdiction to grant a new trial. In making this contention we under-

stand them to rely upon the rule stated in *Gray v. Cotton*, 174 Cal. 256, 162 Pac. 1019, and *Stow v. Superior Court*, 178 Cal. 140, 172 Pac. 598. We think that this case is not controlled by either of said cases, but that the latter case is more nearly in point, and in that event the trial court did not exceed its jurisdiction in granting the so-called motion for a new trial. It might be better said that the trial court was merely remarking that it took a different view of the pleadings than it entertained on a previous date, and was hearing the case for the first time; or, to put it another way, that it had inadvertently exceeded its jurisdiction on the former occasion when the plaintiffs were not awarded a trial, and that the matter was being cured by having a formal trial on the latter date. The first step in the proceedings is, by one of defendants' attorneys, called a motion for judgment on the pleadings; by another of defendants' attorneys it is called a motion for a nonsuit. It is not clear that the first trial was not a trial on the merits. True, the plaintiffs had not alleged "that the defendants had and received" any money; but the defendants, in their answer, inserted an allegation that they had not "had and received the money." The averment of the answer was deemed denied by virtue of the provisions of section 462, Code of Civil Procedure. In the face of such a record the defendants had no right to move for judgment on the pleadings. *McGowan v. Ford*, 107 Cal. 177, 40 Pac. 231. To avoid the rule in that case the defendants at the hearing on April 11, 1918, made certain statements to the trial court which were taken and acted on as evidence. The trial court so considered the record as appears from the record. These, and other matters, tend to show a trial of the case on its merits. Code Civ. Proc. § 582. Moreover, we are of the opinion that the appellants are not in a position to press this point. It is shown by the record that on April 11, 1918, the cause was called for trial. At that time the appellants took the position as stated by the judge of the trial court:

"Shaver has never gotten it and he says he has never gotten it, does not want it, would not have it. It appearing that the defendants each and all disclaimed any interest whatever in the fund," etc.

Judgment was thereupon ordered in favor of the defendants. Before the judgment was signed or filed, to wit, on July 6, 1918, the city officials proceeded to collect the money and have ever since retained it. In view of the acceptance of the moneys by the defendant city, we think the city is not prejudiced when it is denied permission to change its position back to where it originally stood.

The foundation was very imperfectly laid for the introduction in evidence of the certificate of deposit, but the objection to its in-

troduction was equally faulty. The proceedings were as follows:

"Mr. Mooney: I have also here a certificate of deposit which was made by the plaintiffs in this action and which has since been cashed in by the city. Is there any objection to that? Mr. Dole: That is objected to as incompetent, irrelevant, immaterial and hearsay. * * * The Court: I do not think it is hearsay."

We find nothing in the record as to the proof of signatures on the certificate, but such objection was never made nor called to the attention of the trial court. The appellants therefore are not entitled to have this court consider matters which were never before the trial court.

No other points are made which call for our consideration. The judgment as to E. S. Shaver and E. S. Shaver as superintendent of streets is reversed, and the judgment as to the city of Petaluma is affirmed.

We concur: LANGDON, P. J.; NOURSE, J.

Opinion of Supreme Court, in Bank, Denying Hearing.

PER CURIAM. Hearing denied.

WILBUR, J. (dissenting). I dissent from the order denying a transfer, on the ground that the 50 per cent. penalty provided by section 3779 of the Political Code is still applicable to sales for delinquent assessments for the opening of streets under the street opening act of 1889 (Stats. 1889, p. 70). Section 16 of that act provides for the sale of the assessed property in the same manner as is or may be provided for the collection of state and county taxes. It is also provided:

"All property sold shall be subject to redemption in the same time and manner as in sales for delinquent state and county taxes; and the superintendent of streets may collect for each certificate fifty cents, and for each deed one dollar. All provisions of the law, in reference to the sale and redemption of property for delinquent state and county taxes in force at any given time, shall also then, so far as the same are not in conflict with the provisions of this act, be applicable to the sale and redemption of property for delinquent assessments hereunder, including the issuance of certificates and execution of deeds."

Section 3779 of the Political Code as it existed at the time of the enactment of the street opening act, supra, provided:

"On filing the certificate with the county recorder, the lien of the state vests in the purchaser, and is only divested by the payment to him, or to the county treasurer for his use, of the purchase money and fifty per cent. thereon."

Section 3780 of the Political Code fixed the time for redemption as 12 months from the date of purchase "or at any time prior to the giving of the notice and the application for a deed, as provided for in section thirty-seven hundred and eighty-five of this Code."

Section 3785 provided that in order to terminate the right of redemption the purchaser must give 30 days' notice before he applies for a deed, in which he was required to state, among other things, the amount then due. This amount included the 50 per cent. authorized by statute. *Reed v. Lyon*, 96 Cal. 501, 502, 31 Pac. 619. The redemption must be made in gold or silver coin. Pol. Code, § 3781. "The redemption is effected by the payment of the money, and the taking of the receipt." *Cooper v. Shepardson*, 51 Cal. 298.

It would seem clear that the manner of making a redemption is by payment to or for the purchaser of the amount for which the property was sold, plus 50 per cent. and such costs as were authorized by law. Assuming for a moment that the statute of 1895 revising the whole system of sales and tax redemptions (Stats. 1895, p. 19), containing the express repeal of section 3779, Political Code, so affected the street opening act of 1889, that the law of 1895 (page 204), intending in part at least to make the new system of collecting taxes inapplicable to the collection of delinquent assessments under the street opening act of 1889, is the only basis for charging the 50 per cent. penalty, the question is whether this and the saving statute of 1895 (Stats. 1895, p. 204) still required the payment of the 50 per cent. penalty for redemption. That statute provides (Stats. 1895, p. 204):

"All sales, and redemptions after sale, of any real property upon which the assessment levied and assessed to pay the damages, costs, and expense for or incident to laying out, opening, extending, widening, straightening, diverging, curving, constructing, or closing up, in whole or in part, any street, square, lane, alley, court, or place within municipalities in this state, shall remain unpaid and become delinquent under the provisions of any act or law regulating such matters, shall be made and had in the same time and manner as such sales and redemption were required by law to be made and had on the first day of January, Anno Domini eighteen hundred and ninety-five."

Thus, as applied to redemptions the statute provides that all redemptions "shall be made and had in the same time and manner as such sales and redemption were required by law to be made and had on the first day of January, Anno Domini eighteen hundred and ninety-five." The question then is whether the manner of redemption included the payment of the 50 per cent. penalty. It would seem fairly clear that, as the redemption was affected by the payment of the amount due to the purchaser, if the manner of redemption was to be the same, both before and after the amendments to the law relating to collection of state and county taxes, such payment would still be required notwithstanding the repeal and amendments to the various sections of the Code involved in the new scheme of tax sales.

We have so far assumed that the statute

of 1895, repealing section 3779, Political Code, affected the right of the purchaser under a sale made for an assessment for the opening of a street; but the logical result of the decision of this court in *Ramish v. Hartwell*, 126 Cal. 443, 58 Pac. 920, is that the statute of 1895 did not affect the street opening act of 1889 in so far as it adopted the provisions of the general system for the sale for delinquent taxes. It will be observed that the statute of 1889 adopts and makes a part of that statute the general scheme for the collection of delinquent state and county taxes. The exact language of the provision will be considered later. The case of *Ramish v. Hartwell*, supra, dealt with a similar provision of the bond act of 1893 (Stats. 1893, p. 33), which statute provided in section 5 for the adoption of the general plan for the collection of delinquent bonds "in all respects the same as are provided by law for the collection of delinquent state and county taxes." Thereafter the general law was amended by the statute of 1895 (page 19), now under consideration, and the city treasurer refused to proceed in accordance with the provisions of the Code concerning the collection of state and county taxes in effect before the amendments of 1895. The court held that the amendments of 1895 were inapplicable to the proposed sale for delinquent bonds and for that reason the revised statute with reference to the collection of state and county taxes did not apply to the collection of delinquent street bonds. In that regard the court stated:

"In 1895 (Stats. 1895, p. 327), section 3771 of the Political Code was amended by providing that, instead of selling the land at auction, the property upon which the taxes are delinquent 'shall by operation of law and the declaration of the tax collector be sold to the state, and said tax collector shall make an entry "Sold to the state" on the delinquent assessment list opposite the tax.' It is contended by the appellants that by this amendment to the Political Code its provisions are ipso facto incorporated into the act of February 27, 1893, and that the city treasurer can proceed only in accordance with the provisions of the Political Code, as thus amended.

"It is a rule of statutory construction that the adoption in one statute, for the purpose of carrying its provisions into effect, of the provisions of another statute by reference thereto, does not include subsequent modifications of these provisions in the statute referred to, unless a clear intent to do so is expressed. This rule is subject to a qualified exception in cases of the adoption into a special act of the provisions of law then in force by virtue of general laws. In such cases, subsequent modifications of the general law will be deemed to be within the intent of such adoption, so far as they are consistent with the purposes of the particular act. (See *Kirk v. Rhoads*, 46 Cal. 403.) A repeal of the adopted statute will not take from the adopting statute the operative force of these provisions, so far as they may be necessary to carry the later statute into effect, but these provisions

will be regarded as if they had been originally incorporated therein at length. (Spring Valley W. W. v. San Francisco, 22 Cal. 434; People v. Clunie, 70 Cal. 504; Collins v. Blake, 79 Me. 218; Darmstaetter v. Moloney, 45 Mich. 621; Sutherland on Statutory Construction, § 257.) Under the same principles, any amendment of these provisions of the statute thus adopted, whether it be a particular act or a general law, which *so far modifies them as to subvert the purpose of the statute by which they were adopted, will be regarded in the same light as a repeal.* The main object of all statutory construction is to ascertain the legislative will, and, as it is to be assumed that the legislature intends its acts to have effective operation, such amendments will not be construed as depriving the adopting statute of all effect, unless there is a clear necessity for such construction.

"A comparison of the act of 1893 with the provisions of the Political Code, as amended in 1895, shows that the provisions in the latter as thus amended are entirely inapplicable to the former, and ineffective to carry its objects into effect. The provision in section 5 above quoted was to enable the contractors to receive the amount of the assessment as the several installments should mature, and to provide means for enforcing its collection in case of delinquency. The provision for a sale of the land at public auction to any one who would pay the assessment, with the right in the contractor to become such purchaser, was an efficient mode of securing such payment, but if, instead thereof, the land should be struck off to the state with no power for its sale within five years, and no fund from which to pay the amount for which the sale was made, there would be no means by which the contractor could receive his payment, and the entire purpose of the act would be frustrated. We hold, therefore, that the above amendments to the Political Code in 1895 are inapplicable to the provisions of the act of February 27, 1893, and that the sale of land for delinquency in the payment of the bond is to be made according to the provisions of the law for the collection and enforcement of taxes at the date of the act." (Italics ours.)

It follows then that the express repeal of section 3779, Political Code, imposing a penalty of 50 per cent., if theretofore applicable to the proceedings for the sale of property for delinquent street opening assessments by reason of the incorporation by reference of such Political Code provisions in the street opening act of 1889, did not operate upon or render inapplicable its provisions as affecting sales for delinquent street opening assessments. It seems to be conceded that section 16 of the street opening act of 1895 as originally enacted (St. 1889, p. 73), provided for the penalty of fifty per cent. in cases of redemption. If so, the authority for its imposition is contained in the following sentences of section 16:

"All property sold shall be subject to redemption in the same time and manner as in sales for delinquent state and county taxes; and the superintendent of streets may collect for each

certificate fifty cents, and for each deed one dollar. All provisions of the law, in reference to the sale and redemption of property for delinquent state and county taxes in force at any given time, shall also then, so far as the same are not in conflict with the provisions of this act, be applicable to the sale and redemption of property for delinquent assessments hereunder, including the issuance of certificates and execution of deeds."

If the first sentence requires the payment of the penalty it is because the "manner" of redemption incorporates the idea of the fifty per cent. penalty, and if that is true there is no difficulty in concluding that the penalty is still imposed, because, as already stated, the saving act of 1895 (Stats. 1895, p. 204) expressly provides that as to the manner of redemption the statute in force January 1, 1895, remains in force with relation to the street opening assessments.

If the requirement for the payment of the 50 per cent. penalty is found in the next sentence, "All provisions of the law, in reference to the sale and redemption of property for delinquent state and county taxes in force at any given time," etc., incorporated by reference section 3779, Political Code, we have to determine whether upon the principle stated in *Ramish v. Hartwell*, supra, the amendment of 1895 renders inapplicable the 50 per cent. penalty. It is true that the street opening act (section 16), above quoted, differs in the terms by which it makes applicable to the street opening assessment sales the general scheme for sales for delinquent state and county taxes, and that interpreted in the case of *Ramish v. Hartwell*, supra, for the reason that the provision for the sale for the street opening assessments provides that the scheme for "the sale and redemption of property for delinquent state and county taxes *in force at any given time*, shall also then, *so far as the same are not in conflict with the provisions of this act*, be applicable," etc. (Italics ours.)

It would follow that the new scheme for the collection of state and county taxes would apply "so far as the same are not in conflict with the provisions of this act"; but, as stated in *Ramish v. Hartwell*, supra, the new scheme for the collection of delinquent state and county taxes by a sale to the state is thoroughly inconsistent with the system of sales at public auction to the highest private bidder for cash. In the one case the entire property is sold to the state for the tax, subject to a five-year redemption, in the other case only so much of the property as is necessary to pay the delinquent assessment is sold and then to the private bidder who accepts the smallest part of the property and pays the assessment. The new scheme of tax sales in its entirety is inapplicable to and inconsistent with the scheme of sales to private individuals provided by the street opening act (*Ramish v. Hartwell*, supra), and for that reason under the express terms of the statute

of 1889 is not applicable to the sale and redemption of the property for delinquent street opening assessments.

I concur: RICHARDS, Justice pro tem.

57 Cal. App. 391

PEOPLE v. JOHNSON. (Cr. 1025.)

(District Court of Appeal, First District, Division 2, California. April 19, 1922.)

1. Burglary § 41 (5)—Evidence held to sustain finding offense was committed in nighttime.

Evidence that the burglary was committed while the occupants of the house were absent for several days, and that on the night before the door of their apartment was discovered to have been broken open, a neighbor heard sounds as of some one pounding, held sufficient to sustain the jury's finding that the burglary was committed in the nighttime.

2. Criminal law § 1035 (3)—Remark of trial court which could have been corrected is not reversible, in absence of assignment made at time.

Where defendant's counsel, in objecting to a statement by a witness for the prosecution on cross-examination, said that what the witness stated was not an identification, a remark by the court that the court did not say it was an identification, but it was the fact, was not of such a character as to preclude the possibility of obviating a harmful result if an assignment of misconduct had been made at the time, and therefore the remark does not require reversal of the conviction, where it was not assigned at the time as misconduct.

3. Criminal law § 1044—Answers made before objection to question cannot be reviewed without motion to strike.

Answers, made by witnesses before objections were made to questions asked them, cannot be reviewed on appeal from a conviction, where there was no motion to strike out the answers.

4. Criminal law § 1166½ (8)—Unless some objectionable juror sat, prejudice in disallowing challenge for cause if juror subsequently peremptorily challenged not shown.

Accused was not prejudiced by the disallowance of his challenge for cause, directed against a juror whom he subsequently excused on peremptory challenge, where he exercised all his peremptory challenges, but did not show that any one of the jurors who sat at the trial of the case was objectionable to him.

Appeal from Superior Court, City and County of San Francisco; Michael J. Roche, Judge.

Frank Johnson was convicted of burglary in the first degree, and he appeals. Affirmed.

Edmond H. Lomasney, of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and John H. Rioridan, Deputy Atty. Gen., for the People.

NOURSE, J. Defendant was convicted of burglary in the first degree and appeals from the judgment. It is contended that the evidence is insufficient to support the verdict of burglary in the first degree under the provisions of section 1097 of the Penal Code that—

"When it appears that the defendant has committed a public offense, and there is reasonable ground of doubt in which of two or more degrees he is guilty, he can be convicted of the lowest of such degrees only."

Mr. and Mrs. Clifton, the occupants of the residence in San Francisco from which the silverware, jewelry, and clothing were taken, were away from home from August 5, 1921, until after August 11th, and the house was unoccupied. Before leaving they had carefully closed and locked the doors and windows. On the morning of August 11th a neighbor discovered that the kitchen door in the rear of the house was open. An examination disclosed that entrance had been gained by chopping a panel out of the kitchen door and removing a bolt which fastened the door on the inside, and that silverware, jewelry, and clothing of the approximate value of \$2,500 had been taken from the house. Shortly after 12 o'clock noon of the same day defendant was arrested by police officers, who saw him come out of a certain San Francisco hotel, in which he was registered. His room was searched and in a closet thereof were found eight suit cases containing the articles in question. There appears to be no question raised on appeal as to the sufficiency of the evidence to show that defendant committed the burglary. Therefore a particular recital of the evidence on this phase of the case is unnecessary.

[1] Regarding the time when the crime was committed, the evidence shows that appellant rented the room in which the stolen articles were located about noon on August 9th, and that at the time he had with him two or three suit cases or grips. At about half past 3 in the afternoon of that day he was seen by one of the witnesses standing on the corner of Broderick and Green streets looking towards Union street, the Clifton residence being on Broderick between Green and Union streets. One Mrs. Ernst testified that she lived on Union street right below Broderick; that her house stood on the key lot, and her yard and the Cliftons' yard met in the rear; that on the night of August 10th she was sleeping in a room in the back part of her house on the second floor with the windows wide open; that she was awakened from a sound sleep by a noise as if some one was pounding—that it sounded like a rock pounding, as if some one was grinding something and pounding; that she thought it was in her place; that she listened, and then pulled

the window up and down and the noise stopped; that she went back to bed, and almost immediately she again heard the noise; that she got up again and opened the window screen and looked around and just then she heard a door, and somebody said, "Sh!"; that it was a very dark night, and she did not see any one; that she then went to bed and thought no more about the occurrence until the next day. As heretofore stated, the evidence showed that the kitchen door was found open the following morning, and that a panel had been chopped therefrom in order to reach within and withdraw a bolt which had been placed on the inside of the door. The burglary was committed some time between the 5th of August and the morning of the 11th, and whether in the daytime or the nighttime was a matter for the determination of the jury. *People v. McCarty*, 117 Cal. 65, 48 Pac. 984. A disturbance of its verdict in that respect does not appear to be justified in view of the evidence here.

[2] During the cross-examination by appellant's counsel of the witness who testified he saw appellant in the vicinity of the Clifton residence on August 9th, the following occurred:

"Q. Did you ever identify this man? A. I identified him after I saw his picture in the paper.

"Mr. Lomasney: I ask it go out.

"The Court: That is what you asked him.

"Mr. Lomasney: That is not an identification.

"The Court: I am not saying it is an identification, but it is the fact."

Appellant now complains that this remark constituted prejudicial misconduct on the part of the trial court. The remark was not assigned as misconduct at the time it was made, and the trial court's attention was not in any manner directed to its alleged impropriety. Neither does it appear that the remark was of such a character as to preclude the possibility of obviating a harmful result had an assignment of misconduct been made at the time. Under these circumstances, the rule is that a claim of misconduct will not be considered on appeal. *People v. MacDonald*, 167 Cal. 545, 551, 140 Pac. 256.

[3] Appellant next contends that the admission of certain alleged hearsay evidence constituted prejudicial error. The answers to certain questions went into the record before objection was interposed, and no motion was made to strike out. This point, therefore, requires no consideration.

[4] Appellant also complains that the trial court erred in disallowing his challenge for cause interposed to one of the jurors on the ground of bias. The juror was not sworn and did not serve as such on the trial, having been subsequently excused by appellant on a

peremptory challenge. It appears from the record that appellant exhausted his 10 peremptory challenges, but it does not appear that he had occasion or desired to exercise an additional peremptory challenge. There is nothing to indicate that any of the jurors who served were objectionable to appellant, or that each and all of the 12 jurors finally accepted and sworn were not entirely satisfactory to him. Under these circumstances it is unnecessary to determine whether or not the ruling was erroneous, as it did not amount to prejudicial error and would not warrant a reversal. *People v. Kromphold*, 172 Cal. 512, 519, 520, 157 Pac. 599; *People v. Schafer*, 161 Cal. 573, 576, 119 Pac. 920. Judgment affirmed.

We concur: LANGDON, P. J.; STURTEVANT, J.

57 Cal. App. 310

DE CARLI v. ASSOCIATED OIL CO. et al.
(Civ. 4203.)

(District Court of Appeal, First District, Division 1, California. April 11, 1922.)

Jury ⚡19(1)—Master and servant ⚡347—**Workmen's Compensation Act constitutional as applied to injuries due to willful disregard of duty.**

Const. art. 20, § 21, authorizing the Legislature to create a complete system of workmen's compensation irrespective of fault, does not limit the Legislature to injuries caused by negligence as distinguished from willful disregard of duty, and St. 1917, p. 834, § 6b, providing for compensation for serious and willful misconduct of the employer, is not unconstitutional as denying the constitutional right of trial by jury.

Appeal from Superior Court, Contra Costa County; A. B. McKenzie, Judge.

Action by Joe P. De Carli against the Associated Oil Company and others. From a judgment for defendants on demurrer, plaintiff appeals. Affirmed.

Jay Monroe Latimer, of San Francisco, for appellant.

Redman & Alexander, of San Francisco, for respondents.

TYLER, P. J. Action for damages for personal injuries. Plaintiff alleges that he was employed by defendant Associated Oil Company and that, while engaged in his duties as such employee, he received severe personal injuries through the gross and willful carelessness and negligence of defendant company. Defendant Ocean Life Insurance Company was the insurance carrier of defendant oil company and was made a party defendant solely for that reason. Both defendants demurred generally to the complaint

upon the ground that it did not state a cause of action, and upon the further grounds of lack of jurisdiction of the court, misjoinder, and uncertainty.

The ground relied upon below was that the superior court had no jurisdiction, it being claimed that the matter of employers' legal liability for injuries to employees was vested in the Industrial Accident Commission, which body had sole power to determine and assess any compensation to which a plaintiff might be found to be entitled. It appears from the record that plaintiff was paid \$730 pursuant to the terms of the compensation act. After collecting this amount, he brought this present action. The demurrers of the different defendants were sustained without leave to amend. Plaintiff appeals from the judgment, and in support of his appeal contends in substance that article 20, § 21, of the Constitution as amended in 1918 does not by its terms justify the provisions of section 6(b) of the Workmen's Compensation Act in so far as said section 6(b) seeks to deny the right of trial by jury in a court of law granted to one by the Constitution. It is argued that article 20, § 21, merely vests the Legislature with plenary, unlimited power to create a complete system of workmen's compensation for injury, disability, or death incurred or sustained by workmen in the course of employment "irrespective of the fault of the party"; that, giving to the word "fault" the meaning attributed to it by the decisions, it is merely synonymous with "negligence"; and that, this being so, a workman is, by the Constitution, impliedly left his common-law right to trial by jury, in that different class of cases where injury results from a willful disregard of duty by the employer. This question has been put to rest in this state by the Supreme Court through numerous decisions.

The Workmen's Compensation Act as originally enacted provided for an election of remedies by an injured employee where such injuries were caused through the gross or willful misconduct of the employer. Section 12(b), c. 176, Laws 1913. In 1917 the act was amended, and this election was eliminated, and in lieu thereof it was provided that when an employee was injured through "the serious and willful misconduct of the employer, etc.," that the amount of compensation should be increased one-half. Section 6(b), Laws 1917, p. 834. The remedy here provided for has been held to be exclusive of all other statutory or common-law remedies, and the constitutionality of the provision has been upheld in numerous cases. *E. Clemens Horst Co. v. Industrial Accident Commission*, 184 Cal. 180, 193 Pac. 105, 16 A. L. R. 611. See, also, *Western Metal Supply Co. v. Pillsbury*, 172 Cal. 407, 156 Pac. 491, Ann. Cas. 1917E, 390; *San Francisco Stevedoring Co. v. Pillsbury*, 170 Cal. 321, 149 Pac. 586; *Do-*

minguez v. Pendola (Cal. App.) 188 Pac. 1025; *Helme v. Great Western Milling Co.*, 43 Cal. App. 416, 185 Pac. 510. As pointed out in these cases, the Constitution authorizes a complete system of workmen's compensation, and the language employed is comprehensive enough and was intended to include all injuries, irrespective of the manner in which they might occur. The contention of appellant, therefore, that the language employed in the Constitution is a limitation on the power of the Legislature, is without merit.

For the reasons given the judgment is affirmed.

We concur: KERRIGAN, J.; KNIGHT, Justice pro tem.

57 Cal. App. 408

HESSE v. MERCED SECURITY SAV. BANK.
(Civ. 2414.)

(District Court of Appeal, Third District, California. April 20, 1922.)

Banks and banking — 227(3)—Evidence held insufficient to prove bank's agreement to pay depositor's creditor certain sum on bank's receipt of certain fund.

In action by assignee of installments due on trucks sold highway contractor against a bank, which was supplying the contractor with the money to enable him to perform the contract and had taken assignment of moneys to become due under the contract as security, for breach of the bank's agreement to pay certain amount due on the trucks on contractor's deposit in bank of amount then due from the state under the contract in consideration of assignor's agreement not to retake possession of trucks, evidence held to sustain finding that the bank did not make the alleged promise to pay such sum.

Appeal from Superior Court, Merced County; E. N. Rector, Judge.

Action by R. E. S. Hesse against the Merced Security Savings Bank, a corporation. Judgment for defendant, and plaintiff appeals. Affirmed.

Earl A. Bagby, of Visalia, for appellant.

F. W. Henderson, of Merced, for respondent.

FINCH, P. J. The complaint alleges that the defendant agreed to pay plaintiff's assignor \$1,500 "from a special fund, then and there being by said defendant and one J. E. Lee provided for that purpose, said payment to be made by the said defendant immediately upon receipt by defendant of said fund which said fund was * * * in the amount of \$7,000 or thereabouts"; that the defendant thereafter received such fund but refused to pay plaintiff the sum promised and converted the fund to its own use; "that the said special fund consisted of moneys then

due and payable by the California State Highway Commission on account of the contract of said J. E. Lee with said commission for the construction" of a certain highway. The answer denies the allegations of the complaint. The court found the foregoing allegations of the complaint to be untrue and rendered judgment for the defendant.

The defendant was supplying Lee with money to carry on his highway contract and had furnished him large sums for that purpose, taking as security a mortgage on his personal property, tools, and equipment and an assignment of moneys due and to become due under the contract. Lee had purchased two trucks from plaintiff's assignor on the monthly payment plan, and several installments were due and unpaid on May 22, 1920. On that day A. Woods, representing the seller, indicated to the officers of defendant that it would be necessary to take the trucks, which were being used on the work, from Lee's possession unless arrangements were made for payment of part of the overdue installments. Certain payments were then due on the highway contract, and Woods called up the state engineering department to ascertain the amount thereof and the time when payment would be made. From this point forward the evidence is conflicting.

Woods testified that he informed the bank officials that he had received information from the state engineering department that checks would be mailed to Lee that afternoon for payments due. He further testified:

"I asked Mr. Stoddard if he would pay a check on Mr. Lee of \$1,500 on the arrival of the money * * * coming from the state at that time, and he said he would pay it and that would not put Mr. Lee's overdraft any higher than it was at that time, and I * * * did secure a check of Mr. Lee. * * * They (the bank officials) informed me, in those estimates, I think they called them, there was approximately \$7,000. * * * Stoddard made the statement at that time that he did not wish to carry Mr. Lee for any more money at that particular time, but would pay a check of \$1,500 or pay the amount of \$1,500 when these estimates that were presumably coming from Sacramento arrived."

H. B. Stoddard, defendant's cashier, testified:

"He (Lee) was overdrawn on May 22d, \$3,345.26. * * * Mr. Woods assured us that a check was being mailed from Sacramento for \$7,000; at one meeting he said the check had been mailed. * * * We agreed to pay that check if we got the money from the state that he said had been mailed to us at that time. * * * The promise was conditional, that if we received that money from the state that he said was being mailed to us, that would put Mr. Lee's account in such shape we could pay his check."

M. D. Wood, vice president and manager of defendant, testified:

"I stated to him at that time that we would recognize a check of Lee in his favor or his firm's favor when Lee had the money to his credit to pay it. * * * At the time Mr. Woods was there, he said the money was coming from the state right away, which would take up the overdrafts. * * * I did not tell him anything except what I have already stated, that we could not recognize any checks against Lee's account until he had the money to pay outside of the labor proposition. * * * I mean preferred claims, anything that was a preferred claim. * * * Such claims as can be filed against the job, before the labor commissioner, for instance. * * * I did not know, as a matter of fact, what money was coming from the state to Mr. Lee, because the money always went to Lee; it did not come to the bank."

The anticipated payment by the highway commission was not received and deposited with the bank until May 28, and then only in the sum of \$3,565.33. In the meantime the bank had continued to pay Lee's checks for labor and material, so that on May 28, after crediting Lee's account with the \$3,565.33, it showed an overdraft of \$1,068.02. The \$1,500 check was not presented to the bank for payment till about the middle of June, and at that time Lee's account was overdrawn. While Lee later deposited other sums with defendant, at no time after May 22d did he have sufficient funds to the credit of his account to pay the check.

From the foregoing evidence it is clear that the court was justified in finding that the defendant did not make the alleged promise to pay plaintiff's assignor \$1,500 or any sum.

The judgment is affirmed.

We concur: HART, J.; BURNETT, J.

57 Cal. App. 400

PEOPLE v. LEE MON. (Cr. 618.)

(District Court of Appeal, Third District, California. April 20, 1922.)

Prisons ⇨ 17½, New, vol. 19 Key-No. Series
—Statute prohibiting taking of opium into prison is valid.

Pen. Code, § 171a, making it a felony for any person not authorized by law to bring into any prison, jail, or reformatory any opium or other narcotic, is valid.

Appeal from Superior Court, San Joaquin County; George F. Buck, Judge.

Lee Mon, sometimes called Ah Fong, pleaded guilty to taking opium into a county jail. From a judgment sentencing him to the penitentiary, he appeals. Affirmed.

Walter F. Lynch, of Stockton, for appellant.

U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

BURNETT, J. The charging part of the information against defendant is as follows:

"The said Lee Mon (sometimes called Ah Fong) did on or about the 29th day of December, A. D. 1921, prior to the filing of this information, at and in the county and state aforesaid, willfully, unlawfully, and feloniously bring, take, and convey into the county jail of the county of San Joaquin, state of California, a quantity of opium, and at the time of so bringing, taking, and conveying said opium into said county jail as aforesaid, the said Lee Mon (sometimes called Ah Fong) was not then and there authorized by law so to do."

The defendant was duly arraigned and pleaded guilty. He was thereupon sentenced to the penitentiary in accordance with the requirement of the statute.

We find nothing erroneous or irregular in the proceedings. The information was based upon the provisions of section 171a of the Penal Code, and is in proper form. The only reason urged in the court below why judgment should not be pronounced against the defendant was that "the statute is invalid." But there seems to have been no argument upon the question, and there has been no appearance in this court on behalf of appellant.

No reason occurs to us why such statute should not be upheld, or why the judgment should not stand.

The judgment is affirmed.

We concur: **FINCH, P. J.; HART, J.**

57 Cal. App. 359

WILLIAMS v. MACONDRAY & CO.
(Civ. 4116.)

(District Court of Appeal, First District, Division 2, California. April 17, 1922. Hearing Denied by Supreme Court June 15, 1922.)

1. Master and servant $\hookrightarrow$ 80(5)—**Complaint held to warrant recovery of commissions on transaction proved.**

A complaint, alleging that plaintiff was employed to solicit orders for the purchase through defendant of merchandise for the account of the purchasers, and that defendant promised to pay him 25 per cent. of the gross profits on all business received from persons in plaintiff's territory, was broad enough to support a recovery of commissions on a transaction, though defendant contracted to furnish the goods and then purchased them on its own account, instead of purchasing for the customer's account.

2. Pleading $\hookrightarrow$ 398—**Variance as to nature of transaction on which commissions sought held immaterial.**

In an action for commissions on an order for goods obtained through plaintiff's solicitation, a variance between an allegation that the goods were purchased by defendant for the

account of the customer and proof that it contracted to furnish them to the customer and then purchased them on its own account was immaterial under Code Civ. Proc. §§ 469 and 470.

3. Contracts $\hookrightarrow$ 176(1)—**Construction is for court.**

The interpretation of a contract is a question of law for the court.

4. Corporations $\hookrightarrow$ 432(12)—**Evidence held to support finding of authority to employ one to solicit orders for share of profits.**

Evidence held to support a finding that the president of a corporation, who was ostensibly manager of its export department and with its vice president owned all of its stock, had authority to employ plaintiff to solicit orders for the purchase through defendant of goods for a share of the profits on such orders.

Appeal from Superior Court, City and County of San Francisco; **T. I. Fitzpatrick**, Judge.

Action by **H. R. Williams, Jr.**, against **Macondray & Co.** From a judgment for plaintiff, defendant appeals. Affirmed.

Thomas H. Breeze, of San Francisco, for appellant.

Wilson & Wilson, of San Francisco, for respondent.

LANGDON, P. J. This is an appeal by the defendant from a judgment for \$5,000 in favor of plaintiff entered upon a verdict of a jury.

The complaint alleges that on or about January 10, 1918, plaintiff and defendant entered into an agreement whereby plaintiff was employed by defendant to solicit trade with, and if possible obtain orders from, persons, firms, and corporations doing business in or residing in the republic of China (excepting Manchuria) Hongkong, Philippine Islands, Dutch Indies, Straits Settlements, Australia, and New Zealand for the purchase through defendant of goods and merchandise in the United States for the account of such persons, firms, and corporations, and that in and by said agreement it was understood and agreed that plaintiff should solicit said orders and promote said trade by communicating by mail or cablegram or otherwise with such persons, firms, and corporations, and it was agreed by and between plaintiff and defendant that in consideration of the performance of such services by plaintiff, the defendant would on demand, pay the plaintiff a commission of 25 per cent. of the gross profits made or earned by defendant on all business received by defendant from persons, firms, or corporations so residing or doing business in the said countries, or any of them, regardless of whether or not said business was received by defendant as the result of solicitation or

efforts by plaintiff; that immediately after the making of said contract, plaintiff entered upon the performance thereof, and that plaintiff thereafter continued to fully carry out and perform the said contract until the 30th day of April, 1919, at which latter time defendant wrongfully and unlawfully, and without any cause or reason whatever, refused to allow plaintiff further to carry out and perform said contract, and that defendant has ever since refused, and still refuses, to allow plaintiff further to carry out and perform said contract, and that plaintiff has at all times since the said refusal of defendant been, and he still is, ready, able, and willing to carry out and perform said contract on his part; that while plaintiff was, as aforesaid, carrying out and performing said contract, defendant received orders from persons, firms, and corporations, residing and doing business in said countries for the purchase by the defendant in the United States of goods for the account of said persons, firms, and corporations and for the shipment of said goods to said persons, firms, and corporations, and that all of the goods called for by the said orders were purchased by defendant in the United States for the account of the persons, firms, and corporations giving such orders, and have been shipped by defendant to said persons, firms, and corporations.

It is further alleged that defendant has paid plaintiff the commissions that became due on certain of said orders, but that defendant has made and earned gross profits on others of the said orders, amounting to the sum of \$45,600, and that plaintiff is entitled to 25 per cent. thereof.

Appellant's first contention is that there is a material variance between the proof and the allegations of the complaint. The argument is based upon the following facts: The profit made by defendant upon which it refused to pay plaintiff a commission was made upon one transaction with the Kailan Mining Administration of Tientsin, North China. There is no dispute about the fact that this business came from the territory covered by the contract between the parties. The record shows that the materials called for by this order were steel rails, and that these rails were not purchased by the defendant "for the account" of the customer, but a quotation of price or a "firm offer" was made to the customer by the defendant after defendant had secured quotations of price from the manufacturers. This offer to the customer was for a price 3 per cent. in excess of the price asked at that time by the manufacturers. The customer accepted, by cable, defendant's offer to furnish the rails. Deliveries were to be made at different times in the future. At the time of the offer and acceptance steel prices were unusually high because of the World War. Defendant, how-

ever, did not place its orders with the manufacturers at this time, but waited for several months, during which time a great reduction in the price of steel occurred, due to the signing of the armistice. Defendant thereupon purchased the rails at the greatly reduced prices, but held the customer to its acceptance of the offer at the higher price, thus making a large profit.

Defendant now seeks to escape liability to plaintiff, urging that he has pleaded that he was "employed * * * to solicit orders * * * for the purchase through defendant of * * * merchandise * * * for the account of such persons, firms, and corporations"; also, that the complaint alleges that "all of the goods called for by the said orders were purchased by defendant in the United States for the account of the persons, firms, and corporations giving such orders. * * *" It is asserted that such allegations do not warrant a recovery on the facts shown.

[1] With reference to the allegations of the complaint regarding the terms of the contract between the parties, we are of the opinion that such allegations are sufficiently broad to cover the facts proven. Aside from the allegation above quoted and referred to by appellant as being insufficient to include the facts proven, there is, as previously stated, an allegation that defendant promised to pay the plaintiff a commission of 25 per cent. of the gross profits made or earned by defendant on *all business* received by defendant from persons, firms, or corporations so residing or doing business in the said countries. This allegation is sustained by the testimony of plaintiff, and is sufficient to include the transaction admitted to have taken place between the defendant and the Kailan Mining Administration.

[2] While there is some variance between the allegation that the indebtedness arose by reason of orders for the purchase by defendant of goods for the account of persons in the territory named and the proof, which showed that the commission was due upon business handled in a somewhat different manner, we are not disposed to regard this matter as material, because it could not have misled the defendant to its prejudice in maintaining its defense under all the facts in evidence in this case. Code Civ. Proc. § 469; Fielding v. Iler, 39 Cal. App. 559, 562, 179 Pac. 519; Holden v. Mensinger, 175 Cal. 302, 165 Pac. 950. Plaintiff would have been entitled to have amended his pleading to conform to the proof or the fact could have been found in accordance with the proof. Code Civ. Proc. § 470.

It is argued by appellant that it is unlikely that the defendant intended to contract to pay a commission upon profits made upon direct sales to customers, but that it is more reasonable to suppose that defendant intend-

ed to contract with plaintiff to pay a commission only upon purchases "for the account" of customers. We do not see the force of this reasoning. It is entirely clear from the record that the defendant was in the habit of handling its business in either of two ways; by purchasing for the account of a customer, charging a commission for its services, or by making a "firm offer" to the customer and then buying the goods in the open market for resale to the customer. The circular letters and advertising matter sent out by the plaintiff in pursuance of his contract with the defendant solicited business from prospective customers in the prescribed territory, under either of these arrangements. The cablegrams covering the Kailan Mining Administration transaction were submitted to Macondray, by plaintiff, before they were sent out. Mr. Macondray was in charge of the department where plaintiff worked, and plaintiff necessarily deferred to his judgment and advice as to the method of handling business that came to the defendant company. Macondray was therefore in a position to direct that the business be handled in either manner. There seems to be equal reason for allowing plaintiff a commission upon the one transaction as upon the other. Regardless of the way the business was handled by the defendant, it came to them out of the territory assigned to plaintiff and in response to his advertising methods and plaintiff has testified that the agreement made with him was for "an interest to the extent of 25 per cent. of gross on business done or coming from China" and the other countries mentioned.

Defendant seeks to charge plaintiff with negligence because, immediately upon receipt of the acceptance from the Mining Administration of the offer made to it by defendant, plaintiff did not place orders with the manufacturers for the merchandise required. Of course, the question of whether or not the plaintiff performed his duties carefully or negligently or used good or bad judgment during his period of service with the defendant is not an issue in this case. It would seem, however, that criticism of plaintiff's method of procedure would come rather ungracefully from the defendant, in view of the fact that plaintiff's failure to immediately place such an order resulted in a profit of many thousands of dollars to defendant, while the pursuit of the only other method suggested as proper would have made anything more than a nominal profit an impossibility. Defendant contends that the fortunate outcome was the result of mere chance, and that plaintiff was not warranted in taking this chance. However, plaintiff has testified that when he made the offer to the mining administration it was after consultation with the president of the defendant company, who was also the manager

of the export department; that prices of steel were then so high that the defendant was assured they would not go higher, and in fact the defendant was expecting a drop in such prices and also a drop in the freight rates. By the time shipment was made of this order freight rates had decreased by 50 per cent., and the price of steel had declined sufficiently to afford the defendant a profit, as shown by their books, of \$30,661, after deducting a "manager's bonus." The jury allowed to the plaintiff \$5,000.

[3] Complaint is made of the refusal of the trial court to give certain instructions to the jury by which the contract pleaded is construed to cover only transactions with customers by which goods are bought for the account of such customers. Our previous discussion of the pleadings answers this objection of appellant. We do not consider the contract pleaded to be so limited in its scope, and we think such instructions would have been erroneous. It is true, as contended by appellant, that the question of the interpretation of a contract is a question of law for the court, but the instructions offered by defendant on this subject do not fairly interpret the contract which plaintiff pleaded, and which he proved, not only by his own testimony, but by numerous other facts and circumstances appearing in the record and hereinafter referred to.

[4] The appellant also contends that there is no proof of the authority of Mr. Macondray to enter into such a contract on behalf of the corporation. Briefly, and in substance, the proof is: All of the shares of the capital stock of defendant were owned by Mr. Macondray and Mr. Rathbone. Mr. Macondray was the president of the company; Mr. Rathbone was the vice president and the manager of the insurance department. Mr. Macondray was, ostensibly at least, the manager of the export department of defendant, to which department of its business the contract with plaintiff related. Macondray employed and discharged clerks in said department, ordered goods, and saw that it was shipped out. No one but Macondray and Mr. Connolly participated in the business connected with the export department; the contract with the Kailan Mining Administration, upon which this commission is claimed, was made by Macondray on behalf of the defendant. There were four directors of defendant, Mr. Macondray, Mr. Kittle, Mr. Connolly, and Mr. Rathbone. The directors, practically, never held a meeting. Mr. Kittle, one of the directors, was merely a "dummy director," owning but one share of the stock, and never participated in the business. Mr. Connolly discussed with both plaintiff and Mr. Macondray the contract involved here, and was apparently satisfied with the same. Mr. Rathbone knew of the contract with plaintiff about January or Feb-

ruary, 1918, which was shortly after it was made, and, apparently, he made no objection to it. Mr. Connolly himself had a contract with defendant which was similar to the contract held by plaintiff, and such contract had been made with Connolly by Mr. Macondray as president of the defendant. It was never authorized by or acted upon in any way by the directors, and yet such contract was recognized by the defendant as a binding obligation, and payments were made thereunder to Connolly. Defendant also recognized plaintiff's contract, and furnished him with a statement of commissions due him thereunder—in fact, paid \$500 upon such commissions and tendered another small sum in full settlement, which was refused. It was only when plaintiff insisted upon having a commission upon this large transaction with the Kailan Mining Administration that any question was raised regarding the authority of Macondray to enter into this contract on behalf of defendant.

Under all of these facts we think the implied finding of the jury that Macondray did have authority to enter into this contract on behalf of the defendant was justified. *Crowley v. Genesee Mining Co.*, 55 Cal. 273, 276; *Stevens v. Selma Fruit Co.*, 18 Cal. App. 242, 250, 123 Pac. 212; *Streeten v. Robinson*, 102 Cal. 542, 545, 546, 36 Pac. 946; *Scott v. Superior Sunset Oil Co.*, 144 Cal. 140, 77 Pac. 817; *Newhall v. Levy Bag Co.*, 19 Cal. App. 9, 25 et seq., 124 Pac. 875; *Algeltinger v. Burke*, 176 Cal. 621, 626, 627, 169 Pac. 373; *Reardon v. Richmond Land Co.*, 21 Cal. App. 357, 358, 131 Pac. 894.

There are no other matters requiring discussion.

The judgment is affirmed.

We concur: STURTEVANT, J.; NOURSE, J.

57 Cal. App. 401

CHAMBERS v. BOARD OF SUP'RS OF TEHAMA COUNTY. (Civ. 2411, 2452.)

(District Court of Appeal, Third District, California. April 20, 1922.)

1. Waters and water courses ⚡225—Proceeding for organization of irrigation district held judicial.

A proceeding before the board of supervisors for the organization of an irrigation district under St. 1897, p. 254, requiring a notice, a hearing, the taking of evidence, and a judgment, presents all the elements of a judicial proceeding.

2. Waters and water courses ⚡225—On writ of review from order of a board of supervisors, only evidence before board considered.

On writ of review from an order of a board of supervisors denying a petition to establish an irrigation district, the investigation is limited

to the evidence before that board in determining whether it had any discretion to dismiss the petition.

3. Waters and water courses ⚡225—Board's determination on credibility of witnesses and weight of the evidence held conclusive.

On writ of review from an order of a board of supervisors refusing to establish an irrigation district, the determinations of the board on questions of weight of the evidence and credibility of the witnesses are conclusive.

4. Mandamus ⚡28—Office of writ of mandate stated.

The office of a writ of mandate is, not to control the discretion of an inferior tribunal, but to compel it to act where only one course is open to it under the law.

5. Waters and water courses ⚡225—Whether owners of town lots qualified petitioners for irrigation district held question of fact.

The primary purpose of St. 1897, p. 254, providing for the establishment of an irrigation district on petition to a board of supervisors signed by a majority of the owners of "lands susceptible of irrigation from a common source," was to irrigate agricultural lands; but whether owners of town lots were qualified petitioners in any particular case was a question of fact for the board of supervisors.

6. Waters and water courses ⚡225—Board of supervisors have power to include a town within irrigation district.

A board of supervisors with power to create irrigation districts on petition of landowners have authority to determine whether a town will be benefited by water for irrigation and may include it within the boundaries of an irrigation district.

7. Waters and water courses ⚡225—Record held to authorize conclusion that petition for irrigation district was not signed by majority of landowners.

In a petition to a board of supervisors for the establishment of an irrigation district under St. 1897, p. 254, and amendatory acts, the record held to authorize the board's conclusion that petitioners had failed to maintain the burden of proving that petition was signed by majority of the qualified landowners.

8. Waters and water courses ⚡225—Signatures to petition for establishment of irrigation district not to be withdrawn after publication.

Irrigation Act, § 2, providing that signatures to a petition for the establishment of an irrigation district may be withdrawn at any time before publication, implies that such signatures may not be withdrawn thereafter.

Petition by O. W. Chambers against the Board of Supervisors of the County of Tehama. From an order denying the petition, the petitioner applies for writ of review and for a writ of mandate. Denied.

McCoy & Gans and W. P. Johnson, all of Red Bluff, for petitioner.

Fred C. Pugh, of Red Bluff, for respondent.

BURNETT, J. Petitioner made an original application to this court for a writ of review (No. 2411) to annul an order or resolution of the board of supervisors of Tehama county denying a petition for the organization of an irrigation district to be known as Los Molinos Colony irrigation district, and later, an application for a writ of mandate (No. 2452) to require the board to adopt a suitable resolution determining that all the provisions of the Irrigation Act of March 31, 1897 (Stats. 1897, p. 254), and the amendatory acts have been complied with. The two applications were made for the reason that petitioner was in doubt as to whether it is a case for certiorari or for mandate, and it was stipulated at the hearing herein that they might be considered together by this court and covered in one opinion.

The petition to the board of supervisors was in proper form and was published as required by the statute. A written opposition or contest was filed by certain property owners within the proposed district, and after a public hearing the board denied the petition. Several questions have been discussed by counsel, but the only serious controversy seems to be as to whether the evidence before the board of supervisors showed without substantial conflict that the petition for the organization of the district was signed by the requisite number of property owners in view of section 1 of said act, providing:

"A majority in number of the holders of title or evidence of title to lands susceptible of irrigation from a common source, and by the same system of works, including pumping from subsurface or other waters, such holders of title or evidence of title representing a majority in value of said lands, may propose the organization of an irrigation district, under the provisions of this act."

[1] In considering this question there can be no doubt that the board exercised a judicial function.

"The board must hear all relevant and competent evidence offered, and thereupon determine whether or not the petition is signed by a majority in number of the holders of land within the proposed district susceptible of irrigation from the same source or system, and whether or not the lands held by such signers represent a majority in value of such lands within the district. * * * This scheme presents all the usual elements of a judicial proceeding, the notice, the hearing, the taking of evidence, and the judgment." *Imperial Water Co. v. Supervisors*, 162 Cal. 14, 120 Pac. 780.

[2] We take it, also, that in the determination of the merits of these applications we are not to try any issues of fact that were presented to the board of supervisors, but our investigation is limited to an inquiry as to the evidence before said board and whether, in view of the situation as then and there existing, the board had any legal discretion

to dismiss or deny the petition. *Inglin v. Hopkin*, 156 Cal. 483, 105 Pac. 582; *Harelsion v. S. San Joaquin Irr. Dist.*, 20 Cal. App. 324, 128 Pac. 1010.

[3, 4] If there was any substantial evidence before the board, or there was any ground for a rational inference, that said petition was not signed by the requisite number of property owners, and, for that reason, the board decided against the petitioners, manifestly we cannot say that the board exceeded its jurisdiction, for the law expressly clothes the board with the authority to decide that very question in accordance with the view entertained by said board of the weight of the evidence and the credibility of the witnesses. Likewise, in such case the writ of mandate would not issue because its office is not to control the discretion of an inferior tribunal, but to compel it to act where only one course is open to it under the law; in other words, to require that said tribunal or officer discharge a plain ministerial duty. These propositions need not be discussed any further, as they are elementary and not disputed.

What, then, was the situation before the board in relation to this question? Without reviewing in detail the evidence as to the number of competent and qualified signatures to the petition we may accept the admission of petitioner that the number is 140. This is shown by the supplementary affidavit of H. S. Gans, one of the attorneys for petitioners, filed with the board on October 17, 1921.

[5, 6] What was the showing as to the whole number of qualified property owners within the proposed district? As to this, it was not disputed that 319 names appeared upon the assessment roll. From this number it is the claim of petitioner that 104 should be deducted because they were the owners of lots in the towns of Los Molinos and Dairyville. If such deduction were made we would have, of course, 215, of which 140 is obviously more than one-half. But here we are confronted with the contention of respondent that the showing before the board of supervisors did not justify any such deduction. Before considering the disputed question of fact, it is well to note the peculiar language of the statute requiring the signatures to the petition to be of a majority of the owners of "lands susceptible of irrigation from a common source." It does not necessarily follow from this that town lots should be excluded from consideration. The primary purpose of the act is to accomplish the irrigation of agricultural lands, and in the sense in which the expression is used in the statute the ordinary town lot should not be classified with said lands; but it is true that some town lots are of such size and put to such use as to require irrigation, and the difference between such lots and agricultural lands would be only one

of degree and would not justify any discrimination. Whether the owners of the town lots should be deemed qualified petitioners in any particular case would be a question of fact to be determined by the board of supervisors to whose discretion the Legislature has committed it. It is also true that the board has authority to determine whether a town will as a whole be benefited directly by water for irrigation and so include it within the boundaries of an irrigation district. The foregoing follows from a consideration of the statute and the decisions of the Supreme Court in *Board of Directors v. Tregear*, 88 Cal. 334, 26 Pac. 237; *In re Central Irrigation District*, 117 Cal. 382, 49 Pac. 354; *Imperial Water Co. v. Supervisors*, 162 Cal. 14, 120 Pac. 780; *La Mesa Homes Co. v. La Mesa, etc., Irr. Dist.*, 173 Cal. 121, 159 Pac. 593.

[7] Turning to the record before the board as to this feature of the case, we find that petitioners, after describing the lands to be included in the proposed district comprising some 12,000 acres, alleged in their petition:

"That said lands are susceptible of irrigation from the common sources and by the same system of works mentioned herein."

This allegation was not challenged by the written objection filed by the contestant property owners except that there appeared upon said petition "the names of twenty-nine persons who are the owners and holders of the title or evidence of title to town lots in the town of Los Molinos and are not the owners, or the holders of title or evidence of title to any other lands within said proposed irrigation district; said town lots not being agricultural lands and not being lands that will be benefited by irrigation," and the names of six persons "who hold the title or evidence of title to town lots in the town of Danville." There was thus presented an issue as to the property qualification of only thirty-five of those on the assessment roll, and while it may not be that petitioners would be estopped from showing before the board that a larger number was disqualified, yet the board of supervisors, acting as a judicial tribunal, would be justified, at least where no proof was offered to the contrary, in assuming that as to the remainder they were owners of lands susceptible of irrigation from a common source. And we find that no evidence was offered before the board as to this disqualification except as to those challenged by the contestants, and the effect of the showing in that regard is that twenty-four of petitioners were included in that class.

It is the contention, however, of petitioner that when it is shown that certain persons were owners of town lots, it must be inferred that such lots were not susceptible of irrigation from a common source and the owners were therefore disqualified. The only evi-

dence before the board shown by the record as to this is the following testimony of H. S. Gans:

"That of the said 319 persons whose names appear upon the said assessment roll, 91 were assessed upon property within the town of Los Molinos; that of said 91 persons, 27 were signers to the said petition for organization of district; that of said 319 persons, 13 were assessed upon property within the town of Danville; that of said 13 persons, 3 were signers to the said petition for organization of district; that taking the sum of 91 and 13 names, to wit, 104 names, from said 319 names, would leave the balance of 215 names as on the assessment roll; that 4 of said 27 persons signing said petition and on the assessment roll for lots within the town of Los Molinos, as aforesaid, were also on the said assessment roll for lands not in said town of Los Molinos and within the boundaries of said irrigation district."

There was, thus, no description whatever of the character or extent of the property within said towns not represented on said petition. It was not even designated as lots but property, and it would not be unreasonable to suppose that in these sparsely populated towns or villages the several tracts of land may have been of considerable extent and susceptible to irrigation. However, if we concede that from that evidence the board of supervisors should have drawn the inference that this property should not have been included in the calculation at all, there is nothing to show that the owners were not assessed upon other property in the district which should be so considered. It is to be observed that there is evidence in this respect as to those who signed the petition, but not as to the balance.

It is not to be disputed that the burden of proof was upon petitioners to prove every fact that lies at the foundation of their proceeding. They allege and were required to prove that their petition was signed by a majority of all the qualified owners of property within the proposed district. This involved, of course, the two considerations, to wit, the number of eligible names on their petition and the whole number upon the assessment roll. If either of these facts was left to conjecture or was not established satisfactorily, this court cannot say that the board exceeded its jurisdiction or violated a plain ministerial duty. As we view the record, we cannot say with any degree of certainty that more than 24 names should have been deducted, by reason of the ownership of lands not susceptible to irrigation, from the assessment roll. This would leave 295, and the 140 would therefore fall short of the required number.

[8] It appears that about 90 of those who signed said petition filed with the board, at the time of the hearing, a written application to have their names withdrawn and stricken from the petition upon the ground that they

signed it under a misapprehension. Petitioner urges that this circumstance probably influenced the board in its denial of the petition. But the said Irrigation Act in section 2 provides that "signatures to the petition may be withdrawn at any time before the publication is commenced, as in this section required," etc., thereby implying that it may not be done thereafter. Since the record does not show to the contrary, we must assume that the board of supervisors had due regard for this provision of the statute and gave no effect to the attempted withdrawal. Indeed, the minutes show the ground upon which the order was based as follows:

"Whereas, the above matter having been heard by this board and evidence oral and documentary having been introduced and it appearing therefrom that the said petition does not comply with the requirements of an act approved March 31, 1897, and the subsequent acts amendatory thereof and supplemental thereto, in that said petition does not contain, or is not signed by a majority in number of the holders of title, or evidence of title as required by said act and the amendments thereto.

"Now, therefore, be it resolved, that it is the sense of this board, and the board hereby finds, as a fact, that said petition contains less than a majority of the holders of title and evidence of title as shown by the assessment roll of Tehama county for the year of 1921, that the said petition be, and the same is hereby denied."

We think it cannot be held that the board acted without jurisdiction or in violation of its plain duty; and, moreover, if it might be said that there was sufficient evidence to justify a conclusion in accordance with the contention of petitioner, the state of the record is such that we should exercise our discretion in favor of respondent.

The order to show cause in each case is discharged, and the peremptory writ denied.

We concur: FINCH, P. J.; HART, J.

57 Cal. App. 395

SCHOLLES v. SILVIUS. (Civ. 3688.)

(District Court of Appeal, Second District, Division 2, California. April 19, 1922.)

1. Evidence $\S$ 246—Excluding attorney's letter admitting one-fourth interest in property only, instead of one-half claimed, error.

In an action to establish a trust and quiet title to a one-half interest in real property, the exclusion of a letter written by plaintiff's attorney burdened with the admission that her interest in the property was but a one-fourth was error.

2. Evidence $\S$ 258(2)—Letter written by attorney held to be utterance of client.

In an action to establish a trust and quiet title to a one-half interest in a parcel of real

property, evidence held to show that a letter admitting ownership of a one-fourth interest only written by plaintiff's attorney, was written under her express direction, and that it was her utterance, and not merely that of her counsel.

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Action to establish a trust and quiet title by Grace M. Scholes against F. D. Silvius. From judgment for plaintiff, defendant appeals. Reversed and remanded.

Hocker & Austin, of Los Angeles, and James F. McBryde, of Glendale, for appellant.

Leon R. Yankwich and Edward H. Allen, both of Los Angeles, for respondent.

WORKS, J. This is an action to establish a trust in a parcel of real property and to quiet title to an undivided one-half interest in it. The complaint alleges that upon certain considerations the parties had agreed to take title to the property, that defendant took title thereto in his own name in severalty, and that he refused to convey to plaintiff her one-half interest. Plaintiff had judgment, and defendant appeals.

It is contended by appellant that the trial court erred in refusing to receive a certain letter in evidence. The missive was written by respondent's counsel to appellant, and it was offered upon the theory that it contained an admission that respondent was entitled to but a one-fourth interest in the property; the objection to its reception in evidence being that it was but an offer of compromise. The body of the letter follows:

"Mrs. Grace Scholes of this city has retained me to protect her interests regarding the property located at 3026 South Hoover street in this city in which she has a one-fourth interest as a result of the agreement entered into between you and Mrs. Scholes at the time the property was purchased.

"A search of the records in the county recorder's office made this morning discloses the fact that no transfer of this property has been made, and, unless I receive a written assurance from you by return mail that you intend to live up to your agreement to the extent that she may be allowed to occupy the property at least until such time as the sum of \$325 shall have been applied as rent at the rate of \$25 per month for the apartment, I am instructed to file an action to have her declared an owner in said property to the extent of one-fourth interest.

"The sum of \$325 is arrived at by using the sum of \$3,500 as the actual value of the property. Mrs. Scholes is willing to settle the whole matter on the above basis; that is, that she be allowed to occupy the premises on the basis of \$25 per month rent so long as any part of the said sum of \$325 still remains due

her; otherwise we will commence suit for an interest in the property."

It should be observed in explanation of this letter that the mention of the figures contained in it and the offer of appellant to accept an occupancy of the premises in settlement of her claim to an interest in the property all arose from certain negotiations which, according to the testimony of appellant, had preceded the final agreement to acquire the place. It is strikingly apparent from a perusal of the letter that it is burdened with the admission that respondent's interest in the property was but a one-fourth interest. The only question to be considered is whether the admission is one which may be termed an independent admission. Whether it is so appears to us to be settled by *Rose v. Rose*, 112 Cal. 341, 44 Pac. 658. The exact nature of the paper which was received in evidence in that case is not disclosed by the opinion of the Supreme Court, but we have examined the record on appeal in the litigation and have ascertained its contents. The case was a divorce case and one of the questions for determination was whether certain property was the community estate of the parties. The paper mentioned was signed by the husband. It opened with the assertion:

"I and Maria M. Rose are husband wife [sic], and are owners of the following community property, and which constitutes all the property that I have or own in my own name or otherwise."

There was next a statement that the two could not longer live happily as man and wife, followed by an offer to divide all the property describing it, equally with the wife. In disposing of the question as to the admissibility of the paper the Supreme Court said:

"The court did not err in admitting, on the issue as to the character of the property, the paper signed by defendant, in which he offered to divide the property, and described it as community property. It was admitted solely on the question as to whether the property was community or separate, and for this purpose it was proper as a declaration by the defendant, even conceding that the paper is to be regarded as an offer of compromise. The declaration as to the community character of the property was not essential to the purposes of the compromise, and is, therefore, not to be regarded as a concession made for that purpose. While, therefore, it would not be competent to admit an offer of compromise as such, the declaration therein of facts involved in the controversy which are not mere concessions made for the purpose of such offer, but are statements of independent facts, are admissible against the party making them.

"The rule is thus stated by Mr. Rice: 'It is

never the intention of the law to shut out the truth, but to repel any inference which may arise from a proposition made, not with the design to admit the existence of a fact, but merely to buy one's peace. If an admission, however, is made because it is a fact, the evidence to prove is competent, whatever motive may have prompted to the declaration. But, if the party admits a particular item in an account, or any other fact, meaning to make the admission as being true, this is good evidence, although the object of the conversation was to compromise an existing controversy.' 1 Rice on Evidence, 435."

[1] It seems clear that *Rose v. Rose* is in point here. In fact, if there is any difference between that case and this, it operates against, rather than in favor of, respondent. The statement of Rose that the property mentioned by him was community property bore a closer relation to his proposition for a division of it than respondent's statement that she had but a one-fourth interest in the property in question here bears to her offer to accept an occupancy of it in lieu of an interest in common in it. We are satisfied that the court erred in excluding the letter.

[2] Respondent contends that the communication was inadmissible because it was written by her counsel, and not by herself. There are two conclusive answers to this contention. In the first place, the point was not raised in the trial court, the only objection to the letter being that it was an offer of compromise; secondly, the letter was identified by respondent herself while under cross-examination, and the offer of it was based upon that identification. The testimony on this head was as follows:

"Q. Now, you employed Mr. Allen [her counsel] to adjust this matter for you? A. To adjust this matter; yes; because I thought he [appellant] was trying to cheat me out of my property. Q. And you explained to Mr. Allen fully all the facts and circumstances of the surrounding case? A. I did. Q. And at your suggestion and with your consent Mr. Allen as your agent wrote Mr. Silvius a letter asking a settlement of the matter? A. He tried to compromise, which failed. Q. You authorized the writing of the letter. Do you know whether or not this is the letter that he wrote (passing letter to the witness)? A. It is. Mr. Austin: We ask that that be received as Defendant's Exhibit 1. A. (continuing). I had this letter written when I thought the property was sold."

It is apparent from this examination that the letter was written under the express direction of respondent, and that it was her utterance, and not merely that of her counsel.

Judgment reversed, and cause remanded for a new trial.

We concur: FINLAYSON, P. J.; CRAIG, J.

188 Cal. 765

PERCY v. PERCY. (L. A. 7109.)

(Supreme Court of California. May 25, 1922.)

- 1. Divorce** ⚡184(10)—Except that plaintiff's testimony must be corroborated, findings on conflicting evidence not disturbed.

Rule that findings of fact on conflicting evidence may not be disturbed on appeal is applicable in a divorce case, with the single exception that, before a divorce can be granted, plaintiff's testimony must, under Civ. Code, § 130, be corroborated.

- 2. Divorce** ⚡127(4)—What is sufficient corroboration of plaintiff stated.

The corroboration of plaintiff's testimony, which, under Civ. Code, § 130, is necessary for divorce, is not of every act of which there is testimony, but it is enough that there is evidence, circumstantial or direct, substantially tending to confirm the party's testimony on a considerable number of material facts.

- 3. Divorce** ⚡127(4)—Corroboration of plaintiff's testimony as to residence held sufficient.

Corroboration of testimony of plaintiff in divorce as to his residence in county of suit held sufficient.

- 4. Divorce** ⚡62(6)—Plaintiff could establish residence while on military duty in an army camp.

Plaintiff in divorce was not precluded from establishing his residence in the county of suit because, at the time in question, he was there on military duty in an army camp.

- 5. Divorce** ⚡254—Judgment awarding community property unauthorized by pleadings or submission.

The issue of division of the community property not having been submitted to the court by the pleadings or otherwise, but the evidence of, and reference to, the value of such property having been incidental to the issue of cruelty, predicated on extravagance and the allowance of costs to the wife, judgment so far as awarding to the husband the balance of the community property, after payment of costs awarded to the wife, was unjustified.

- 6. Divorce** ⚡322—Rights in community property may be left for subsequent action.

The rights in the community property need not be litigated in an action for divorce, but may be left for determination in a subsequent action, in which the court may exercise its discretion where divorce was awarded on the ground of extreme cruelty.

- 7. Divorce** ⚡194—Right to costs on appeal to be determined by Supreme Court.

Under Code Civ. Proc. §§ 1027, 1034, and the rules of court, the determination of whether appellant in a divorce action is entitled to her costs on appeal is for the Supreme Court.

In Bank.

Appeal from Superior Court, San Diego County; C. N. Andrews, Judge.

Action for divorce by James Fulton Percy against Josephine Levina Percy. Judgment for plaintiff, and defendant appeals. Modified.

Lucien Gray, of Los Angeles, for appellant. Gordon Gray and Dwight D. Bell, both of San Diego, and Hunsaker, Britt & Cosgrove, of Los Angeles, for respondent.

WILBUR, J. The plaintiff husband was granted an interlocutory decree of divorce on the ground of extreme cruelty and desertion, and the defendant was awarded \$1,000 as her share of the community property, payment of which was ordered forthwith. The defendant appeals upon the ground that the evidence is insufficient to justify the findings of the trial court as to residence, cruelty, and desertion, and predicates such contention in part upon the statutory requirement that the evidence of the parties in a divorce action must be corroborated. Civ. Code, § 130. It is conceded that the evidence on most of the contested points is contradictory, but it is nevertheless claimed that there is not sufficient corroboration to justify the respective findings attacked.

[1, 2] Appellate courts are powerless to interfere with the findings of fact, where the evidence is conflicting. This rule applies to divorce cases as well as to any other, with the single exception that, before a divorce can be granted, the testimony of the plaintiff must be corroborated. Civ. Code, § 130. The rule in this regard is correctly stated in the respondent's brief, as follows:

"Corroboration of every act sworn to by the plaintiff is not required. Evidence, circumstantial or direct, substantially tending to confirm the plaintiff's testimony upon a considerable number of material facts, is sufficient." *Cooper v. Cooper*, 88 Cal. 45, 48, 25 Pac. 1062; *Andrews v. Andrews*, 120 Cal. 184, 52 Pac. 298; *Avery v. Avery*, 148 Cal. 239, 82 Pac. 967.

Without a discussion of the evidence or of the findings in detail it is sufficient to say that the record shows ample corroboration of the plaintiff's testimony.

As to the finding of desertion, appellant claims that the plaintiff's testimony concerning her refusal to have reasonable marital intercourse is not corroborated, except by her admission, and that therefore the evidence is insufficient to justify a decree upon that ground. In view of our conclusion that the evidence is sufficient to support the finding of the trial court upon the issue of extreme cruelty, it is immaterial whether or not the testimony with reference to desertion is corroborated.

[3, 4] It is claimed that there is not sufficient corroboration to sustain the testimony of the plaintiff as to his residence in the county of San Diego for more than a year

before the action was commenced. It is conceded that the plaintiff actually lived within the county of San Diego for more than a year before the commencement of the suit. He testified that he lived there with the intention of making California and, for the time being, the county of San Diego, his permanent residence. He was at that time in the United States army, serving as a physician in the military hospital at Camp Kearny. His actual presence within the county of San Diego for more than a year immediately prior to the bringing of the action was amply corroborated by the testimony of others, and his intention to make California his residence was corroborated by various circumstances indicating his intent to establish his residence in California. Plaintiff's testimony as to his intention to remain in California was corroborated by the application to the state medical board for a license to practice; by his investigation concerning his right to practice in California; by his conference with physicians with a view to establishing a partnership here; by his declarations from time to time of his intention to remain in California; by his application to join a secret order which required a residence for six months in California as a condition to initiation; by his registration to vote, wherein he took the usual oath that at the next election he would have been one year within the state of California. The fact that, at the time in question, he was on military duty in an army camp did not preclude him from establishing his residence there if he so desired. *Stewart v. Kyser*, 105 Cal. 459, 464, 39 Pac. 19; *Budd v. Holden*, 28 Cal. 124, 127; *Estate of Gordon*, 142 Cal. 125, 75 Pac. 672.

[5] Appellant contends that the portion of the decree awarding her \$1,000 as her proportion of the community property and directing its payment forthwith is premature and beyond the issues, and for that reason the case should be reversed. It is conceded by the respondent that the order directing the immediate payment of the \$1,000 is premature and therefore erroneous, but that the appellant is not aggrieved by that portion of the order which directs the immediate payment to her of the \$1,000. This is undoubtedly true. The serious question in the case is whether or not the rights of the parties as to the community property was submitted to the court for decision. This issue was not raised in the pleadings. It is claimed by the appellant that all the evidence in regard to the community property and the parties was introduced, not with a view of ascertaining the character and extent of this property for purposes of division, but merely as incidental to the issue of extreme cruelty which was in part predicated upon the extravagance of the defendant. The appellant therefore claims that she is not bound by the

rule which requires that judgments shall be affirmed even though the formal issues are not raised by the pleadings, where the parties in fact litigated the question in the lower court, and the judgment determined the actual questions litigated.

Immediately upon the court orally announcing its conclusion that the plaintiff was entitled to a divorce upon both grounds stated in the complaint and that the findings would be prepared by the plaintiff in the usual way, the defendant asked the court to take into consideration the question of costs. It was suggested to the court that no preliminary motion had been made by the defendant for costs and that the plaintiff had furnished no money for costs for the defendant. Defendant's attorney thereupon stated: "It seems to me there should be some allowance to cover her costs and expenses at least." The court thereupon discussed the value of the community property as shown by the evidence. This included the value of the plaintiff's office at Galesburg and its equipment and \$3,000 in liberty bonds. The court then asked counsel if they wished to be heard further on the question of costs before it was decided. Plaintiff's counsel replied that he did. In the course of the discussion as to the costs counsel agreed that, under the law, the court had power to award all the community property to the plaintiff where the divorce was granted upon the ground of cruelty. The court then stated that the defendant had made a clean cut defense which was justified and that he felt that he "might well take into account what she had expended in making that kind of a defense, and deduct it from the community property." Thereupon the following occurred:

"Mr. Lucien Gray: It is before your Honor that the doctor has \$76,000 insurance and from his insurance he expects to receive an income when he is 64 years of age, besides this other property. I simply call that to the attention of the court. It is only approximate. All the expenses of the defendant have to be met; she made a trip back to take depositions and so forth. If the court wants to take that up now or at any other time we will be glad to take it up and make any suggestions or recommendations about it. I would like to have it all settled, if I could, while we were here, particularly as both Mr. Cosgrove and myself are going back to Los Angeles.

"Mr. Cosgrove: We think the court ought to decide it now.

"The Court: I will tell you, it is a purely arbitrary thing with me. I think she is financially on a safe footing; it, however, does not occur to me when the suggestion is made that it would not be out of keeping with the situation to indemnify her to some extent against the costs made in the kind of a defense that she has conducted here. I suggest that she be allowed a thousand dollars, and that it be arranged so that it may be paid within the possibilities of the plaintiff.

"Mr. Lucien Gray: Of course a thousand

dollars would hardly cover her actual court expenses, her depositions and actual costs in court, to say nothing of her personal expense or counsel fees.

"The Court: Well, it is an endeavor to help out in the court costs, and in the actual expenditures that I had that in mind; I had no idea of what they were, or anything of that kind."

After further discussion as to the expenses of the litigation the court stated:

"Mr. Lucien Gray: I understood him to say he had all his insurance so that at 64 years of age he would receive an income.

"The Court: I did when I heard him, but I do not see how he figured it. He would have a very meager income from anything the testimony shows he had in the way of life insurance. I think I will let it go at a thousand dollars and try and arrange it in the matter of the judgment how it should be paid."

This colloquy does not justify the conclusion that the parties submitted to the court an issue which is not contained in the pleadings, namely, the division of the community property. Neither plaintiff nor defendant has alleged the nature nor extent of the community property. The colloquy occurred after the court had announced its decision and is directed wholly to the question of cost which was a matter in the discretion of the trial court. Code Civ. Proc. §§ 1022, 1025. The statement about the division of the property was wholly incidental to the question of costs under discussion. Under section 137 of the Civil Code the court was authorized, during the pendency of the action, to require the plaintiff to pay for the support of the defendant and her expenses in prosecuting the action. As no such preliminary order had been made and as the court at the time of the rendition of its judgment had a right to require the plaintiff to pay the defendant's costs (Code Civ. Proc. § 1025), it is apparent that the whole matter referred to by counsel, as submitted to the court at that time for its decision, was the matter of costs, and that the order of the court, as announced at the hearing, was one for the payment of these costs to the defendant from the community property, thus diminishing the total amount of community property. That portion of the decree which directs the plaintiff to pay defendant \$1,000 from the community property is in accordance with the request of the parties that the court fix the costs to be paid by the plaintiff and the manner of its payment, but the judgment, in so far as it awards to the plaintiff the balance of the community property, is justified neither by the pleadings nor by the subsequent conduct of the parties. It was a decision upon an issue not presented to the court, namely, the division of the community property.

[6] The parties were entitled to litigate their marital status without reference to

their community property and to leave their rights in the community property to be determined by a subsequent action in which the court might exercise its discretion as to a proper division thereof, inasmuch as the divorce was awarded to plaintiff upon the ground of extreme cruelty. *Brown v. Brown*, 170 Cal. 1, 147 Pac. 1168. The judgment must be modified.

[7] Under the statute and rules of the court it is necessary for this court to determine whether or not the appellant is entitled to her costs (Code Civ. Proc. §§ 1027, 1034) upon appeal. The bulk of the transcript, containing 846 pages, is taken up with a presentation of the conflicting evidence with relation to the various acts of cruelty and residence, and therefore is unnecessarily long.

The trial court is directed to modify its fifth conclusion of law to read as follows: "That defendant is entitled to \$1,000 to be paid to her as costs from the community property of said parties," and to modify the last paragraph of the interlocutory decree to read as follows: "It is further ordered, adjudged, and decreed that plaintiff pay to the defendant the sum of \$1,000 costs out of the community property of said parties." It is further ordered that appellant have one-half of her costs of printing transcript on appeal, the costs of printing her briefs, not exceeding the statutory allowance of \$100, and her other costs on appeal.

We concur: SHAW, C. J.; SLOANE, J.; LENNON, J.; SHURTLEFF, J.; LAWLOR, J.; RICHARDS, Justice pro tem.

188 Cal. 762

Ex parte NEWELL. (Cr. 2460.)

(Supreme Court of California. May 23, 1922.)

1. Counties 55—Court may determine existence of facts on which declaration of necessity of immediate effect of ordinance based.

The determination of the board of supervisors that facts existed which made it necessary for an ordinance to take effect immediately on its passage, as provided in Pol. Code, §§ 4057, 4058, are not conclusive, and the court may determine for itself the existence or nonexistence of the facts on which the declaration of necessity was based.

2. Counties 55—Ordinance held not effective until 30 days after passage.

Ordinance declaring it to be unlawful for any person to ship or offer for shipment citrus fruits, showing evidence of 15 per cent. of frost injury, is not to be interpreted as a measure for preservation of public health, which under Pol. Code, § 4058, could be made to take effect immediately and it could not take effect till 30 days after its passage, as provided in section 4057.

In Bank.

Application of Hugh Newell for a writ of habeas corpus against the Sheriff of Los Angeles County. Writ granted.

Leonard, Surr & Hellyer, of San Bernardino, for petitioner.

U. S. Webb, Atty. Gen., and Thomas Lee Woolwine and Tracy Chatfield Becker, both of Los Angeles, for respondent.

SHAW, C. J. The petitioner, by a proceeding in habeas corpus, seeks release from custody on a charge that he has violated the provisions of an ordinance of the county of Los Angeles, passed by the board of supervisors on January 22, 1922.

The provision of the ordinance, which he is charged with having violated, declares it to be unlawful for any person to ship or offer for shipment—"citrus fruits in boxes or other containers or in bulk if the contents of any package or of the fruit in bulk contains fifteen per cent. or more of citrus fruits showing in two or more segments of each fruit marked evidence of frost injury."

The Political Code (section 4057) provides that, except as provided in section 4058, no ordinance "shall take effect within less than 30 days after its passage." Section 4058 provides for a referendum and that such referendum may be initiated by a petition presented to the board of supervisors within 30 days after the final passage of the ordinance, with respect to all ordinances, except, among others, any "ordinance for the immediate preservation of the public peace, health, or safety."

The ordinance in question declares that it shall take effect immediately upon its passage, and that this declaration is made "because the adoption and the enforcement hereof is necessary for the immediate preservation of the public peace, health and safety by reason of the fact that the public peace, health, and safety is now being endangered by the transportation and sale of frozen citrus fruits."

[1] It is a settled rule, applicable to such powers given to a board of supervisors by statutes of this character, that the determination of the board that the facts exist, which make it necessary for an ordinance to take effect immediately, is not conclusive and that the court may, and when a case requires it to do so must, inquire into and determine for itself the existence or nonexistence of the facts upon which the declaration of necessity is based. *San Christina, etc., Co. v. San Francisco*, 167 Cal. 772, 141 Pac. 384, 52 L. R. A. (N. S.) 676; *Josselyn v. San Francisco*, 168 Cal. 441, 143 Pac. 705; *Keyes v. San Francisco*, 177 Cal. 317, 173 Pac. 475; *Burr v. San Francisco* (Cal. Sup.) 199 Pac. 1036, 17 A. L. R. 581.

The ordinance was passed on January 22, 1922, and the complaint against the petition-

er, filed in March, 1922, charges that he did, on February 10, 1922, ship and offer for shipment to the Southern Pacific Railroad Company, three boxes of oranges, more than 15 per cent. of which oranges showed, in two or more segments of each orange, marked evidence of frost injury. It will be seen that, at the time the alleged offer was made, the ordinance was not in force, unless the declaration aforesaid that it was necessary for it to be immediately effective was valid for that purpose, that is, unless such enforcement was necessary for the immediate preservation of the public peace, health, or safety. It is conceded that the date charged is the true date of the act charged. Hence the rule that the date is not material in a criminal complaint and that the commission of the act can be proven to have occurred at any time within the period of limitation need not be considered.

[2] It will not be contended that the shipment of partly frozen oranges could in any manner endanger the public peace or the public safety. The only branch of the provision of the statute providing for the immediate taking effect of an ordinance, which it is necessary to consider, is the one referring to the public health. We are of the opinion that the ordinance should not be construed as intended to preserve the public health. The effect of frost upon an orange makes it become tasteless and unpalatable. We are not advised, and it is not suggested, that such frozen oranges are more detrimental to health than other tasteless and unpalatable substances. The outside appearance is calculated to deceive the eye of the buyer, especially if he has had no experience with frozen oranges. But no ordinance is necessary to inform the eater that such an orange is unpalatable or unfit to eat. His sense of taste will impart that information to him at once. Before the process of fermentation begins, such an orange is palatable. The purpose of preventing the sale of frozen oranges is not to protect health. The sale and shipment of such oranges, as is well known, constitutes a menace to the interests of the orange growers of the state. It injures the reputation, and impairs the market value of California oranges, and is likely to cause all orange growers direct and great financial injury. It is for this reason that precautions are taken by them to prevent the sale of such fruit. We do not doubt that, on that account, reasonable regulations for the prevention of such sales and shipment are within the scope of police power, and we are satisfied that the ordinance was adopted for that purpose alone, and that it was valid as a police regulation as soon as it became effective. For these reasons we are convinced that the ordinance should not be interpreted as a measure for the preservation of public peace, health, or

safety. The result is that, under section 4058, aforesaid, it could not take effect immediately, but would take effect within 30 days after its passage, that is, on February 21, 1922. This was after the act in question had occurred, and therefore at the time the act was done it was not unlawful. Consequently the complaint states no valid charge against the defendant.

Let the petitioner be discharged.

We concur: WILBUR, J.; SHURTLEFF, J.; LAWLOR, J.; SLOANE, J.; LENNON, J.; RICHARDS, Justice pro tem.

188 Cal. 772

ROWLAND et al. v. HORST. (S. F. 9151.)

(Supreme Court of California. May 25, 1922.)

1. Parties ⇐21—Party from whom agent collected account not necessary party in action by principal against agent for the money collected.

In an action by a principal against his agent for the payment of money claimed to have been received by the agent for the principal's benefit but retained by the agent, the person by whom the sum was paid to the agent was not a necessary party.

2. Parties ⇐21—Persons interested in resisting demands necessary parties to action for enforcement.

In view of Code Civ. Proc. § 389, necessary parties to an action in the capacity of defendants are those who are interested in resisting the demands of the plaintiff, either immediately or consequently, and whose rights would be prejudicially affected by the controversy.

3. Principal and agent ⇐78(1)—Agent appointed to collect cannot rely on his refusal to collect balance due to defeat settlement.

Where an agent was appointed to settle and adjust a claim against a carrier, in an action by his principal for the sums collected, the agent could not be permitted to occupy the position of one refusing or failing to make the collection of a balance to which he had long been entitled and yet at the same time refuse to settle with his principals, on the sole ground that such collection had not been made.

4. Principal and agent ⇐78(6)—Evidence sustained finding of principals' proportion of proceeds turned over to agent by carrier.

Where an agent was appointed to adjust and settle a claim for damage to barley in shipment, in an action by the principals against the agent for sums collected, evidence held to sustain a finding of the principals' proportion of the sums turned over to the agent by the carrier.

In Bank.

Appeal from Superior Court, City and County of San Francisco; John T. Nourse, Judge.

Action by John Henry Rowland and another, copartners doing business under the firm name and style of John Westrope & Co., against E. Clemens Horst. From a judgment for plaintiffs, defendant appeals. Affirmed.

Edward C. Harrison and Maurice E. Harrison, both of San Francisco, for appellant. McCutchen, Olney, Willard, Mannon & Greene, of San Francisco, for respondents.

RICHARDS, Justice pro tem. This action was commenced by the plaintiffs as copartners, doing business under the firm name and style of John Westrope & Co., to recover from the defendant the sum of \$42,812.50, with legal interest and costs, claimed to have been received by the defendant as the agent of said firm in certain transactions which are set forth in detail in the plaintiff's amended complaint. Said complaint is in three counts, which all relate to the same matter. The first count in brief alleges that the plaintiffs, who, under their said firm name, are engaged in the business of buying, selling, and shipping grain in the city of Hull, England, but with a local office or agency in the city and county of San Francisco, which had, during the months of July and August, 1915, delivered to the Southern Pacific Company at various points in California 35 carloads of barley, aggregating 30,754 sacks, of the total weight of 3,240,944 pounds, for shipment to said plaintiffs, as consignees, at Hull, England, via the Sunset route of said railroad; and that, while said barley was in course of transit, at or near the city of Galveston, Tex., it was damaged by the Galveston Flood, which occurred in August of that year, through the negligence of the carrier, from which the plaintiffs had sustained a large loss. That the local agent of the plaintiffs in San Francisco had secured the services of the defendant to act as the plaintiffs' agent, and, on their behalf, in presenting the claim of said plaintiffs to the Southern Pacific Company for such loss and in conducting negotiations for the purpose of securing a settlement of their said claim; and that said defendant, acting as the plaintiffs' said agent, had entered into an agreement of settlement with the said Southern Pacific Company, whereby the claim of the said plaintiffs had been settled in full and by which the said defendant, as such agent of the plaintiffs, had received the sum of \$42,812.50, which he had failed and neglected to account for or pay over to the said plaintiffs. The second count of the plaintiffs' amended complaint repeats in the main, but with somewhat more of detail, the averments of the first count, but relates more particularly to a specific payment of \$12,500, which was to be made and which was alleged to have been made by the Southern Pacific Company

in final adjustment and settlement of a balance remaining unpaid upon the claims of the plaintiffs and certain other shippers whose barley had also been damaged in said flood, and of which sum the plaintiffs claim that, after making certain deductions, they are entitled to a balance of \$3,700 from the defendant, but which he had failed and refused to pay over to the plaintiffs. The third count was in the form of a common count upon an alleged indebtedness of \$42,812.50 due from the defendant to the plaintiffs and unpaid. This amended complaint was unverified. There was no demurrer.

The defendant's answer consisted of a general denial of each of the counts in the amended complaint, to which was added a counterclaim for services alleged to be of the reasonable value of \$50,000. An amendment to this answer was later filed containing three additional defenses, the first that of an alleged nonjoinder of the E. Clemens Horst Company, alleged to be a necessary party defendant; the second being that of an alleged nonjoinder of the Southern Pacific Company, alleged also to be a necessary party defendant; and the third being a plea to the effect that the plaintiffs, doing business as partners under a fictitious name, had not complied with the statutes of California having reference to such partnerships, so as to be entitled to maintain their present action. The first and third of these special defenses appeared to have been waived during the trial, but the second thereof, viz., the nonjoinder of the Southern Pacific Company, is still insisted upon on this appeal. The cause went to trial upon the issues as thus framed, and upon its submission the trial court made and filed its findings of fact, going into much of detail as to the history of the transaction, and arriving at its legal conclusion that the defendant was indebted to the plaintiffs in the sum of \$23,789.43, for which sum judgment was ordered and entered. Upon the special defense of the defendant as to the nonjoinder of the Southern Pacific Company, the court found that the said corporation was not a necessary party to the action. In order to determine the correctness of the aforesaid findings and judgment of the trial court it will be necessary to review somewhat the evidence upon which its determination rests.

The plaintiffs were, as has been seen, the shippers of 35 carloads of barley by the Sunset route of the Southern Pacific Company to themselves at Hull, England, in the summer of 1915, which barley was damaged in transit by the occurrence and effect of the Galveston Flood. There were a number of other shippers of barley of about the same quality by the same route and at the same time, whose shipments were also damaged in the same flood and were largely intermingled with the plaintiffs' barley, in the effort to save these cargoes from complete loss in said flood. The

aggregate of such intermingled shipments of barley was 56 carloads. One of these other shippers was the E. Clemens Horst Company, of which the defendant is the manager, and its shipment was one carload of barley. The defendant, being interested in the matter of the claims for compensation arising out of the damage to these aggregated and intermingled carloads of barley, came into touch with the plaintiffs' local representative, with the result of his selection as the plaintiffs' fully authorized agent to make an adjustment and settlement of its claim against the Southern Pacific Company. During the course of such adjustment the defendant also came to represent another of said shippers, George W. McNear & Co., which had shipped 20 of said carloads of barley, but, before the negotiations with the Southern Pacific Company were completed by him, the defendant had acquired by transfer to himself the ownership of the claims of the E. Clemens Horst Company and the George W. McNear Company in respect to said intermingled carload lots of barley, and to the damages which had been occasioned thereto by said flood; so that, in the month of October, 1916, when the final memorandum of adjustment and settlement of these aggregated claims was signed by the defendant representing the claimants and by the duly authorized representative of the Southern Pacific Company, the defendant occupied the dual relation of agent of the plaintiffs in respect to their claim and of principal in so far as the claims of E. Clemens Horst Company and of George W. McNear Company were concerned. He assumed, in making said settlement, to act in his own name as to all of said claimants. The agreement of settlement is in full as follows:

"San Francisco, October 6, 1916.

"Mr. Durbrow: Without prejudice I respectfully submit to you the following offer of adjustment of any and all disputes relative to the shipment of 56 cars of barley from California during July and August, 1915, and which are claimed to have been involved in Galveston Flood, August, 1915.

"The above-mentioned shipment shipped in the name of

20 cars by George W. McNear, Inc., to Christiana, Copenhagen and New York;

1 car by E. C. Horst & Co. to New York,

35 cars by John Westrope Co. to Hull.

—
56 cars.

"The offer of settlement is as follows:

"(1) E. C. Horst & Co. to get for S. P. Co. from owners of the barley, clean releases of all liability on all 56 carloads involved in the dispute.

"(2) S. P. Co. to deliver Horst free alongside their dock to Horst's vessels, all unsold barley now in New York on docks and in warehouses, originally shipped by Westrope, McNear and Horst, as principals or agents, upon surrender to S. P. Co. bills lading covering said shipment,

"(3) S. P. Co. to pay Horst the gross proceeds of all barley sold by S. P. Co., ex. above 56 cars, upon receipt of releases from Horst.

"(4) Horst to pay freight to New York on point of origin weights, on entire 56 carloads, less whatever amounts of freight have already been paid to S. P. Co. upon delivery of said shipments by S. P. Co.

"(5) S. P. Co. to waive reconditioning charges in event Horst fully performs all conditions.

"(6) S. P. Co. to repay Horst freight prepaid from New York to Christiana, Copenhagen and New York transfer charges on barley not transferred, plus interest thereon from date of payment until repayment of 6 per cent. per annum.

"(7) S. P. Co. to pay Horst \$12,500.00 whenever and at such time as Horst has fully performed all conditions.

"(8) S. P. Co. shall pay Horst nothing for his services in making adjustments.

"San Francisco, October 9, 1916.

"E. C. Horst,

"G. W. Luce."

Prior to the completion of the foregoing negotiations, the plaintiffs had received about one-third of the total amount of their original shipment as the same had been disentangled from the intermingled aggregate, the same having been shipped to them by the Southern Pacific Company at Hull. The remainder of this original shipment was, shortly after the making of the foregoing agreement of settlement, sold by the defendant to certain European buyers, receiving therefor the sum of \$29,335.24. He was also, by the terms of the settlement above set forth, entitled to receive from the Southern Pacific Company the sum of \$12,500 whenever he had performed on his part the terms of the aforesaid agreement, which required him to get for the Southern Pacific Company from the owners of the barley clean releases of all liability on all 56 carloads involved in the dispute. These releases were prepared by the attorney for the Southern Pacific Company and were executed by the defendant on November 13, 1916, acting on behalf of the plaintiffs as their attorney in fact. The evidence shows these releases to have been satisfactory to the Southern Pacific Company, and no other or further releases have ever by it been required. Having thus come into possession of a large sum of money belonging to his principal derived from his sales of their remaining barley to said European buyers, and having thus become entitled to receive from the Southern Pacific Company the sum of \$12,500, less the sum which was to be paid as freight charges under the terms of said agreement, and having informed the plaintiffs of his said acts, the latter began seeking to make a settlement with him as their agent, by which they should receive such balance as might be due them after payment of the defendant's commissions for his services and his claims for expenses incurred, and after making such deductions from the gross sum

which was or should have been in his hands as he might be obligated to pay in the way of the freight charges under the terms of his foregoing agreement with the Southern Pacific Company. After repeated efforts to obtain such settlement, the plaintiffs commenced the present action, with the result which has been above noted. The defendant appeals from the judgment which determines the net amount which plaintiffs were entitled to receive as a deduction from the foregoing facts.

[1, 2] The appellant's first contention upon this appeal is that the trial court was in error in deciding adversely upon his defense of nonjoinder of the Southern Pacific Company as a necessary party defendant in this action. We discover no such error. The action was one strictly between the plaintiffs as principals and the defendant as their agent for the payment to them of money claimed to have been received by their said agent for their benefit and retained by him. The Southern Pacific Company had no interest in that relationship nor in the plaintiffs' said claim. It may be conceded that one of the defenses which the defendant might urge to his payment to the plaintiffs of the sum claimed was that he had not yet received all or a portion of said money from the Southern Pacific Company; but this would not require the joinder of the latter in the action either originally or latterly as a necessary party thereto, since it was in no wise concerned in the dispute between the plaintiffs and their agent as to the settlement of their accounts. Necessary parties to an action in the capacity of defendants are those who are interested in resisting the demands of the plaintiff either immediately or consequently and whose rights would be prejudicially affected by the controversy. Pomeroy, Code Remedies, pp. 320, 321; Code Civ. Proc. § 389. It might be possible that the Southern Pacific Company would have been a proper party to this action had the defendant suggested by his pleadings or succeeded in showing, as one of his defenses, that the reason he had not paid over to his principals some portion of the moneys claimed from him was that he had not been able to collect the same from the said corporation under the agreement which he had made with it on the plaintiffs' behalf, but, if he had such a defense and if the presence of the said corporation as a party to the action was necessary to enable him to make it, the court upon his motion, or even of its own motion, might have ordered the said corporation brought into the action. But this evidently is not the fact, since the evidence discloses that the Southern Pacific Company has received from the defendant, acting as the plaintiffs' agent, full releases of their claims on account of their said barley, and is satisfied therewith and stands

and has long stood ready to pay over to the defendant whatever balance of the \$12,500 referred to in its agreement with him, is due, after deducting the freight charges mentioned in said agreement.

[3] The defendant herein cannot be permitted to occupy the position of one refusing or failing to make the collection of said balance to which he has long been entitled, and yet at the same time refusing to settle with his principals upon the sole ground that such collection has not been made. Under such circumstances his dilatory plea that the Southern Pacific Company has not been joined as a defendant in the action does not meet with favor, and is wholly without the semblance of merit.

[4] The next contention of the appellant is that the evidence is insufficient to support the finding of the trial court that the plaintiffs' share of the net total of \$34,545.64 received by the defendant from the sale of the portion of said barley turned over to him by the carrier and sold to European buyers was 84.9 per cent. thereof, or the sum of \$29,335.24. This contention is based upon several elements, all of which are elaborately discussed in the briefs of counsel for appellant. He argues that there was insufficient evidence to support the court's finding that 1,777,555 out of the total of 2,093,704 pounds of barley so sold to European buyers belonged to the plaintiffs. The basis of this finding was the so-called Price-Waterhouse & Co.'s report. This firm of experts were requested by the defendant himself to make a careful examination of the barley on the New York piers for the purpose of determining what proportion thereof belonged to each of the original shippers. They made such examination and report, and the latter was offered in evidence by the plaintiffs and was admitted without objection on the defendant's part. It is conceded that the report embraced matter which would suffice to uphold the finding of the trial court in this regard. The present objection of the defendant that it was hearsay was waived by its admission in evidence without objection. In addition to this evidence upon this point there was also offered and admitted certain letters, telegrams, and reports of the defendant, wherein he has stated that an even larger proportion of this barley belonged to the plaintiffs than that found by the court. These declarations eke out the report of the experts and supply, we think, ample evidence to justify the finding as to the amount of said barley shipped to European buyers which belonged to these plaintiffs. The appellant further argues that the evidence was insufficient to show that the plaintiffs' barley so sold on their account was of equal quality to that of the other shippers with which it had been intermingled, so as to entitle the plaintiffs to the same percentage of share in

the proceeds of these European sales as the bulk of their barley bore to that of their fellow shippers; but upon this subject also the Price-Waterhouse & Co. report speaks sufficiently to show that the plaintiffs' barley was fully up to the quality which would entitle them to the same proportionate share in the proceeds of such sales as the weight of their barley bore to that of their fellow shippers. We conclude, therefore, that the contention of the appellant that the plaintiffs were not entitled to recover the full amount of \$29,335.24 as their share of the proceeds of the European sales of their barley is without merit.

The appellant's next and main contention is, first that the evidence does not sustain the finding of the trial court to the effect that the plaintiffs were entitled to receive \$7,125 of the \$12,500 to be paid the defendant by the Southern Pacific Company pursuant to their aforesaid agreement. The defendant himself, however, testified that the value of the plaintiffs' barley amounted to 57 per cent. of the value of the entire barley shipment damaged in the Galveston Flood. This percentage would give the plaintiffs precisely the sum of \$7,125 out of said \$12,500 which the trial court awarded them and would also furnish sufficient proof to justify the court's finding to that effect. Besides there was abundant evidence that the loss to the plaintiffs by reason of the damage caused by said flood was much greater in proportion than that suffered by the other shippers. While the exact proportion of such damage was difficult of ascertainment and while the evidence in the case reflects the extent of this difficulty due to the confusion caused through the intermingling of the consignments of the several shippers, still we think the evidence taken as a whole shows that the trial court rather underestimated than enlarged the proportion of said \$12,500 which the plaintiffs were entitled to receive. The second contention of the appellant under this head is his claim that the plaintiffs were entitled to recover no part of this sum of \$12,500 from him, for the reason that he had not received the same from the Southern Pacific Company and hence he could not be required to account for or pay over any portion of said sum to the plaintiffs. It appears to be a fact, and the court so found, that the defendant has not yet received said sum of \$12,500 from the Southern Pacific Company. But this fact standing alone would not be sufficient to bar the plaintiffs' right to recover from the defendant its due share of said sum, unless it should also appear that the failure of the defendant to collect and receive this money was due to no fault or hindrance of his own. Upon this subject the evidence shows quite convincingly that the terms of settlement with the Southern Pacific Company were fix-

ed by the above-quoted agreement between itself and the defendant as of the date of October 6, 1916; that within a few weeks after that date the defendant consummated the sale of the remainder of the plaintiffs' barley then on the New York piers to European buyers, receiving therefrom the sum of \$29,335.24, money belonging to the plaintiffs; that from that time forth the defendant had in his possession ample funds with which to pay the railroad company whatever freight or other charge on account of these barley shipments were coming to it by virtue of said agreement; that not long thereafter the defendant, assuming to act for the plaintiffs, gave to the Southern Pacific Company the full releases which were required from all the shippers of said barley to be given to it by them, and that these releases so executed had at all times been satisfactory to the Southern Pacific Company. Nothing thereafter remained for the defendant to do but to get from the Southern Pacific Company the said sum of \$12,500, or whatever balance would be coming to him upon the adjustment of the predetermined and undisputed account. The defendant did not, however, do this but began delaying his settlement with his principals upon various pretexts and by the making of claims for compensation in the form of commissions and otherwise, which the trial court found to be exorbitant and refused to sustain.

During the protracted interviews and correspondence carried on between the defendant and the principals or their representatives prior to the institution of this action the defendant never suggested that the fact that he had not as yet received the amount coming from the Southern Pacific Company stood in the way of a settlement with his principals, but on the contrary made repeated offers of immediate settlement upon other terms as to commissions and compensation which were not acceptable to them. In his pleadings in this action he made no claim or plea that the action had been prematurely brought, but based his defenses wholly upon other grounds. The present claim that the defendant ought not to be required to pay over to the plaintiffs, his principals, the large sums he had received from the sale of their barley to European buyers for the reason that he had not seen fit to collect the comparatively small sum to which he was entitled

to get without obstacle from the Southern Pacific Company was an evident afterthought of which the plaintiffs had no notice or knowledge until after this action was instituted. Under these circumstances we think the trial court would have been entirely justified in directing the defendant to pay over to the plaintiffs the whole amount to which they were shown to be entitled, even though a certain small portion thereof had not been received by the defendant solely by reason of his own unexcused delay in collecting it. The trial court did not, however, go so far, but in its findings and judgment so adjusted the accounts between the parties as to charge the credits which the defendant was found entitled to receive for commission compensation, and traveling expenses, together with such amounts as he was required to pay the Southern Pacific Company for freight charges under the aforesaid agreement against the particular sum which the plaintiffs would otherwise have been entitled to receive from said corporation under said agreement, and by so doing did not require the defendant to actually pay over to the plaintiffs any money which he did not for any cause receive. All that the defendant has to do under the form of this judgment is to make those settlements with the Southern Pacific Company which he was required by his agreement to do and in the way of which there is no obstacle and which he should apparently have long since done, paying over to the plaintiffs the net sum derived by him from the sales of the plaintiffs' barley to the European buyers and which he has long and without sufficient reason withheld.

As to the other contentions of the defendant with reference to the reasonableness of his compensation, these matters were submitted to the discretion of the trial court in view of all the circumstances of the case, and we are unable to discover that this discretion has been in any manner abused. Its findings as to these matters will not, therefore, be disturbed upon appeal.

Judgment affirmed.

We concur: SHAW, C. J.; SLOANE, J.; WILBUR, J.; LENNON, J.; LAWLOR, J.

SHURTLEFF, J., deeming himself disqualified, does not participate in the foregoing.

189 Cal. 1

CONNOR v. ATCHISON, T. & S. F. RY. CO.
et al. (L. A. 6936.)

(Supreme Court of California. May 26, 1922.)

1. Courts ⇨97(5)—**Applicability of res ipsa loquitur doctrine to case under federal Employers' Liability Law to be determined by national Supreme Court decisions.**

Whether the doctrine of *res ipsa loquitur* applies to a case under the federal Employers' Liability Law (U. S. Comp. St. §§ 8657-8665) is to be determined by the decisions of the national Supreme Court.

2. Master and servant ⇨265(6)—**Unexplained falling of railroad bridge establishes negligence prima facie.**

Under the doctrine of *res ipsa loquitur*, the unexplained falling of a railroad bridge, causing injury to a trainman, establishes a *prima facie* case of negligence.

3. Negligence ⇨121(2)—**Doctrine of res ipsa loquitur inapplicable, where complaint explains cause of accident.**

The doctrine of *res ipsa loquitur* does not apply, where the complaint and plaintiff's evidence explains the cause of the falling of a railroad bridge while plaintiff's train was going over it, by alleging and showing that its support was washed away by a cloud-burst, shortly before, and predicates negligence on failure to inspect the tracks after the cloud-burst.

4. Negligence ⇨138(2)—**Instruction that res ipsa loquitur does not apply proper, though nothing indicates reliance on doctrine.**

Though there is nothing in the case, either pleading or evidence, to indicate that plaintiff relies on the doctrine of *res ipsa loquitur*, it is proper to instruct that the doctrine does not apply, that being the fact.

In Bank.

Appeal from Superior Court, San Bernardino County; J. W. Curtis, Judge.

Action by James Connor against the Atchison, Topeka & Santa Fé Railway Company and another. Judgment for plaintiff, and defendants appeal. Reversed.

E. W. Camp, M. W. Reed, and Robert Brennan, all of Los Angeles, for appellants.

Allison & Dickson, of San Bernardino (David W. Richards, of San Bernardino, of counsel), for respondent.

WILBUR, J. The plaintiff recovered a judgment for \$7,500, for injuries received by him while acting as a fireman upon a train operated from Searchlight to Goffs, upon the railroad of the Atchison, Topeka & Santa Fé Railway. The injuries were caused by the giving away of an abutment of a bridge, upon which the engine occupied by the plaintiff was crossing. The line was a branch line, 52 miles in length, and the train operated by the plaintiff and his coemployees left Goffs for Searchlight in the morning,

crossing the bridge in question about 3 miles after leaving Barnwell. The injuries occurred when they were returning over the same bridge in the evening. During the afternoon, a cloud-burst occurred in the mountains, causing a washout under the eastern abutment of the bridge, about 4 feet wide and sufficiently deep to undermine the abutment. The tracks remained in perfect alignment, and there was nothing to indicate to the approaching engineer and fireman that there had been any washout rendering the bridge unsafe, although there was some evidence that there had been rainfall in the vicinity. The train was proceeding about 10 miles an hour. The negligence relied upon by the plaintiff is the failure of the defendants to cause the track to be inspected after the cloud-burst and before the train passed over the bridge.

Plaintiff alleges in his complaint:

That "the approach and support of said bridge, on the opposite end from the direction in which said locomotive was proceeding, had previously been washed away by water, leaving said bridge in a defective and unsafe condition and unfit for the purpose for which it was constructed. That the condition of the said approach and support to said bridge and the condition of said bridge was not known to the plaintiff, but said condition was, or could have been, known to the defendants by the exercise of proper and necessary care on the part of the defendants, their agents, and servants. That the defendants, by and through their agents and servants, carelessly and negligently permitted and allowed said bridge to be and remain in the defective and unsafe condition as aforesaid, and did not exercise that degree of care and precaution and diligence to provide safe appliances and roadbed which the law requires."

The defendant John Barton Payne admits the injury to the bridge by the washout, but denies that he had knowledge of the injury to the bridge or that he could have ascertained such injury by the exercise of proper or necessary care, and denies that he negligently permitted the bridge to remain in an unsafe condition. The plaintiff offered evidence tending to show that certain employees of the defendant railroad director had been informed of the cloud-burst but, notwithstanding such information, had failed to inspect the tracks.

The defendants appeal from the judgment and claim that, in any event, the judgment is erroneous as to the railway company, because of the fact that, at the time of the accident, the railroad was being operated by the Director General, John Barton Payne, the defendant. It is conceded by the respondent that the judgment against the railroad company should be reversed for that reason. It is further claimed that the court erred in refusing to give certain instructions

proposed by the defendant and that the verdict is excessive.

The plaintiff offered no instructions, and the court gave none of its own motion and submitted the case upon some of the instructions requested by the defendants and refused others requested by the defendants. No instruction was given to the jury defining negligence or informing them that, for the plaintiff to recover, it must be shown that the injuries received by him were the proximate result of the negligence of the defendants nor was any instruction given upon the measure of damages. The defendant offered an instruction in three paragraphs, the first defining negligence, the second instructing the jury that, in order for the plaintiff to recover, the negligence must be the proximate cause of his injuries, and the third instruction upon the subject of *res ipsa loquitur*. Respondent concedes that the first and second paragraphs are correct statements of the law, and it must also be conceded that such instruction should have been given in the case, but it is contended that the instruction must be considered as a whole and that that portion of the instruction upon the subject of *res ipsa loquitur* was erroneous and therefore justified the refusal of the entire instruction. That portion of the instruction reads as follows:

"In this behalf, you are instructed that the mere occurrence of the accident in this case or of the damage complained of, if you find that the accident and damage did occur, is no evidence of negligence on the part of the defendants or of any of their servants, agents, or employees, and that the burden is on the plaintiff to show, by a preponderance of the evidence, that the defendants were guilty of negligence which proximately caused the damage. The plaintiff has the burden of proving, by a preponderance of the evidence, that the defendants were guilty of negligence."

[1] The question of whether or not the doctrine of *res ipsa loquitur* applies is to be determined by the decisions of the United States Supreme Court under the federal Employers' Liability Law (U. S. Comp. St. §§ 8657-8665), under which this action was brought. It is a matter of doubt whether this doctrine is applicable under the federal Employers' Liability Law. *Roberts' Injuries Interstate Employees*, § 22, p. 48; *Richey's Federal Employers' Liability* (2d Ed.) § 163, p. 330; *Patton v. Texas & Pacific Railway Co.*, 179 U. S. 658, 21 Sup. Ct. 275, 45 L. Ed. 361; *Sweeney v. Erving*, 228 U. S. 233, 33 Sup. Ct. 416, 57 L. Ed. 815, Ann. Cas. 1914D, 905; *Southern Ry. Co. v. Bennett*, 233 U. S. 80, 34 Sup. Ct. 566, 58 L. Ed. 860; *Chicago & N. W. Ry. Co. v. O'Brien*, 132 Fed. 593, 67 C. C. A. 421; *Cincinnati, etc., Ry. Co. v. South Fork Coal Co.*, 139 Fed. 528, 71 C. C. A. 316; *Southern Ry. Co. v. Derr*, 240 Fed. 73, 153 C. C. A. 109.

[2] For the purpose of this decision, how-

ever, we will assume that the doctrine of *res ipsa loquitur* does apply to actions brought by the employees against interstate commerce carriers, under the federal Employers' Liability Law. Under this doctrine the unexplained falling of the bridge in question would establish negligence *prima facie*.

[3] In this case there was a complete explanation of the cause of the accident. The plaintiff himself in his pleading explains the cause of the accident, namely, the washing out of the support of the bridge. The evidence shows that this was the result of a sudden cloud-burst and that the injury to the bridge had occurred but a short time before the accident. The complaint is predicated upon the theory that the defendants were negligent in failing to inspect the tracks after the cloud-burst. The general rule is that, where the plaintiff in his complaint gives the explanation of the cause of the accident, that is to say, where the plaintiff, instead of relying upon a general allegation of negligence, sets out specifically the negligent acts or omissions complained of, the doctrine of *res ipsa loquitur* does not apply. *White v. Chicago G. W. R. Co.*, 246 Fed. 427, 158 C. C. A. 491; *Midland Valley R. Co. v. Conner*, 217 Fed. 956, 133 C. C. A. 628; *Lyon v. Chicago, etc., Ry. Co.*, 50 Mont. 532, 148 Pac. 386; *West v. Hollady* (Mo. App.) 196 S. W. 403; *Texas Co. v. Charles Clarke & Co.* (Tex. Civ. App.) 182 S. W. 351. The *res ipsa loquitur* doctrine is based in part upon the theory that the defendant in charge of the instrumentality which causes the injury either knows the cause of the accident or has the best opportunity of ascertaining it, and that the plaintiff has no such knowledge and, therefore, is compelled to allege negligence in general terms and to rely upon the proof of the happening of the accident in order to establish negligence. See cases last cited.

In this case, if the plaintiff had alleged negligence in general terms and had merely proved the happening of the accident, a *prima facie* case would have been established under the doctrine of *res ipsa loquitur*. But, where the plaintiff went further and showed that the accident was caused by a cloud-burst, the question of whether or not the defendant was negligent in failing to inspect the track was to be determined by the jury without reference to the *prima facie* case resulting from the mere happening of the accident. *Parsons v. Hecla Iron Works*, 186 Mass. 221, 223, 224, 71 N. E. 572; *Lyon v. Chicago, etc., Ry. Co.*, supra; *Hull v. Berkshire Street Railway*, 217 Mass. 361, 104 N. E. 747, 5 A. L. R. 1330; *Cleary v. Cavanaugh*, 219 Mass. 281, 106 N. E. 998; *Anderson v. Northern Pac. R. Co.*, 88 Wash. 139, 152 Pac. 1001, L. R. A. 1917F, 1020; *West v. Hollady*, supra; *Velotta v. Yampa*

Valley Coal Co., 63 Colo. 489, 167 Pac. 971, 975, L. R. A. 1918B, 917; Texas Co. v. Charles Clarke & Co., supra; Shea v. Thomas Elevator Co., 167 Ill. App. 365, 367; Dentz v. Pennsylvania Railroad Co., 75 N. J. Law, 893, 70 Atl. 164; Illinois Steel Co. v. Zolnowski, 118 Ill. App. 209, 216; Rocap v. Bell Telephone Co., 230 Pa. 597, 602, 603, 79 Atl. 769, 36 L. R. A. (N. S.) 279; Enloe v. Southern Ry. Co., 179 N. C. 83, 101 S. E. 557; Randolph v. Hunt, 41 Cal. App. 739, 748, 183 Pac. 358, 29 Cyc. 592; Ginocchio v. City and County of San Francisco (Cal. App.) 206 Pac. 763, rehearing denied. However, where the explanation leaves it doubtful as to whether or not the ultimate cause of the injury is the negligence of the party charged, it is proper to instruct the jury as to the *res ipsa loquitur* doctrine. Zerbe v. United Railroads of San Francisco (Cal. App.) 205 Pac. 887, rehearing denied.

[4] Under the pleadings and the evidence in support thereof the *res ipsa loquitur* doctrine did not apply. While there is nothing in the case indicating that the plaintiff relied upon the doctrine, either in the pleading or proof, it was nevertheless proper to instruct the jury that the doctrine did not apply, and therefore the entire instruction under consideration defining negligence should have been given.

We think it clear, under these circumstances, that the instructions propounded by the defendants correctly stated the law, namely, that the mere happening of the accident under the circumstances of the case did not establish negligence upon the part of the defendants. The case of O'Connor v. Mennie, 169 Cal. 217, 146 Pac. 674, relied upon by the respondent as establishing the doctrine of *res ipsa loquitur* in cases of injury received by an employee, is not applicable for the reason that, in that case, the court was dealing with an unexplained accident, while in the case at bar the cause of the accident is fully explained and undisputed. It did not result from defective or unsafe appliances, but from an injury to the railroad from storm water, and the question involved was as to whether or not the defendants were negligent in failing to ascertain the fact of the injury in time to prevent the accident. Under the Employers' Liability Act, the basis of the plaintiff's recovery is negligence. 35 U. S. Stats. at Large, 65, c. 149; Seaboard Air Line Ry. v. Horton, 233 U. S. 492, 34 Sup. Ct. 635, 58 L. Ed. 1062, L. R. A. 1915C, 1, Ann. Cas. 1915B, 475. The question of negligence under the circumstances was one for the determination of the jury.

In view of the fact that our conclusion necessitates a reversal of the case, it is unnecessary to pass upon the other questions raised by the respondent as, in the event of a

new trial, the jury, no doubt, will be properly instructed.

Judgment reversed.

We concur: SHAW, C. J.; SHURTLEFF, J.; LENNON, J.; SLOANE, J.; LAWLOR, J.; RICHARDS, Justice pro tem.

188 Cal. 744

PEOPLE v. SANDERS. (Cr. 2411.)

(Supreme Court of California. May 20, 1922.)

1. Threats ⇨5—Indictment charging extortion by threat to accuse named person of selling intoxicating liquors in violation of the United States statutes held sufficient.

Indictment alleging that defendants threatened to accuse named person of "engaging in the sale of intoxicating liquors, in violation of the United States statutes," held sufficient, in the absence of a demurrer, to charge extortion under Pen. Code, §§ 518, 519, subd. 2, defining extortion, where on the specified date it was unlawful to sell liquors for beverage purposes under the War Prohibition Act (U. S. Comp. St. Ann. Supp. 1919, §§ 3115¹¹/₁₂f-3115¹¹/₁₂h), and to order, purchase, or cause intoxicating liquors to be transported in interstate commerce, to any state or territory in which the manufacture or sale of liquor was prohibited under the Reed Amendment to the Post Office Appropriation Act of March 3, 1917 (U. S. Comp. St. 1918, U. S. Comp. St. Ann. Supp. 1919, § 8739a), though the indictment did not describe the crime of which defendants threatened to accuse named person as the sale of liquor for beverage purposes.

2. Threats ⇨5—Indictment held to charge threat to do an unlawful injury to the person of prosecuting witness; "extortion."

Indictment charging that defendants threatened to "incarcerate" named person in county jail unless he paid defendants a certain sum of money held sufficient, in the absence of a demurrer, to charge a threat to "do an unlawful injury to the person" of such person under Pen. Code, §§ 518, 519, subd. 1, defining extortion as the crime of obtaining money by means of such threats, notwithstanding failure to allege that the threat to incarcerate such person in the county jail was a threat to "do him an unlawful injury," it appearing from the indictment as a whole, charging that defendants "did unlawfully, corruptly, knowingly, and feloniously extort and obtain" a certain sum of money from the named person, that the threat was to unlawfully injure such person, in view of section 950, subd. 2.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Extort—Extortion.]

3. Threats ⇨7—Evidence held to sustain conviction for extortion by threat to accuse prosecuting witness of violation of prohibition laws.

In prosecution for extortion by threatening to accuse prosecuting witness with the

crime of engaging in the sale of intoxicating liquors in violation of the United States statutes, under Pen. Code, §§ 518, 519, subd. 2, evidence held to sustain conviction.

4. Threats (1)—Threat to incarcerate defendant in county jail after unlawful arrest held a threat to do an "unlawful injury to the person"; "extortion."

In prosecution for extortion under Pen. Code, §§ 518, 519, subd. 1, defining extortion as the crime of obtaining property by means of fear induced by threat to do an unlawful injury to the person of the prosecuting witness, where defendants, one of whom was a police officer, pursuant to a conspiracy, pretended to arrest the prosecuting witness without a warrant, and without any pretense of any legal right to make such arrest, in violation of sections 182 and 836 et seq., and threatened to incarcerate him in the county jail unless he paid them a certain sum of money, such threat constituted one to do prosecuting witness an "unlawful injury to his person" within section 519, subd. 1.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Unlawful Injury.]

In Bank.

Appeal from Superior Court, Los Angeles County; Frank R. Willis, Judge.

E. N. Sanders was convicted of extortion, and he appeals. Affirmed.

Louis G. Guernsey, W. I. Gilbert, Paul W. Schenck, and Richard Kittrelle, all of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., for the People.

RICHARDS, Justice pro tem. The appellant herein was tried and convicted upon the charge of extortion. In his appeal from the judgment entered upon such conviction he makes two main contentions as grounds for the reversal of such judgment. These are: First, insufficiency of the indictment; second, insufficiency of the evidence to sustain the verdict and judgment of conviction.

The defendant, with three other persons, whose names were Claude Morton, William W. Swan, and Lee Varain, were accused by the grand jury of the county of Los Angeles, by indictment, of the crime of extortion. The charging part of said indictment, which the appellant claims to be insufficient to charge said crime, reads as follows:

"The said Claude Morton, E. N. Sanders, William W. Swan, and Lee Varain, on or about the 19th day of August, 1919, at and in the county of Los Angeles, state of California, did willfully, unlawfully, corruptly, knowingly, and feloniously extort and obtain from Thomas M. Quinlin, with the consent of said Thomas M. Quinlin, \$500 in lawful money of the United States, which said \$500 was then and there the personal property of the said Thomas M. Quinlin.

"The said \$500 was obtained from the said

Thomas M. Quinlin, and the consent of the said Thomas M. Quinlin was induced by a wrongful use of force and fear, in that the said Claude Morton, E. N. Sanders, William W. Swan, and Lee Varain did then and there unlawfully, and without any legal justification, arrest and detain the said Thomas M. Quinlin, and did then and there threaten to accuse him, the said Thomas M. Quinlin, of a crime, to wit, the crime of engaging in the sale of intoxicating liquors in violation of the United States statutes, and did then and there threaten to incarcerate the said Thomas M. Quinlin in the county jail of the county of Los Angeles unless he, the said Thomas M. Quinlin, did then and there pay to them, the said Claude Morton, E. N. Sanders, William W. Swan, and Lee Varain, the said \$500.

"The said Thomas M. Quinlin did then and there believe that the said Claude Morton, E. N. Saunders, William W. Swan, and Lee Varain would enforce and carry out said threats, and then and there feared that the said defendants, Claude Morton, E. N. Sanders, William W. Swan, and Lee Varain, would and could do so, and solely by reason of said force, unlawful injury, threats, belief, and fear, did then and there consent as aforesaid, to the payment as aforesaid of said \$500, to the said defendants, Claude Morton, E. N. Sanders, William W. Swan, and Lee Varain, and did then and there, on account of the said force, unlawful injury, threats, belief, and fear, pay and deliver to the said defendants, Claude Morton, E. N. Sanders, William W. Swan, and Lee Varain, said \$500, as aforesaid."

It is the appellant's contention that the foregoing language in said indictment fails to sufficiently charge him with the crime of extortion as defined in sections 518 and 519 of the Penal Code. These sections of the Code read as follows:

518. "Extortion is the obtaining of property from another, with his consent, induced by a wrongful use of force or fear, or under color of official right."

519. "Fear, such as will constitute extortion, may be induced by a threat, either:

- "1. To do an unlawful injury to the person or property of the individual threatened, or to any relative of his, or member of his family; or,
- "2. To accuse him, or any relative of his, or member of his family, of any crime; or,
- "3. To expose, or impute to him or them any deformity or disgrace; or,
- "4. To expose any secret affecting him or them."

[1] The appellant contends that the foregoing language of said indictment does not sufficiently set forth any threat on the part of the appellant or his associates, either to (1) accuse the prosecuting witness of any crime; or (2) to do an unlawful injury to his person; or (3) to expose or impute to him any deformity or disgrace; or (4) to expose any secret affecting him. The third and fourth of the specifications may be dismissed without comment as beyond the scope of said indictment. As to the second of said

specifications the appellant contends that there is not to be found within the language of said indictment a threat to accuse Quinlin of any crime. The particular clause in the indictment thus attacked alleges that the said defendants "did then and there threaten to accuse him, the said Thomas Quinlin, of a crime, to wit, the crime of engaging in the sale of intoxicating liquors in violation of the United States statutes." The date fixed in said indictment upon which said alleged threat was made was August 19, 1919, and the proofs correspond to said date. This was prior to the time the so-called Volstead Act (41 Stat. 305) went into effect. It is therefore obvious that the indictment did not include or contemplate the charge of a threat to accuse the prosecuting witness of the violation of a federal statute which had not yet come into being.

There were, however, in being at that time several other federal statutes which it would have been a crime for the defendant Quinlin to have violated. One of these was an act of Congress commonly known as the War Prohibition Act (Fed. Stats. 1919 Ann. Supp. 199 [U. S. Comp. St. Ann. Supp. 1919, §§ 3115¹¹/₁₂f-3115¹¹/₁₂h]). By the terms of said act it was made unlawful to sell intoxicating liquors for beverage purposes, but the sale of such liquors for export or for sacramental, medicinal or other than beverage uses was not made unlawful by said act. There was also in existence at that time the federal act commonly known as the Reed Amendment to the Post Office Appropriation Act of March 3, 1917 (U. S. Comp. St. 1918, U. S. Comp. St. Ann. Supp. 1919, § 8739a), making it a crime for any person to "order, purchase, or cause intoxicating liquors to be transported in interstate commerce, except for scientific, sacramental, medicinal, and mechanical purposes, into any state or territory the laws of which state or territory prohibit the manufacture or sale therein of intoxicating liquors for beverage purposes." There were also other federal statutes then in being, such as the statute forbidding the sale of liquor to Indians and the like, the violation of which would be a crime. As to these then existing federal statutes, the appellant argues that the alleged threat to accuse the prosecuting witness of selling liquors would not suffice to amount to an accusation of a crime because under these several statutes liquor could be sold or transported legally, as, for instance, for export or sacramental or medicinal purposes, under the War Prohibition Act; and, hence, that, in order to accuse a person of the crime of selling liquors, it was necessary to state in the accusation that the accused person was charged with selling liquors for beverage purposes.

In making this contention the appellant relies strongly upon the case of *People v.*

Hoffman, 126 Cal. 366, 58 Pac. 856, in which the threat set forth in the information, and upon which the charge of extortion was founded, was to accuse the prosecuting witness of the crime of selling diseased and unwholesome meat. This court, in reversing the judgment of conviction based upon such information, stated that the act of selling diseased and unwholesome meat was not of itself a crime, but only became so when knowingly sold with intent that it should be eaten, and that it should have appeared in the information that the defendant had threatened to accuse the other with having knowingly sold diseased and unwholesome meat with intent that it should be eaten in order to constitute an accusation of a crime. We do not think this case has the direct or compelling application to the instant case which the appellant claims for it. The questions presented in that case arose upon a demurrer to the information, while in the instant case no objection by demurrer or otherwise was presented. In the case at bar the threatened accusation was not merely one of selling liquors. The threat was that the prosecuting witness was to be accused of "the crime of engaging in the sale of intoxicating liquors in violation of the United States statutes." Assuming that that intended accusation was based upon the provisions of the War Prohibition Act, it would amount to an accusation of a sale of such liquors to such persons and for such purposes as would constitute a violation of the terms of said act, and hence the person so threatened could not have understood said accusation to refer to the sale of liquors for export or sacramental or medicinal or other innocent uses, since such a sale would not have been in violation of said act.

A case which seems to be precisely in point is that of *State v. Blackington*, 111 Me. 229, 88 Atl. 726, in which an indictment wherein the threatened accusation was "the crime of the sale of intoxicating liquor in violation of the law." This the court held sufficient to satisfy the terms of a statute defining the crime of extortion substantially in the form of section 519 of our Penal Code. It is to be noted at this point that a clear distinction is to be drawn between indictments or informations which directly charge a defendant with a crime, and which must be exact and specific both in the definition of the crime and in the elimination of all exceptions which would render the acts charged not criminal, and those indictments or informations which charge extortion through threats to accuse another of a crime. In the latter class of cases no such technical accusation is required as in the former for several obvious reasons, some of which are that the indictment or information cannot go beyond the terms of the threatened accusations, and the accusations need only be such as to put the

intended victim of the extortion in fear of being accused of some crime. The more vague and general the terms of the accusation, the better it would subserve the purpose of the accuser in magnifying the fears of his victim, and the better also it would serve to protect him in the event of the failure to accomplish his extortion, and of a prosecution for his attempted crime. *State v. Blackington*, supra; *Commonwealth v. Murphy*, 94 Mass. (12 Allen) 449; *Commonwealth v. Goodwin*, 122 Mass. 19; *Commonwealth v. Bacon*, 135 Mass. 521; *State v. Patterson*, 271 Mo. 99, 196 S. W. 3. We are therefore of the opinion that the indictment was sufficient in its statement of the accusation of a crime in fear of which the prosecuting witness consented to part with his money. *People v. Fuski* (Cal. App.) 192 Pac. 552.

[2] There is in this indictment a further allegation of an additional threat inducing the fear on the part of the prosecuting witness through which the alleged extortion was accomplished. It consists in the allegation that the defendants "did then and there threaten to incarcerate the said Thomas M. Quinlin in the county jail of the county of Los Angeles unless he, the said Thomas M. Quinlin, did then and there pay to them, the said Claude Morton, E. N. Sanders, William W. Swan, and Lee Varain," etc. The sufficiency of this averment is also called in question by the appellant, who contends that it is insufficient for the reason that the threat contained therein is not alleged to be a threat "to do an unlawful injury to the person" of the individual threatened, and hence is insufficient to satisfy the requirements of subdivision 1 of section 519 of the Penal Code, above quoted. It may not be denied that a threat to imprison another is a threat to do an injury to his person. It is such an injury that, if unlawful, would give grounds for both a civil action for damages and a criminal prosecution for false imprisonment. In order, however, to constitute such a threat as will lay the foundation for a charge of extortion under subdivision 1 of section 519 of the Penal Code, it must be a threat "to do an unlawful injury" to the person of another, and hence the indictment which charges such extortion must set forth that such threat on the part of the defendant was a threat to do an "unlawful" injury to the person of the alleged victim of the extortion. The appellant herein contends that the language of the indictment as to such threat above quoted is insufficient because of its failure to allege that the threat to incarcerate Quinlin in the county jail was a threat to do him "an unlawful injury." It is the absence of the word "unlawful" from said clause in the indictment which, according to the appellant, renders it fatally defective. The contention of the appellant is

sound in so far as it goes to the extent of requiring that the defendant must show that the alleged threat was a threat to do an unlawful injury to the person of the complaining witness. It does not, however, follow that the statement or showing that the threatened injury was unlawful should appear in immediate context with the phrasing of the threat. If, from the face of the indictment, read as a whole, it sufficiently appears that the injury threatened to be done to the complaining witness was an unlawful injury, the indictment will be upheld, particularly as against an assault made against its sufficiency for the first time upon appeal. Looking to this indictment as a whole, the following phrases therein may be emphasized as bearing upon the question as to whether the threat to incarcerate Quinlin in the county jail was sufficiently alleged to be a threat to do an unlawful injury to his person. The indictment begins by charging that the defendants "did unlawfully, corruptly, knowingly, and feloniously extort and obtain from Thomas M. Quinlin," etc. This court, in construing the words "willfully, unlawfully, and feloniously," as thus set forth in an information, in connection with the charge of a particular crime, said:

"The words 'willfully, unlawfully, and feloniously' must be given some effect in construing such language, and they certainly would exclude an act which by law was innocent. The utmost that can be said in criticism of this information, * * * is, that it may not be direct and certain as to the particular circumstances of the offense. Such an objection is waived by a failure to demur." *People v. Mead*, 145 Cal. 500, 78 Pac. 1047.

But the indictment herein goes further. It alleges that the arrest and detention of Thomas M. Quinlin by the defendants was "unlawful and without any justification," and that said Quinlin, "solely by reason of said force, unlawful injury, threats, belief, and fear, did then and there consent," etc., and "did then and there on account of said force, unlawful injury, threats, force, belief, and fear, pay," etc. We think the indictment sufficient, in the absence of a demurrer thereto, to constitute the charge of a threat to do an unlawful injury to the person of Quinlin on the part of these defendants. Section 950 of the Penal Code provides that—

"The indictment or information must contain:
* * *

"2. A statement of the acts constituting the offense, in ordinary and concise language, and in such manner as to enable a person of common understanding to know what is intended."

This indictment charges that these defendants did "willfully, unlawfully, corruptly, knowingly, and feloniously extort and obtain from Thomas M. Quinlin" with his consent a sum of money which was obtained, and his consent thereto induced by "a wrongful use

of force and fear," in that these defendants "did unlawfully and without legal justification arrest and detain said Thomas M. Quinlin, and did then and there threaten to accuse him of a crime, * * * and did then and there threaten to incarcerate the said Thomas M. Quinlin in the county jail" unless he would pay to them a certain sum of money, and that said Thomas M. Quinlin, believing and fearing that said defendants would enforce and carry out said threats, "and solely by reason of said force, unlawful injury, threats, belief, and fear," did then and there consent to the payment of and did pay said sum of money. We think it must be admitted that persons of common understanding, construing the foregoing words and phrases of the indictment according to their usual acceptance in common language, would understand that they were being charged with the extortion of the said money from said Quinlin through fear induced by the threat of an unlawful incarceration. The utmost that can be said in criticism of this indictment in this particular is that it may not be direct and certain as to the particular circumstances of the offense. Such an objection would be waived by failure to demur. Pen. Code, § 1012; *People v. Mead*, supra. If it is claimed by the defendant that this indictment embraces two different threats, viz. a threat to accuse Quinlin of a crime indictable under subdivision 2 of section 519 of the Penal Code, and a threat to do an unlawful injury to his person indictable under subdivision 1 of said section, and that it cannot be ascertained to which of these the above-quoted language of the indictment had application, the answer still remains that this constituted at most a mere uncertainty, which could only be taken advantage of by demurrer or motion to have these two charges, if they be such, separately stated.

[3] The next contention of the appellant is that the evidence is insufficient to establish either of these two charges. As to the first of these, viz. that the defendant extorted said money from Quinlin by the threat to accuse him of a crime, we are of the opinion that the contention of the defendant cannot be sustained. The record herein discloses that the defendant, in arresting and detaining Quinlin, posed and pretended to be acting as a federal officer, and that as such he so arrested and detained Quinlin in the nighttime, and without warrant or other authority so to do. Quinlin testified that during the course of his said arrest and detention the defendant stated that "he had a charge against me of selling liquor; shipping liquor into Arizona, Washington, Idaho, and Nevada." He also testified that Sanders said that "he had enough on me to give me two or three years at McNeill's Island." He further testified that one or the other of the defendants threatened to accuse him of "shipping

liquor into dry territory and selling whisky illegally." It is true that these statements of the prosecuting witness are not couched in the precise language of the indictment, but, taken together, and, as we have seen, uttered by the defendant while he was posing as a federal arresting officer, we think they fairly import a threat to accuse Quinlin of participating in the sale and transportation of liquors into dry territory in violation of the federal statutes then in being, making such acts a crime. What has been heretofore said with reference to the vagueness of such an accusation has application to its proofs. All that was necessary by way of definiteness in such proof was: First, that they should be sufficient to come fairly within the scope and terms of the indictment; and, second, that they should be sufficiently definite to advise a person of ordinary intelligence that he was being threatened with an accusation of having committed a violation of the federal laws then in being relative to the sale and shipment of intoxicating liquors. We think the foregoing testimony sufficient to measure up to both of these requirements under the rules laid down in *People v. Mead*, supra, and hence that the defendant's contention that the evidence was insufficient to justify his conviction upon this particular charge cannot be sustained.

[4] The appellant's next contention is that the evidence is insufficient to sustain the charge in the indictment that the defendants threatened to do an unlawful injury to his person through an alleged threat "to incarcerate him in the county jail." An examination of the record in this regard also fails to support this contention. The evidence abundantly shows that, of the defendants charged jointly with extortion by this indictment E. N. Sanders, the appellant herein, was, at the time of said alleged extortion, a police officer of the city of Los Angeles, as was also one of his codefendants, W. W. Swan; that of the other two defendants Lee Varain was an acquaintance of Quinlin, who, by reason of such acquaintanceship and pretended friendship, was made use of by his codefendants to aid in the accomplishment of said crime; that the other codefendant, Claude Morton, was the attorney of said Varain. These four defendants conspired together to extort money from Quinlin, whom they knew had money, which to the extent of \$1,000 he usually carried upon his person; and whom they also knew to be vulnerable as having been, or suspected of being, engaged in questionable enterprises in respect to the sale of liquor. In pursuance of this conspiracy Sanders on the evening of August 19, 1919, accosted Quinlin as he was coming out of the hotel, telling him that he was an officer; that he (Quinlin) was under arrest. He had no warrant, and Quinlin had committed no offense for which he could be legally ar-

rested without a warrant. The defendant did not tell Quinlin at the time what he was under arrest for, but took him to a tea room kept by Varain, where they were joined by Swan. The defendant indicated to Varain that he (Varain) was also to be arrested, and that both were about to be taken to the county jail. Varain said he would like to visit his lawyer, and the trio were then driven to the office of the defendant Morton, whom Varain first interviewed alone, while Quinlin and Sanders remained in the anteroom, and during which time Sanders told Quinlin that "he had plenty on him, and that he had better get \$1,000." Presently Morton emerged, and asked if he could see Varain and Quinlin alone, and was allowed to do so, and when they were together in Morton's inner office Varain began to play his part by pleading that he could not afford to be arrested again, as he had one charge against him already. He thus succeeded in getting Quinlin to agree that Morton should act as the lawyer for both of them, and go out and see if he could fix it with Sanders. He went outside, and soon returned and reported that the officer said he had "plenty on Quinlin, and had different charges, shipping liquor into different states, dry territories"; whereupon Varain began to suggest giving money to fix the officer up to \$500, to which Quinlin finally agreed; whereupon Morton again went outside, and came back saying "Well if you will give him \$1,000 apiece, you can both go to hell as far as he is concerned." Quinlin had only \$320 on his person, but was allowed to send a messenger to his wife for \$250 more. While these proceedings were going on Swan again appeared on the scene with a bottle of whisky, and they were all together in Morton's office when the final arrangements were made, by which Varain gave his check for \$500 and Quinlin paid over to Morton \$500 in money, agreeing to bring the other \$500 to his office on the following day. Thereupon the parties separated.

Was the threat to incarcerate Quinlin in the county jail, uttered under the foregoing circumstances, a threat to do an unlawful injury to his person within the meaning of subdivision 1 of section 519 of the Penal Code? We think this question must be answered in the affirmative. The conspiracy entered into between this defendant and his codefendants to extort money from Quinlin by means of his pretended arrest, and by the threat of his incarceration, was itself unlawful, and a crime under several of the subdivisions of section 182 of the Penal Code. The arrest and detention of Quinlin by the defendant was an unlawful arrest, in that it was made without a warrant, and, so far as the record discloses, was an arrest based upon no pretense of any legal right in the arresting officer to make such arrest without a warrant under the provisions of section 836

et seq. of the Penal Code, or under any other provision of law. The utmost which the defendant and his coconspirators assert upon the trial as a justification for Quinlin's arrest and detention was that he was suspected of certain acts in relation to the selling or shipment of liquor in violation of the United States statutes then in force; but these acts, even if there was any foundation for their existence, were not pretended to have been committed or attempted in the presence of the arresting officer, or of any other of said defendants, and, in addition to this, were merely misdemeanors, for the commission of which the arrest without a warrant could not lawfully be made. Having thus unlawfully arrested and detained their intended victim, the defendants proceeded to threaten to accuse him of a crime. It is quite immaterial whether they or any of them in making said threat knew or suspected or had any reason to know or suspect that said Quinlin had committed the particular offense of which they threatened to accuse him, since it was unlawful to make or employ such a threat for the purpose of extortion. *People v. Beggs*, 178 Cal. 79, 172 Pac. 152. Having thus unlawfully arrested said Quinlin, and thus far unlawfully detained him in custody and having thus further unlawfully threatened to accuse him of a crime, the defendants proposed to carry their unlawful conspiracy and conduct one step further by the threat to imprison Quinlin in the county jail. Thus it will be seen that this threat of incarceration had its inception in unlawfulness, and was but the last of a series of unlawful acts having for their object the creation of the wrongful fear in the mind of their victim sufficient to induce his consent to part with his money. The appellant, however, contends that this threat to incarcerate Quinlin in the county jail, although made under the foregoing circumstances, was not a threat to do "an unlawful injury" to the latter's person, for the reason that said defendants might lawfully have brought about Quinlin's incarceration in the county jail through the process of a complaint charging him with some offense, and through the issuance and execution of a warrant for his arrest and confinement in jail.

In making this contention the appellant strongly relies upon the case of *People v. Schmitz*, 7 Cal. App. 330, 94 Pac. 407, 419, 15 L. R. A. (N. S.) 717, and particularly upon the opinion of this court in denying the petition for a rehearing in that case. It is to be noted, however, that the questions discussed in that case arose upon the face of the indictment, and related solely to its sufficiency as charging a threat to do an unlawful injury to the property of the persons complaining. This court in that case decided that the term "unlawful injury," as used in section 519, subd. 1, of the Penal Code, had ref-

erence to injuries of such a character that, if committed as threatened, would have constituted an actionable wrong, and further held that the indictment in that case did not sufficiently show that the acts threatened, as stated therein, were not such as could and would have been lawfully done, and that, in order to render an act which a person might lawfully do an unlawful injury to the person or property of another, such act must be threatened to be done by means which the law denounces as unlawful. As illustrating and distinguishing this principle, the court referred to the two cases of *Boyson v. Thorne*, 98 Cal. 578, 33 Pac. 492, 21 L. R. A. 233, and *People v. Hughes*, 137 N. Y. 37, 32 N. E. 1105. In commenting upon the latter of these two cases this court briefly recited the facts therein, showing that the defendant Hughes, the head of a labor organization, in order to extort a sum of money from certain wholesale merchants, threatened to induce certain retail merchants to continue in force a boycott of their institution and of the use of their goods by such retailers after the cause for creating the boycott had been removed. This he proposed to accomplish through an improper exercise of his influence with said retailers, and through false representations and deceit. This court adopted the views of the New York court in saying that, while it was true that the retailers had a lawful right to withhold their custom, and while it was also true that Hughes had a lawful right by proper means to induce them so to do, his threat was nevertheless a threat to do an unlawful injury to the property of those from whom he sought to extort the money, because the means to be employed by him were unlawful. In the text of the particular case thus referred to the New York Court of Appeals says:

"What Hughes threatened was found by the jury to be such an unlawful injury. They saw that he conveyed the idea strongly and clearly that, unless his demand for money was complied with, he could and would, by threatening the hostility of the order, compel the retail dealers to withdraw their custom, and could and would utilize the power he had, although the original occasion for its exercise was gone. Such a threat, within the doctrine of the *Barondess* Case, and within that also of the dissenting opinion in this court, amounts to a threat to do an unlawful injury to property. *People v. Barondess*, 133 N. Y. 649, 31 N. E. 240;¹ *Id.*, 61 Hun, 581, 16 N. Y. Supp. 436. There was therefore a question for the jury, and the court could not properly have directed an acquittal."

This language is peculiarly appropriate to the case at bar. The threat which the defendant and his associates made to incarcerate Quinlin in the county jail must be taken and

understood by us as it would be naturally taken and understood by the person to whom it was uttered under the immediate circumstances of the case. He had been unlawfully arrested, he was being unlawfully detained, and, being thus already unlawfully imprisoned, he was being threatened with being immediately taken to jail. Had the threat been literally carried into effect as uttered under the immediate circumstances and conditions of the case, it would have constituted merely a continuance of the false and unlawful detention to which the person threatened was being subjected at the very moment when the threat was being made. When these facts are considered in connection with the further facts that Quinlin's unlawful arrest and detention as thus far consummated were the result of an unlawful conspiracy between this defendant and his codefendants to accomplish the crime of extortion by the aforesaid unlawful means, and that the threat of his incarceration was but a further step in the consummation of the said crime, and was not intended by these conspirators to be rendered legal by compliance with the usual forms of law, or indeed to be carried into effect at all, except so far as the threat of its execution was to be used as a means for accomplishing the crime of extortion, it would seem to be perfectly clear and in line with the foregoing cases that such a threat, when viewed in the light of its attending circumstances, constituted a threat to do an unlawful injury to the person of him against whom it was directed. The jury to which these facts were presented evidently so regarded it, and we are of the opinion that their verdict to that effect was fully sustained by the evidence in the case.

The judgment is affirmed.

We concur: SHAW, C. J.; WILBUR, J.; WASTE, J.; SLOANE, J.; LAWLOR, J.; SHURTLEFF, J.

188 Cal. 759

PEOPLE v. SWAN. (Cr. 2412.)

(Supreme Court of California. May 20, 1922.)

1. Criminal law §593—Refusal of continuance so that other counsel could be present held not ground for reversal.

Where defendant was fully and fairly represented by counsel during all stages of the trial, court's refusal to postpone the trial until certain other counsel of defendant's choosing could be present held not ground for reversal.

2. Criminal law §823(12)—Instruction held not to withdraw from jury the right to consider the credibility of a witness in view of other instructions.

Court's statement in answer to inquiry of jury that a certain witness was not on trial, and that, if such witness was guilty of anything,

¹ Reported in full in the *Northeastern Reporter*; reported as a memorandum decision without opinion in the *New York Reports*.

it was the duty of the officer to file a charge against him, *held* not to mislead jurors into thinking that they could not consider the credibility of such witness, in view of other instructions as to the weight and credibility of the witnesses.

In Bank.

Appeal from Superior Court, Los Angeles County; Frank R. Willis, Judge.

William W. Swan was convicted of extortion, and he appeals. Affirmed.

Paul W. Schenck and Richard Kittrelle, both of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., Arthur Keetch, Deputy Atty. Gen., and John W. Maltman, of Los Angeles, for the People.

PER CURIAM. [1] This case, as to the main questions presented for consideration, is identical with the case of *People v. Sanders*, 207 Pac. 380, this day decided, and the conclusions reached therein with respect to the sufficiency of the indictment, and also as to the sufficiency of the evidence to sustain it, are hereby given application to this appeal. In addition to the points therein considered, the appellant herein makes two further contentions. These are: First, that the trial court committed error in compelling the defendant herein to go to trial without the presence of one of his attorneys. Without attempting to recite in detail the facts relied upon by the appellant as supporting this contention and by respondent as opposing it, we are satisfied from an examination of the record that the defendant was at all the stages of his case represented by counsel, and particularly by counsel who, having also, and prior to his own trial, represented and been present at the trial of his codefendants, and were thus familiar with every phase of his case at all stages of the trial thereof, and hence that said defendant was fully and fairly represented by counsel during the trial of his case. This being so, we think the trial court did not abuse its discretion in not further postponing the trial of the cause until certain other counsel of the defendant's choosing could be present, and that the defendant has suffered no prejudicial error through the action of the trial court in that regard.

[2] The appellant makes the further contention that the trial court committed prejudicial error in prohibiting the jury from considering the question of the credibility of the prosecuting witness Quinlin. We find upon an examination of the record that it fails to sustain the appellant's contention in that regard. The episode in question occurred during the argument of the case before the jury. It appears that one of the jurors asked some question the substance or purport of which is not shown by the record herein. The court, not having caught the

purport of the question, asked that it be repeated, which being done the court said:

"Mr. Quinlin is not on trial. The one that is on trial is this defendant. If a man had committed a murder, had been guilty of it, and he had been taken by an officer to an office and turned loose for the consideration of \$500, and under threat he would put him in jail if he didn't pay it, the fact he was guilty of murder would not excuse the officer for taking the money from him. You want to get it out of your mind you are trying Mr. Quinlin. You are now trying to see whether these parties extorted the money from Mr. Quinlin, not if Mr. Quinlin was guilty of something. If Mr. Quinlin was guilty of anything, then it was the duty of the officer to file a charge against him, so you just get that out of your mind you are trying Mr. Quinlin, and try Mr. Swan."

In the absence of anything going to show what called for this expression on the part of the court, we are entirely at a loss to determine whether or not the language of the court was justified or whether or not the appellant was prejudicially affected thereby. The utterance of the court does not of itself amount to an instruction to the jury that they were not to consider the question of the credibility of the prosecuting witness, Quinlin. The court gave the usual instructions with relation to the functions of the jury as exclusive charges of the weight of the evidence and the credibility of the witnesses. One of said instructions having apparently reference and application to the particular matter above set forth was the following:

"You are the sole and exclusive judges of the weight and the credibility of witnesses, and it is your function to determine all questions of fact arising from the evidence in the case. With the facts the court has nothing to do. I have not expressed, nor intend to express, nor have I intimated or intend to intimate, any opinion as to what witnesses are or are not worthy of credence, what facts are or are not established, or what inferences are to be drawn from the evidence adduced. If any expression of mine has seemed to indicate an opinion relating to any of these matters, such expression must be entirely disregarded by you."

We are satisfied that, if any misapprehension had been created in the minds of the jurors as to their right and duty to consider the credibility of the prosecuting witness Quinlin by reason of the foregoing remarks of the trial court during the argument, these were entirely removed by the foregoing instruction, and that the appellant therefore suffered no prejudicial injury therefrom.

No other errors appearing in the record, the judgment is affirmed.

SHAW, C. J., RICHARDS, Justice pro tem., and WILBUR, WASTE, SLOANE, LAWLOR, and SHURTLEFF, JJ., concur.

57 Cal. App. 453

CASE v. EGAN. (Civ. 3852.)

(District Court of Appeal, First District, Division 2, California. April 26, 1922. Hearing Denied by Supreme Court June 22, 1922.)

Mortgages $\Rightarrow$ 282(1)—**Purchaser held not personally liable on assumption of mortgage debt for which vendor was not personally liable; "contract for benefit of third person."**

Where defendant purchased property from a vendor who was not personally liable for a debt secured by a deed of trust on the property, and the deed to the purchaser stated the land was "subject to a deed of trust * * * which the party of the second part (purchaser) hereby assumes and agrees to pay," the mortgage indebtedness assumed by the purchaser was not a "contract for the benefit of a third person," within the meaning of Civ. Code, § 1559, providing that a contract made expressly for the benefit of a third person may be enforced by him, so as to entitle the assignee of the note secured by the mortgage to hold the purchaser personally liable thereon, nor can the purchaser be held liable under section 2854, which requires as a basis of liability that the mortgagee must be a creditor of the grantor.

[Ed. Note.—For other definitions. see Words and Phrases, First and Second Series, Contract.]

Appeal from Superior Court, Alameda County; Fred V. Wood, Judge.

Action by Fred H. Case against N. Egan. From judgment for defendant, plaintiff appeals. Affirmed.

Geo. M. Naus and Chester H. Case, both of Oakland, for appellant.

Fred B. Mellman, of Oakland, for respondent.

LANGDON, P. J. This appeal is from a judgment against the plaintiff, following an order sustaining a general demurrer to the amended complaint without leave to amend after the plaintiff had declined to amend.

The complaint alleges, in substance: On August 4, 1913, Claude Scheelk made and delivered to George W. Austin his promissory note for \$1,450 secured by deed of trust to certain real property; that the said note was assigned by said Austin to Case, the plaintiff here; that there has been a default in the payment thereof when due; that the real property covered by said deed of trust was transferred by Scheelk to Covington, by Covington to Faulkner, and by Faulkner to Egan, the defendant here. With reference to the successive transfers of this property, the complaint alleges:

"Plaintiff is informed and believes, and therefore alleges, that neither said Covington nor said Faulkner personally assumed the payment of said promissory note, or the indebtedness secured by said deed of trust, but that each of said transfers was made subject to said deed of

trust without assumption of personal liability by the transferee."

But it is alleged that in the transfer from Faulkner to defendant Egan the grant contained the following:

"Subject to a deed of trust in the sum of fourteen hundred and fifty (1,450) dollars * * * which the party of the second part hereby assumes and agrees to pay."

It is alleged that on July 7, 1919, the trustees under the deed of trust sold the property; that after applying the proceeds of the sale to the debt, there was a deficiency of \$1,966.40, for which judgment is asked against the defendant upon the ground that she agreed in writing that she would personally assume and pay the obligation of said promissory note.

As admitted by both parties, the sole question presented upon this appeal is:

"Is defendant, Egan, relieved from direct liability to the plaintiff upon her assumption of and agreement to pay the amount secured by the note and deed of trust by the circumstance that her grantor, Faulkner, was not himself personally liable therefor?"

Appellant's position is that the liability of the transferee of real property to the mortgagee or beneficiary under a deed of trust springs, in this state, from two independent Code rules, i. e., sections 2854 and 1559, Civil Code. Counsel, however, admit that under section 2854 of the Civil Code it is essential that the grantor of the property be himself personally liable for the debt secured thereby before his grantee can be held liable by the mortgagee. This is because under that section the mortgagee must be "a creditor" of the grantor, and he cannot be a creditor of the grantor unless the grantor is personally liable to him for the debt. It is therefore admitted that if the rights of appellant depended solely upon that section of the Code, the demurrer was properly sustained.

However, the appellant, in a most comprehensive and scholarly brief, seeks to have this court declare that the plaintiff has stated a cause of action under the provisions of section 1559, Civil Code; that under said section personal liability of the grantor is a wholly immaterial circumstance in determining the liability of the grantee. Whatever may be our view as to the logic of appellant's arguments upon this question and his acuteness in differentiating the cases in this state which are opposed to his contention, we feel bound by the expressions of the rule in the following cases: *Biddel v. Brizzolara*, 64 Cal. 354, 30 Pac. 609; *Alvord v. Spring Valley Gold Co.*, 106 Cal. 547, 40 Pac. 27; *Ward v. De Oca*, 120 Cal. 102, 52 Pac. 130; *Williams v. Naftzger*, 103 Cal. 438, 37 Pac. 411; *Sherwood v. Lowell*, 34 Cal. App. 365, 377, and 378, 167 Pac. 554; *Page v. Chase Co.*, 145 Cal.

578, 585, 79 Pac. 278; Andrews v. Robertson, 177 Cal. 434, 437, 170 Pac. 1129.

While some of these cases do not expressly decide the precise question presented here, we are of the opinion that it is the general doctrine of them all that where the grantor of real property is not personally liable for a mortgage debt, a stipulation in a deed from him to his grantee that said grantee shall pay, personally, the mortgage indebtedness, will not be regarded in law or equity as a contract intended for the benefit of a third person within the meaning of section 1559, Civil Code, so as to entitle such third person to enforce the same. The reasoning inducing this conclusion is set forth in the case of Vrooman v. Turner, 69 N. Y. 280, 283, and 284, 25 Am. Rep. 195, which was one of the cases relied upon by our Supreme Court in the case of Biddel v. Brizzolara, supra. The other cases herein cited, and which are binding upon us, either expressly announce this doctrine or they are in entire harmony therewith.

The demurrer to the complaint should have been sustained.

The judgment is affirmed.

We concur: NOURSE, J.; STURTEVANT, J.

57 Cal. App. 320

SCOTT et ux. v. DELTA LAND & WATER CO. et al. (Civ. 3591.)

(District Court of Appeal, Second District, Division 1, California. April 11, 1922. Hearing Denied by Supreme Court June 8, 1922.)

1. Vendor and purchaser ⇨33—That some representations found to have been made are not actionable does not affect judgment rescinding contract on evidence showing actionable misrepresentation.

In purchasers' action to rescind contract, the fact that some of the misrepresentations alleged and found to have been made are not actionable does not affect the judgment rescinding the contract, where it can be sustained upon evidence supporting any one actionable material misrepresentation.

2. Vendor and purchaser ⇨37(6)—Misrepresentations from which no damage could result held not actionable.

As respects validity of contract for purchase of land and shares of stock in irrigation company, misrepresentations as to the cost of the water system, the number of cattle and sheep being cared for in the valley where the land was situated, and as to the dam having a cement core, held not material.

3. Vendor and purchaser ⇨36(2)—Misrepresentations as to productiveness of land and adequacy of water supply held ground for rescission.

As respects validity of contract for purchase of land and stock in irrigation company,

misrepresentations as to the productive quality of the soil and as to the adequacy of the water supply, if purchasers were thereby induced to contract, held ground for rescission.

4. Vendor and purchaser ⇨37(4)—When purchaser could rely on vendor's representations as to productiveness of land and water supply.

A purchaser had the right to rely on vendor's representations as to productiveness of land and adequacy of water supply unless he possessed knowledge sufficient to induce a belief that the representations did not accord with the facts, or unless the conditions were such as to put him upon notice that the truth had not been stated.

5. Vendor and purchaser ⇨44—Evidence held to sustain findings that vendor misrepresented productiveness of land and adequacy of water supply.

In purchasers' action to rescind contract, evidence held to sustain findings that vendor made misrepresentations as to the productive quality of the soil, and as to the adequacy of the water supply.

6. Appeal and error ⇨1011(1)—Finding on conflicting evidence conclusive.

Trial court's conclusion of fact on conflicting evidence is conclusive on appeal.

7. Vendor and purchaser ⇨42—Fraud inducing execution of contract not waived by modification of contract before discovery of fraud.

Fraud by which purchasers were induced to enter into contract was not waived by changing of contract at a time when purchasers were not aware of the fraud.

8. Vendor and purchaser ⇨119—Purchasers held not barred by laches from right to rescind contract for misrepresentations.

Where purchasers obtained information respecting inadequacy of water supply, and attempted to cancel the contract in August, 1915, and carried on negotiations for cancellation for several months thereafter, gave notice of rescission March, 1916, and commenced action therefor during May, 1916, they were not barred by laches from the right to rescind on the ground of misrepresentations.

9. Vendor and purchaser ⇨37(5)—Good faith in making material misrepresentations no defense.

In action for rescission of contract because of misrepresentations, the good faith of the party who made the representations is no defense under Civ. Code, § 1572.

10. Contracts ⇨94(3)—Rule of criminal law requiring proof of specific intent to defraud not applicable to civil actions.

The rule of the criminal law requiring proof of a specific intent to defraud in false pretense cases does not apply to civil actions.

Appeal from Superior Court, Los Angeles County; Frank R. Willis, Judge.

Action by Charles C. Scott and wife against the Delta Land & Water Company,

a corporation, and another. Judgment for plaintiffs, and defendants appeal. Affirmed.

Wm. Story, Jr., of Ouray, Colo., and Joseph L. Lewinsohn, of Los Angeles, for appellants.

L. M. Fall, Dudley W. Robinson, and Hickox & Crenshaw, all of Los Angeles, for respondents.

JAMES, J. Plaintiffs, alleging misrepresentations fraudulently made to induce them to enter into a contract for the purchase of certain land and water rights in the state of Utah, brought this action to enforce rescission. The prayer of their complaint was that the contract of sale be canceled; that a certain mortgage creating a lien against real property in the state of California, which was executed by them to secure payment of a portion of the purchase price of the Utah land and water stock, be ordered surrendered, and promissory notes made incidental therewith be canceled, and for damages and costs. The decree as entered secured to the plaintiffs all of the relief demanded, except that no judgment was allowed for damages. The defendants have appealed from the judgment, and assign as a principal ground thereof that the evidence was insufficient to sustain the findings of the trial court. Certain alleged errors of law occurring in the course of the trial make up the remaining points upon which it is claimed that a reversal should be ordered.

The defendant Delta Land & Water Company was the owner of the real property contracted to be purchased by the plaintiffs; the Western Securities Company was an allied corporation organized for the purpose of acting as sales agent of the property. The legal connection between the two corporations was so close as to leave no question but that the corporation first named assumed full responsibility for every act done and representation made by any of the officers or agents of the latter while promoting sales of the Delta properties; hence, in references made hereinafter to such officers or agents, they will for convenience be generally referred to as those of the defendants, and the principal corporation will be designated as the Delta Company. Plaintiffs in their complaint alleged that on March 5, 1915, they entered into a contract to purchase from the Delta Company 160 acres of land in Beaver county, Utah, and 160 shares of capital stock of the Beaver County Irrigation Company (all of the stock of the latter corporation being owned by the Delta Company); that they executed notes to cover the purchase price of the land, which was agreed to be \$3,800, and the price of the water stock, which was agreed to be \$11,200, and in addition thereto gave a mortgage on five acres of land which they owned near the town of Whittier, in California, to secure payment of the \$3,800. The payment of the price of the water stock

was secured by assignment of the shares to the Delta Company, and by mortgages made covering the land purchased. They alleged that on May 20, 1915, a new agreement was made whereby plaintiffs relinquished one-half of the land and water stock agreed to be purchased, and contracted then to pay for 80 acres retained by them at the price of \$30 per acre, and 80 shares of water stock at \$70 per share. The terms of the notes given on account of the modified contract were changed from those which accompanied the original contract, but the mortgage liens remained, and 80 of the shares of water stock continued to be held by the Delta Company as collateral security. Plaintiffs alleged that their contract to purchase the land and water stock was procured through false and fraudulent representations made to them by defendants; that the defendants represented: (1) that the land "was of the best quality, fertile in every respect, free from alkali and noxious weeds, and suitable for growing thereon all kinds of crops of hay, grain and vegetables"; (2) that the Delta Company owned all of the water flowing in Beaver river, and that, according to the record kept by the United States Government for 14 years, that river furnished sufficient average flow to irrigate 44,000 acres of land; that all of the said water had been made appurtenant to the 15,000-acre tract of land owned by the Delta Company, and that it was sufficient and would furnish all necessary water for irrigating said tract, and amount to an average each year of not less than 3 "acre-feet"; that said land was worth \$30 per acre, and the water stock was worth \$70 per share. There were other allegations as to fraudulent representations, such as that defendants stated that the Delta Company had spent \$1,000,000 in providing an irrigation system; that many thousand cattle and sheep (the particular number being stated in the complaint) were being cared for and fed in the valley where the land was situated; that the dam provided to hold the water in storage had a cement core extending to bedrock. It was alleged that the land was not fertile; that it was impregnated with black alkali; that it was not of the best quality, or in any respect suitable to grow hay, grain, and vegetables, and that the water supply was not as represented, or sufficient with which to irrigate the 15,000-acre tract, but sufficient only to irrigate not to exceed 6,000 acres; that the United States government had not kept a record of the flow of water for 14 years, but had only kept a record for 6 years, and that, according to such record, it was not shown that there was sufficient water in Beaver river to furnish an average of 3 "acre feet" annually to the 15,000-acre tract; that in the year 1915, on or about July 1st, the water was exhausted, and that no further water was available during that season for the irrigation of crops, and that the other

representations referred to were not founded in fact. The trial judge found that misrepresentations had been made in the particulars alleged, and found that the land was not worth more than \$10 per acre, and the water stock not more than \$15 per share.

[1-4] The judgment may be sustained upon evidence supporting any one material misrepresentation. *Davis v. Butler*, 154 Cal. 623, 98 Pac. 1047; *Thomas v. Hacker*, 179 Cal. 731, 178 Pac. 855. It matters not that there may have been included in the allegations and findings representations which are not actionable; for instance, the representations as to the cost of the water system, and as to the number of cattle and sheep which were represented as being cared for in the valley where the land was situated, and whether the dam had a cement core, may be left out of consideration. The representations as to the productive quality of the soil and as to the adequacy of the water supply were material factors which, if they furnished an inducement to the vendees to enter into the contract made by them, would afford ground upon which to base a rescission when their falsity was established. *Bickel v. Munger*, 20 Cal. App. 633, 129 Pac. 958; *Tracy v. Smith*, 175 Cal. 161, 164, 165 Pac. 535. On the other hand, if the land was as represented, and the water supply adequate, no damage could result because of any of the other alleged misrepresentations. Misinformation as to the material matters referred to would constitute representations as to existing facts and conditions, and would not fall within the category of mere opinion or speculation. *Barron Est. Co. v. Woodruff Co.*, 163 Cal. 573, 126 Pac. 351, 42 L. R. A. (N. S.) 125. And the vendee had the right to rest upon them unless he possessed knowledge sufficient to induce a belief that the representations did not accord with the facts, or unless the conditions were such as to put him upon notice that the truth had not been stated. *Wiley v. Clements*, 146 Cal. 91, 79 Pac. 850; *Neher v. Hansen*, 12 Cal. App. 370, 107 Pac. 565.

The evidence showed that the Delta Company issued a circular which was printed and used generally by the sales agents, which contained these statements:

"15,000 acres of virgin soil under a one million dollar irrigation system; an inexhaustible supply of water that makes the Milford farmer absolutely independent of rainfall."

Plaintiff C. C. Scott (the husband) testified that he was a farmer residing near Whittier, California; that he had been solicited by an agent of the defendants to purchase land in the Utah tract, and that he was given one of the circulars to which reference has been made; that he went to Utah in February of 1915 with an agent of defendant, and was shown an experimental farm upon which was a good stand of alfalfa (this experimental farm had been highly fertilized but the

agents did not give that information to Scott); that he was shown the dam in which was collected the water supply, and that the agent told him that every share of water entitled the holder to 3 acre-feet; that the agent explained what the term "3 acre-feet" meant; that at Minersville adjoining the 15,000-acre tract the agent showed trees and berries, and said that there could be grown just such products on the tract referred to; also that the agent showed alfalfa which he said had been planted 35 years, and said that the same kind of crop could be produced on the land which said plaintiff was solicited to buy; that the agent took a shovel and showed different soils; said that it was all good soil; that he had never seen better; and made the representations regarding the government having measured the water for 14 years, and of the conclusions drawn therefrom as to the water supply, as the same were alleged by plaintiffs in their complaint. The land had never been cultivated or changed from its raw state.

It appears by Scott's testimony that he did not enter into a contract immediately after making this first trip to the Utah land, and other agents of the defendants soon called upon him, one of whom (the president of the Delta Company) stated that "they had sufficient water for 44,000 acres, but to make this thing safe for the people we are going to put it on only 15,000." Following this, plaintiffs made the contract of March 5, 1915. Shortly thereafter Scott took his son and went upon the land contracted to be purchased, and spent some time in leveling and clearing the ground. He raised no crops, but expressed himself in his testimony as having become dissatisfied with conditions, although he did not, during his stay there, obtain information as to whether the water supply would be adequate, or what the productivity of the soil was. Upon his return to his home in Los Angeles county he requested and secured the new agreement which has been mentioned, under which he contracted to purchase but one-half of the land covered by the agreement of March 5th. Some time in July of 1915 he received notice that the water supply for irrigation purposes had for the time being become exhausted, and, after negotiations with the Delta Company looking to an abrogation of his contract, all of which failed of result, he served on behalf of himself and wife a notice of rescission, which notice was given on March 20, 1916.

As to the representations concerning the character of the soil, it must be conceded that such representations, testified by Scott as having been made, warranted the latter in believing and assuming that the soil was of a character as would produce crops of general kinds suitable to that locality and in average quantities. It was shown, even by the testimony of witnesses for the defendant, that the land was lacking in humus

constituent, and would not produce general crops until that element had been supplied, either by fertilizing with material brought upon it, or by growing alfalfa thereon for several years; furthermore that for the first year or two even an average crop of alfalfa could not be produced. The representation was that the then condition of the land was such as would produce crops of the kind referred to, and in average quantities, and such representation would not be satisfied by showing that, after a process of fertilization extending over several years, the land might be made productive. It was shown that the only way that the quality of the soil could be determined would be by chemical analysis, or by actual experimentation; hence there could be no imputation of negligence because Scott, a farmer, having been afforded an opportunity to see and examine the soil, did not at once discover its true character.

[5, 6] The evidence was sufficient to sustain the finding on that issue. It was sufficient also to support the conclusion of the trial judge that 1.7 acre-feet, which he found to be the maximum available supply of water, was insufficient to properly irrigate the 15,000-acre tract. There was some conflict in the evidence as to that issue, but there was testimony of witnesses who stated that the requirement (or the water duty, as it was termed) was 3 acre-feet annually in order to meet needs in the production of average crops. This testimony furnished evidence of a substantial kind and, as this court has no duty to resolve the conflict, the conclusion of the trial judge upon that matter of fact must be taken as final. Upon the two main issues specified there was sufficient evidence.

[7] The fraud was not waived by the changing of the contract on May 20, 1915. At the latter date plaintiffs had not been made aware of the deficiencies in soil and water supply. The consent of the Delta Company to the release of the obligations of the plaintiffs as to one-half the quantity of land and water shares purchased was not in any way, so far as is shown, based upon a condition that the Delta Company should no longer be liable for any fraudulent representations made as an inducement to the plaintiffs to enter into the original contract. The contract of May 20th amounted to a modification of the original agreement; it carried with it the original mortgage security as then existing against the California property of the plaintiffs.

[8] Plaintiffs were not guilty of laches barring them from the equitable relief sought. In August of 1915 they obtained information respecting the inadequacy of the water supply. They then proceeded in an attempt to secure a cancellation of their contract, and negotiations proceeded, it may be gathered from the record, for several months there-

after. About March 20, 1916, they gave notice of rescission, and on May 3d of the same year commenced this action. They acted with reasonable diligence in pursuing the remedy which the law afforded them. No conditions are shown as where the opposite party has so changed its situation, relying upon the contract, as to make it inequitable that it should now be compelled to release plaintiffs from the obligations assumed by them. The offer of the plaintiffs to release to the Delta Company all claim to the land or water stock was sufficiently expressed in the notice of rescission.

[9, 10] The court in its findings recited that the representations made by defendants and their agents were "false, untrue, misleading, and fraudulent, and were positively asserted by said defendants and their said agents, and each of them, to be true, in a manner not warranted by the information which they or either of them possessed at the time of the making thereof." Appellants argue that the burden rested with the respondents to show at the trial that the representations when made by defendants were not "actually believed by the defendants on reasonable grounds to be true." This point carries with it the suggestion that the finding of the court which has just been referred to was not sufficient to support the judgment. Aside from the provisions of section 1572 of the Civil Code, it is not established by the weight of authority in the United States that a party to a contract may innocently, and with belief in the truth of his statements, misrepresent to the opposite party conditions material to the consideration to be rendered by the former and escape liability. In a civil action the good faith of the party who procures the assent of another to the making of a contract by material misrepresentations is of no moment.

"Many courts lay down the rule that the misrepresentation of a material fact may be ground for rescinding or avoiding a contract though there is no actual fraud, and though it is innocently made. Such a representation is considered to be constructively fraudulent because of its effect of imposing upon and deceiving the person to whom it is made." 12 R. C. L. p. 343, par. 98.

The rule of the criminal law requiring proof of a specific intent to defraud in false pretense cases does not apply to civil actions.

Errors alleged to have been committed by the trial judge in his rulings on the admission of evidence have been examined, and as to none of them is it made to appear that the appellants have been so prejudiced as to entitle them to a new trial. There was competent evidence to the main issues which have been hereinbefore discussed. Such evidence supports the findings and judgment.

The judgment is affirmed.

We concur: CONREY, P. J.; SHAW, J.

(67 Cal. App. 314)

(207 P.)

DELTA LAND & WATER CO. v. PERRY
et al. (Civ. 3590.)

(District Court of Appeal, Second District, Division 1, California. April 11, 1922. Hearing Denied by Supreme Court June 8, 1922.)

1. Pleading $\S$ 411—Parties who without objection assumed issue to be presented by cross-complaint cannot complain that it was not properly presented.

A cross-complaint must in itself state facts sufficient to entitle the pleader to affirmative relief, and is not aided by averments in other pleadings; but, where the parties without objection to the pleading assumed the issue to be properly presented, and made no objection to evidence, they cannot complain on appeal.

2. Vendor and purchaser $\S$ 42—Fraud inducing execution of contract was not waived by modification of contract before discovery of fraud.

Fraud inducing the execution of a contract was not waived by modification of the contract prior to discovery of fraud.

3. Waters and water courses $\S$ 234—Rights of purchasers of water stock under notice of rescission held not affected by payment of assessments to prevent sale for nonpayment.

Payments of assessments on water stock to prevent a sale thereof for nonpayment by purchasers subsequent to service of notice of rescission of the contract for purchase thereof did not affect the rights of the purchasers under their notice of rescission.

4. Appeal and error $\S$ 1170(7)—Erroneous admission of evidence held harmless in view of other evidence overwhelmingly supporting the finding.

In purchasers' action to rescind contract because of misrepresentations as to the productiveness of the land and adequacy of the water supply, admission of document signed by other purchasers as to inadequacy of water supply, if error, held harmless under Const. art. 6, $\S$ 4½, in view of overwhelming evidence in support of the conclusion that the water supply was inadequate.

5. Vendor and purchaser $\S$ 113—Purchasers held not barred by laches from obtaining rescission of contract for fraud.

Purchasers who gave notice of rescission promptly upon discovery of fraud, and who tendered back and offered to relinquish and return to vendor everything of value which they had received, were not barred by laches from obtaining relief in vendor's action brought less than 9 months after service of notice of rescission, since purchasers were not required to immediately sue to enforce rescission, but could await affirmative action on part of vendor, and set up facts upon which they based their right to relief in vendor's action.

Appeal from Superior Court, Los Angeles County; Frank R. Willis, Judge.

Action by the Delta Land & Water Company against Harry F. Perry and others, in

which the defendant filed a cross-complaint. Judgment for defendants, and plaintiff appeals. Affirmed.

William Story, Jr., of Ouray, Colo., and Lissner & Lewinsohn and Lewinson & Barnhill, all of Los Angeles, for appellant.

L. M. Fall, Dudley W. Robinson, and Hickcox & Crenshaw, all of Los Angeles, for respondents.

SHAW, J. In this action plaintiff sought the foreclosure of a mortgage given by defendants to secure the payment of their promissory note in the sum of \$2,400. By answer defendants admitted the execution and delivery of the note and mortgage, but, as a defense to the cause of action, alleged the same was procured by false and fraudulent representations made by plaintiff and its agents, whereby defendants in reliance thereon were induced to buy from plaintiff certain arid land and right to water for irrigating the same, which right was evidenced by shares of stock in the Beaver County Irrigation Company, a subsidiary of plaintiff, and for the purchase price of which the note and mortgage were given to plaintiff. By a cross-complaint filed they alleged in substance the facts set forth in the answer as a defense to the action, and prayed that the note and mortgage constituting plaintiff's cause of action be annulled and canceled. The court upon trial of the issues found in accordance with the allegations of defendants' answer and cross-complaint, and entered judgment thereon in favor of defendants as prayed for, from which plaintiff has appealed.

The 40 acres of land sold to defendants, and for the purchase of which the note and mortgage securing the same were executed, was a part of a tract of 15,000 acres of arid land situated in Beaver county, Utah, for the irrigation and development of which plaintiff, in the name of the Beaver County Irrigation Company, caused to be constructed a reservoir for impounding the waters of Beaver river, together with a system of conduits for distributing the water upon the same.

A complete history of the scheme adopted by plaintiff for the development of this large tract of land, and the means and representations employed by it in procuring purchasers of subdivisions thereof, together with one share of stock in the irrigation company for each acre of land as a means of obtaining water for sufficiently irrigating the land, without which crops could not be successfully produced, is stated in an opinion by this court, filed on April 11, 1922, in the case of Scott et al. v. Delta Land & Water Co. (Civ. No. 3591), 207 Pac. 389. As shown by the evidence in the instant case, the representations made and means em-

ployed by plaintiff to induce defendants to purchase the land and water stock and execute the note and mortgage are, as conceded by appellant, substantially the same as made and employed in the Scott Case. No purpose could be served by a repetition of what is there said in discussing that feature of the case. Suffice it to say that, notwithstanding testimony on behalf of plaintiff in conflict therewith, there is here, as in the Scott Case, ample evidence to support the finding that defendants, in buying the land and water stock, and executing the note and mortgage in part payment therefor, relied upon the representations so made by plaintiff and its recognized agents; that such representations were false and untrue, and "were known to the cross-defendant at the time of making them and each of them to be wholly false, untrue and fraudulent." The finding relates to the representations as to the fertility of the soil, its content of humus, freedom from alkali, and the adequacy of a supply of water for irrigation, the amount of which, as represented to defendants, was $2\frac{1}{2}$ acre feet for each acre of the entire tract. As in the case referred to, wherein the evidence touching such issues is substantially the same as in this, we conclude there is no merit in appellant's contention that the findings are without sufficient support in the evidence.

[1] The fraudulent representations whereby defendants were induced to execute the note and mortgage were set up by the answer as a defense to the foreclosure of the mortgage. By a cross-complaint filed therewith defendants alleged the same facts pleaded by way of defense, and upon which they based a claim for affirmative relief, namely, the cancellation of the note and mortgage. In the cross-complaint, however, they failed to allege a rescission or offer to rescind, by reason of which omission appellant insists that the cross-complaint did not state facts upon which defendants were entitled to affirmative relief, and hence the judgment canceling the note and mortgage should be reversed. *Fairchild v. Western Securities Corporation*, 176 Cal. 742, 169 Pac. 363. While it is true that a cross-complaint must in itself state facts sufficient to entitle the pleader to affirmative relief, and is not aided by averments in other pleadings, nevertheless, where the parties without objection to the pleading assume the issue to be properly presented, and make no objection to evidence touching the same, they are in no position on appeal to complain of such defect. It is alleged that defendants first discovered the fraud about July 1, 1915. While no reference is made thereto in the cross-complaint, there was attached to it, marked "Exhibit A," a notice of rescission upon the ground of false and fraudulent representations made by said company, its officers and agents, and wherein defendants tendered to the company deeds to said property so con-

veyed to them by plaintiff, and offered to execute such other or further instruments as might be requested in order to release any interest they might have in the property, and demanded a cancellation and return of the note and mortgage mentioned. At the trial, and without objection, the notice of rescission, copy of which was attached to the cross-complaint, was offered and received in evidence, and plaintiff admitted the same was served on its agent on July 15, 1915. It thus appears that the issue, though not presented by the pleading, was nevertheless fully tried, and hence appellant could not have been prejudiced by reason of the error, and is now for the first time in no position to complain on account of its omission from the pleading.

[2] It is also claimed in this case, as in the Scott Case, that the right to rescind on account of fraud was waived by the making of a new contract. This contention is based upon the fact that on January 20, 1915, Perry purchased 80 acres of land, together with 80 shares of water stock, as to which, but prior to July 1, 1915, when he learned of the fraud, he agreed with plaintiff for a modification of his contract by which he surrendered 40 acres of the land, together with the stock attached thereto, retaining the balance with 40 shares of water stock, upon which the note and mortgage were to be applied. Under these circumstances, and since the modification was had prior to the discovery of the fraud, defendant's act in making the new contract did not relieve the transaction of the vice of the original act founded in fraud. Since defendants had no knowledge of the fraud prior to the subsequent transaction, their acts did not constitute a waiver thereof. *Pomeroy's Eq. Juris.* (4th Ed.) p. 2090; *Hodgkins v. Dunham*, 10 Cal. App. 690, 103 Pac. 351.

[3] It also appears that subsequent to serving the notice of rescission defendants paid two assessments upon the water stock, and it is insisted by appellant that this constituted a waiver of the fraud. The purpose of paying the assessments was to prevent a sale of the stock for nonpayment, and thus preserve the property to its rightful owner. In the case at bar it operated to preserve the property to appellant, which, as the wrongdoer, had refused to accept a return of the property tendered. The making of the payments did not affect the rights of defendants under their notice of rescission. *Clark v. Wells*, 127 Minn. 353, 149 N. W. 547, L. R. A. 1916F, 476; *Shermaster v. California Building, etc., Co.*, 40 Cal. App. 661, 181 Pac. 409.

[4] It is next claimed that plaintiff was prejudiced by the ruling of the court in admitting, over its objection that the same was irrelevant and immaterial, a document signed by a number of farmers who had purchased lands in the project, wherein atten-

tion of the plaintiff was called to the fact that the two preceding years had demonstrated that there was not more than half enough water available to irrigate the lands in the project, and suggested a means of increasing the supply. Conceding, as we do, the ruling to have been erroneous, nevertheless, in view of the overwhelming evidence in support of the conclusion that the supply of water was inadequate to irrigate the lands, it cannot be deemed to have operated prejudicially to plaintiff or influenced the court in arriving at its decision. Section 4½, art. 6, of the Constitution.

[5] Lastly, it is claimed that defendants are barred from relief by laches. There is no merit in this contention. They gave notice of rescission promptly upon discovering the fraud, tendered back and offered to relinquish and return to plaintiff everything of value which they had received from it. Plaintiff had possession of the water stock, holding it as collateral security for the purchase price thereof, and hence it was not necessary to tender to plaintiff that which it already had. Defendants were not called upon to institute an immediate suit to enforce the rescission, but might, as they did, await some affirmative action on the part of plaintiff in this case had and taken by filing its complaint less than nine months after the service of notice of rescission (*Suhr v. Lauterbach*, 164 Cal. 591, 130 Pac. 2), and then in that action set up the facts upon which they based their right to relief.

That the land was arid, and practically valueless for the growing of crops, without a supply of water for irrigation, admits of no question. It likewise appears, that for the purpose of inducing defendants to purchase the land and execute the note and mortgage, plaintiff's agents made representations which led the purchasers to believe that plaintiff had then made ample provision for an adequate supply of water for use upon the entire tract of 15,000 acres, to which the water developed and impounded by the Beaver County Irrigation Company was made appurtenant, and that the 40 shares of stock thereof so purchased by defendants represented a right equal to 40/15,000 of the water of said irrigation company, by virtue of which defendants were and would be entitled to at least 2½ acre feet of water to each acre so purchased, and which amount was necessary to the proper irrigation of the same. These representations, at the time of making them, were by plaintiff's agents known to be untrue. Hence, conceding, as claimed by appellant, that other representations should be disregarded as mere expressions of opinion, nevertheless the false representations as to the supply of water, standing alone, justify the decision of the trial court. The record as a whole discloses no error which could have

prejudiced the substantial rights of cross-defendant.

The judgment is therefore affirmed.

We concur: CONREY, P. J.; JAMES, J.

(57 Cal. App. 790)

BRADLEY et ux. v. DELTA LAND & WATER CO. et al. (Civ. 3593.)

(District Court of Appeal, Second District, Division 1, California. April 11, 1922. Hearing Denied by Supreme Court June 8, 1922.)

Appeal from Superior Court, Los Angeles County; Frank R. Willis, Judge.

Action by Leroy Bradley and wife against the Delta Land & Water Company and another. Judgment for plaintiffs, and defendant named appeals. Affirmed.

William Story, Jr., of Ouray, Colo., and Lissner & Lewinsohn, and Lewinsohn & Barnhill, all of Los Angeles, for appellants.

L. M. Fall, Dudley W. Robinson, and Hickcox & Crenshaw, all of Los Angeles, for respondents.

SHAW, J. This is one of a brood of like cases based upon alleged false and fraudulent representations made by defendants and their selling agents, by means whereof certain parties, including plaintiffs, in reliance thereon, were induced to purchase arid lands in Beaver county, Utah, and shares of stock in an irrigation company which evidenced the right to water for use thereon. This action, instituted upon notice of rescission served upon defendants, is to recover a sum of money paid by plaintiffs in the purchase of 80 acres of such land, located in what was known as the Milford project in said state, and to cancel a promissory note and mortgage securing payment of the same, executed by plaintiffs in the purchase of the water stock. Upon trial the court found the issues in favor of plaintiffs, and entered judgment in accordance therewith, from which defendant Delta Land & Water Company has appealed.

Appellant's chief contention is that the findings are not justified by the evidence.

The facts upon which the action is based are in substance identical with those involved in the case of *Scott v. Delta Land & Water Co.* (Civ. No. 3591) 207 Pac. 389, the judgment in which was, in an opinion filed by this court on April 11, 1922, affirmed. The opinion referred to contains a full discussion of the alleged errors urged in the instant case as ground for a reversal of the judgment herein. What is there said is equally applicable to appellant's contention upon the insufficiency of evidence to support the findings herein, as well as upon the ground of laches on the part of plaintiffs in bringing their action to enforce the rescission. No purpose could be served by a restatement of the facts or reasons which prompted the court in affirming the judgment therein. Suffice it to say that, upon the authority of what is said in the *Scott Case* and the case of *Delta Land & Water Co. v. Perry et al.* (Civ. No. 3590) 207 Pac. 393, filed herewith, the judgment herein is affirmed.

We concur: CONREY, P. J.; JAMES, J.

57 Cal. App. 789

LOHR v. DELTA LAND & WATER CO. et al.
(Civ. 3592.)

(District Court of Appeal, Second District, Division 1, California. April 11, 1922. Hearing Denied by Supreme Court June 8, 1922.)

Appeal from Superior Court, Los Angeles County; Frank R. Willis, Judge.

Action by John W. Lohr against the Delta Land & Water Company and another. Judgment for plaintiff, and defendants appeal. Affirmed.

William Story, Jr., of Ouray, Colo., and Lissner & Lewinsohn, and Lewinsohn & Barnhill, all of Los Angeles, for appellants.

L. M. Fall, Dudley W. Robinson, and Hickcox & Crenshaw, all of Los Angeles, for respondent.

PER CURIAM. Action to enforce rescission of a contract for the purchase of real property and of certain shares of corporation stock, and for other relief. The case is similar to three others in which decisions of this court are being filed at this time. They are No. 3590, Delta Land & Water Co. v. Perry et al., 207 Pac. 393; No. 3591, Scott et al. v. Delta Land & Water Co. et al., 207 Pac. 389, and No. 3593, Bradley et al. v. Delta Land & Water Co. et al., 207 Pac. 395. This case differs from the others only in that it relates to a different contract and different property. The alleged false and fraudulent representations made by the defendants and their agents and the various circumstances of the transactions are so much alike that a separate statement of the particular facts of this case is not necessary.

On the authority of the decisions above mentioned, the judgment is affirmed.

57 Cal. App. 195

PEOPLE v. SEILER. (Cr. 1012.)

(District Court of Appeal, First District, Division 2, California. March 28, 1922. Hearing Denied by Supreme Court May 25, 1922.)

1. Criminal law § 553—Jury has right to accept testimony for prosecution, notwithstanding contradiction by defendant's witnesses.

Though defendant and his witnesses testified defendant was driving at a reasonable speed on the right side of the road before colliding with the automobile of deceased, the jury had the right to accept the testimony of witnesses for the prosecution that defendant was driving in the center or on the left of the road at a speed between 40 and 55 miles an hour.

2. Homicide § 250—Evidence held to sustain conviction for manslaughter by unlawfully driving automobile.

Evidence on behalf of the state that defendant was driving his automobile in the nighttime, either in the center of the road or on the left-hand side at a speed of 45 or 50 miles an hour, when he collided with two other automobiles at

a sharp curve and killed the driver of one of the other machines, held sufficient to sustain a conviction for manslaughter.

3. Homicide § 62—Death caused by act expressly forbidden by statute is "manslaughter."

Death caused by driving an automobile on the left side of the road at a speed exceeding 40 miles an hour or at an unreasonable rate of speed on a winding road where there was much traffic, each of which acts made a misdemeanor under Motor Vehicle Act, as amended by St. 1919, p. 191, is manslaughter under Pen. Code § 192, defining "manslaughter" as the unlawful killing of a human being without malice, in commission of an unlawful act not amounting to a felony.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Manslaughter.]

4. Homicide § 340(3)—Instruction held favorable to accused.

In a prosecution for manslaughter by the unlawful operation of an automobile, a paragraph of the instruction that the driving of an automobile on the highway under the circumstances disclosed by the evidence was a lawful act was more favorable than defendant was entitled to.

5. Criminal law § 800(1)—Homicide § 285—Instruction as to criminal negligence held unnecessary, and where given need not define term where acts charged were unlawful.

Where the acts charged in a prosecution for manslaughter were unlawful, so that the negligent performance of a lawful act was not involved in the case, an instruction on criminal negligence was unnecessary, and the fact that the court gave such instruction did not require it to go further and define criminal negligence.

6. Criminal law § 789(4), 823(15)—Instruction as to reasonable doubt held improper in form, but not prejudicial in view of further instruction.

An instruction that, if the jury are convinced beyond a reasonable doubt defendant was not negligent in operating his automobile, they should return a verdict of not guilty, was in improper form; it should have directed a verdict of not guilty if the jury were not convinced beyond a reasonable doubt he was negligent, but the error does not require reversal, where the next sentence in the court's charge stated that, if the jury entertained a reasonable doubt as to whether he was negligent, they should give him the benefit of that doubt.

On Hearing in Supreme Court.

7. Homicide § 74—Commission of lawful act need not be wanton or reckless to be "manslaughter."

Under Pen. Code, § 192, subd. 2, defining involuntary manslaughter as the unlawful killing of a human being involuntarily, but in the commission of a lawful act which might produce death, without due caution and circumspection, the act performed must be one which might produce death, but lack of caution and circumspection need not go to the extent of being wanton or reckless.

Appeal from Superior Court, San Mateo County; George H. Buck, Judge.

A. V. Seiler was convicted of manslaughter, and he appeals from the judgment of conviction and from the order denying new trial. Affirmed.

Theodore A. Bell, and Ralph Starke, both of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and John H. Rioridan, Deputy Atty. Gen., for the People.

STURTEVANT, J. The defendant was convicted on a charge of manslaughter; he moved for a new trial, the motion was denied; he made a motion in arrest of judgment, and that motion was denied; and he has appealed from the judgment and the order denying him a new trial.

[1, 2] That the appellant contends that the evidence is insufficient to support the verdict. The evidence shows that on the evening of the 22d day of April, 1921, the defendant was driving an automobile from Burlingame north toward San Francisco. At the point known as Death Curve, which is located below the cemeteries and between Burlingame and San Francisco, the car driven by the defendant collided with an automobile driven by Harry D. Utter, and thereafter proceeded and immediately struck an automobile driven by the deceased, Harry R. Doty. The latter collision was of such violence that Doty was killed. The place of the accident is particularly dangerous, as may be inferred from the name it bears. Each of the drivers of each of the machines lived in the general neighborhood and knew the dangerous nature of the spot. The accident occurred about 8 o'clock in the evening. The prosecution called as its witnesses persons who were riding in the other machines, and the defendant called as his witnesses persons who were riding in his machine. It will serve no purpose to quote the testimony of each witness, but it may be said that the defendant's witnesses testified that the defendant was driving on the right-hand side of the highway, at a rate of speed variously estimated at 18, 20, or 25 miles per hour; that the other two automobiles were very close together, and both were going down the road at a rate of speed variously estimated at 35 or 40 miles per hour. Of course, if the jury had accepted the foregoing testimony they would have been entitled to bring in a verdict of not guilty. Their verdict, however, indicates that they did not accept the foregoing as being the true statement of the facts.

The witnesses called by the prosecution testified that at the time of the first impact and also at the time of the second impact, the defendant was either in the center of the road or on his left-hand side; some of those witnesses placed the speed of the defendant's car at 45 miles an hour, and some placed

his speed as high as 50 miles an hour; those same witnesses claimed that Utter's car and Doty's car, at the time of the accident, were traveling at a rate of speed not exceeding 20, 23, 24, or 25 miles an hour. The jury had the right to believe, and if it did believe, that at the time of the accident, the defendant attempted, in the nighttime, to make Death Curve by driving on the left-hand side of the road at a speed of 45 or 50 miles an hour, then, and in that event, the defendant was guilty of manslaughter.

On the publication of the foregoing, the appellant applied for a rehearing. In his petition he set forth that certain errors were committed by the trial court in instructing the jury. The petition was granted for the purpose of allowing the appellant to present his points. As we understand the appellant's contention, it is that the trial court gave instructions which were conflicting, and that the instructions of the trial court stated to the jury that the defendant should be convicted if the decedent was killed by reason of the "criminal negligence" of the defendant, but that the trial court did not define the expression "criminal negligence." Complaint is also made that one instruction as to the proof was unfair as to the defendant. The instructions given we have numbered for convenience as follows:

I. "I want to say to you that the driving of an automobile upon the public street or highway under the circumstances disclosed by the evidence in this case was a lawful act. In other words, it was an act which this defendant or any other person had under the law a right to do.

II. "If you are convinced to a moral certainty and beyond a reasonable doubt that the defendant on the occasion in question was guilty of negligence, and you further find to a moral certainty and beyond a reasonable doubt that the negligence of which he was then and there guilty, if any, was of criminal character, or, in other words, was criminal negligence, you will in that case return a verdict of guilty on that count as charged in the information.

III. "If you are convinced to a moral certainty and beyond a reasonable doubt that he was not at the time in question guilty of negligence of any sort or kind, whatsoever, and was exercising reasonable care and circumspection and caution in the operation of the automobile, and that he was not under the influence of intoxicating liquor, you will, of course, return a verdict of not guilty."

It was the theory of the prosecution, and it introduced evidence tending to prove: (A) That at the time of the accident the defendant was under the influence of intoxicating liquor, while driving his automobile; (B) that at said time he was driving on the left-hand side of the road; (C) that immediately prior to the accident he was driving at a speed of 40, or 45 miles or 50 miles per hour; (D) that the accident occurred about 8 o'clock at night on a hilly, serpentine road, which is,

during the day and night, traveled by vast numbers of pedestrians and vehicles, and, at said time and place, the defendant did not operate his car in a careful and prudent manner and at a reasonable rate of speed having regard to the traffic and use of said highway. Under the Motor Vehicle Act of California as amended (Stats. 1919, p. 191), specification A, is a felony (Id. § 17); specification B is a misdemeanor (Id. § 20, subd. "a"; section 32, subd. "a"); specification C is a misdemeanor (Id. § 22, subd. "a"; section 32, subd. "a") and specification D, is a misdemeanor (Id. § 22, subd. "a"; section 32, subd. "a").

In the information on which the defendant went to trial there were two counts. The second count charged the defendant as under specification A. On that count the jury refused to bring in a verdict. For the purpose of this decision we will assume that the jury acquitted the defendant thereon, and we will not consider intoxication in determining the merits of this appeal.

Section 192 of the Penal Code, in effect, provides as follows: Manslaughter is the unlawful killing of a human being without malice. It is involuntary—in the *commission of an unlawful act* not amounting to a felony; or, manslaughter is the unlawful killing of a human being without malice. It is involuntary—in the *commission of a lawful act* which might produce death without due caution and circumspection.

[3] Under our statutes if the death was caused under specification B, C, or D, the jury was entitled to bring in a verdict of guilty under the first definition of manslaughter. In other words, if one performs an act in a *manner expressly forbidden* by statute and thereby causes the death of another, he may be convicted under the definition of manslaughter as firstly defined. *State v. Campbell*, 82 Conn. 671, 677, 74 Atl. 927, 135 Am. St. Rep. 293, 18 Ann. Cas. 236; *People v. Camberis*, 297 Ill. 455, 130 N. E. 712; *State v. Clark*, 99 Or. 629, 196 Pac. 360; *State v. Rountree*, 181 N. C. 535, 106 S. E. 669, and 2 R. C. L. 1212. If one performs an act in a *manner not forbidden by statute*, but in a wanton, reckless, or culpable manner, and thereby kills another, he may be convicted under the definition of manslaughter as secondly defined. *Schultz v. State*, 89 Neb. 34, 130 N. W. 972, 33 L. R. A. (N. S.) 403, Ann. Cas. 1912C, 495; *State v. Goetz*, 83 Conn. 437, 76 Atl. 1000, 30 L. R. A. (N. S.) 458, 462; 21 Cyc. 760. In other words every alleged act of the defendant done in the management of his car at the time of the accident is provided against in the statute and is made unlawful. This being so, the case involved the doing of *unlawful acts* and not *lawful acts*.

[4] It will be noted that the instructions given by the trial court were not addressed to homicides committed in the performance

of unlawful acts. It will be noted, at once, that instruction I, which is addressed to homicides committed in the performance of lawful acts, is far more favorable to the defendant than he was entitled to. Under that instruction as it is worded, the jury should have brought in a verdict of not guilty. But, by its verdict, it appears that the jury disregarded the instruction.

[5] Instruction II deals with "criminal negligence." That expression is used in those jurisdictions where it has been created by statute. 29 Cyc. 424. Nebraska is such a state.

"The term 'criminal negligence,' as it is used in" section 3, article 1 of chapter 72 of the Compiled Laws of Nebraska, "is defined to be gross negligence. It is such negligence as would amount to a flagrant and reckless disregard of her own safety and amount to a willful indifference to the injury liable to follow." *Omaha & R. V. R. Co. v. Chollette*, 33 Neb. 143, 146, 49 N. W. 1114, 1115.

In other words, criminal negligence consists of the commission of a lawful act, but in a culpable, reckless manner. However, as stated above, the performance of a lawful act is not involved in the issues in this case. It was neither necessary nor appropriate that the trial court should have given instruction No. II concerning criminal negligence. Having done so, however, it was not error for the trial court to omit to go further and define criminal negligence.

[6] Instruction No. III is not exactly correct. The instruction would have been in better form if it had been worded as follows:

"If you are not convinced to a moral certainty and beyond a reasonable doubt that he was at the time in question guilty of negligence of any sort or kind, whatsoever, and was exercising reasonable care and circumspection and caution in the operation of the automobile, and that he was not under the influence of intoxicating liquor, you will, of course, return a verdict of not guilty."

Such, undoubtedly, was the meaning of the trial court, and such undoubtedly was the meaning which the jury obtained, because the very next sentence in the court's charge was:

"On the other hand if you entertain reasonable doubt as to whether he was guilty of negligence of any kind or character, whatsoever, or as to whether he was under the influence of intoxicating liquor, you will in that case give him the benefit of such reasonable doubt and return a verdict of not guilty."

We find no reversible error in the record. The judgment is affirmed.

We concur: LANGDON, P. J.; NOURSE, J.

Opinion of Supreme Court in Bank Denying Hearing.

PER CURIAM. [7] The opinion of the district court contains this passage:

"If one performs an act in a manner not forbidden by statute, but in a wanton, reckless, or culpable manner, and thereby kills another, he may be convicted under the definition of manslaughter as secondly defined."

The statute (Pen. Code, § 192, subd. 2) defines involuntary manslaughter of this specific character as the unlawful killing of a human being, involuntarily, but "in the commission of a lawful act which might produce death * * * without due caution and circumspection." In order to constitute this kind of manslaughter the act may be lawful, but it must be one which might produce death, and which does produce death, and it must be committed without due caution and circumspection. The lack of due caution and circumspection need not go to the extent of being wanton or reckless, although it might possibly be such as would be defined as culpable. But the word "culpable" is not an apt description of the idea intended to be conveyed by the words "due caution and circumspection." On this subject see note II to the case of Johnson v. State (1902) 61 L. R. A. 277. This remark was not necessary to the decision of the district court, and therefore its inaccuracy does not require us to grant a rehearing.

The petition for a rehearing is denied.

SHAW, C. J., and SHURTLEFF, WILBUR, and LAWLOR, JJ., concur.

57 Cal. App. 347

JOHNSTON et al. v. MENDENHALL et al.
(Civ. 4158.)

(District Court of Appeal, First District, Division 1. California. April 14, 1922. Hearing Denied by Supreme Court June 12, 1922.)

1. Ejectment ⚡69—Demurrers to defenses based on entry under contract of sale properly sustained in view of defense of ownership and right to possession as plaintiff's partners.

In an action in ejectment, which went to trial on defendant's first defense denying plaintiffs' ownership as exclusive tenants in common, and alleging ownership and right of possession in plaintiffs and defendants as partners, demurrers to defenses and causes of action based on defendant's entry under and fulfillment, so far as not prevented by plaintiffs' nonperformance, of a contract of sale, under which they were to have exclusive possession, management, etc., for ten years, apply the entire gross income, except salary, to the payment of interest on a note and mortgage, which they agreed to discharge in payment of the purchase price, and reduce the amount thereof at the end of such period to a given sum, at which time provision was made for a division of the profits between them and plaintiffs, but that, if they failed to pay as stipulated, plaintiff should be

released from the contract, and defendants' rights thereunder, including that of possession, forfeited, and that the agreement was purely one of purchase and sale, under which the parties were not partners, were properly sustained; the first defense being sufficient to afford defendants full opportunity to present their defenses of ownership and right to possession under the contract.

2. Ejectment ⚡23—Vendors' agreement to resell and indemnify purchasers for losses from proceeds held not to create interest in land sufficient as a defense in ejectment.

Vendors' agreement to pay purchasers in possession under a contract of sale the amount expended on the land by them, in consideration of their remaining in possession and caring for it, despite losses alleged to have been caused by vendors' nonperformance, until a sale could be consummated, and to use their best efforts to sell the land and pay such sum with interest from the proceeds did not create an interest in the land which defendants could set up as a defense to an action in ejectment but merely an interest in the proceeds of the sale thereof.

3. Appeal and error ⚡694(1)—Judgment on issue held conclusive in absence of evidence.

In an action in ejectment where trial was had on an issue as to defendants' ownership and right of possession under a contract of sale a judgment for plaintiffs, in the absence of the evidence, held conclusive.

Appeal from Superior Court, San Diego County; C. N. Andrews, Judge.

Action by John Johnston, Jr., and another, against Carl Mendenhall and another. Judgment for plaintiffs, and defendants appeal. Affirmed.

U. E. White, of Pomona, and Glen M. Ely, of Los Angeles, for appellants.

R. C. Springer, of San Diego, for respondents.

TYLER, P. J. This action is one in ejectment brought to recover possession of certain land situated in San Diego county and known as the Riverview ranch. Plaintiffs, who are husband and wife, claim to be the owners in common of the property and entitled to its possession. Defendants' pleadings consist of a second amended answer containing seven different pleas, which include a denial of ownership as alleged, and certain allegations which, it is claimed, establish equitable defenses and counterclaims, and an amended cross-complaint containing eleven allegations which substantially set up all the alleged equitable defenses recited in the various defenses in the amended answer. Demurrers were sustained to the amended cross-complaint and to all of the defenses set up in the amended answer except the first defense thereof. This first defense denied ownership in plaintiffs as exclusive tenants in common and alleged ownership and right to

possession in both plaintiffs and defendants as partners. It further denied the allegations of the complaint as to the wrongful withholding of possession by defendants, and alleged rightful possession in them at the time of the commencement of the action, and it also denied, as charged in the complaint, that the value of the use and occupation of the premises was of the sum of \$300 a month or any other sum. The case went to trial upon the complaint and the first defense contained in the amended answer. Judgment went for plaintiffs. Defendants appeal on the judgment roll alone, and they contend that the trial court erred in sustaining demurrers to various allegations of their amended answer and to their amended cross-complaint, which pleadings, they assert, contain and fully set forth complete legal and equitable defenses to the action and upon which they have been denied a trial. These defenses, it is claimed, appear in the seventh defense of the answer and are again reiterated in the second cause of action alleged in the cross-complaint.

The seventh defense of the amended answer alleges the making of a contract upon February 26, 1919, with a recital of its terms and the entry of the defendants thereunder, and their fulfillment, so far as not prevented by plaintiffs, of the contract. It then alleges the failure of plaintiffs to perform, and the giving of notice to them by defendants of certain losses which would necessarily follow from a continuation of nonperformance. It also alleges a modification of the contract in relation to plaintiffs' duty, the continued failure of plaintiffs to perform the agreement as modified, and the consequent inability of defendants to make payments under the contract, with notice of such fact to plaintiffs. A new agreement of settlement is then claimed to have been made whereby defendants were to have and receive the sum of \$15,000, which sum, it is recited, they had expended on the land, and it is further alleged that under this new agreement defendants were to remain in possession of the property for the purpose of farming and caring for the same for the mutual benefit of plaintiffs and defendants until a sale thereof could be consummated, plaintiffs agreeing in the meantime to use their best efforts to sell the land and out of the proceeds to pay defendants the said sum with interest thereon from the date of the settlement agreement, they being unable to purchase defendants' interests. Defendants then allege that pursuant to this settlement agreement they remained on the land and carried out their contract until prevented from so doing by an attachment levied by plaintiffs in another action upon the farming tools, the nature of which action the record does not disclose. Defendants then plead their willingness and ability to carry out the agreement except as prevented by plaintiffs, and claim that the plaintiffs have waived

their right to declare any of the agreements forfeited. The pleading then concludes with a prayer that plaintiffs take nothing and that it be adjudged that the said agreements have not been forfeited by defendants, but that they are still in full force and effect, and general relief is asked for. The second cause of action of the amended cross-complaint reiterates the matters alleged in the seventh defense of the amended answer, and this pleading concludes with a prayer that the agreement be revised to show the true contract existing between the plaintiffs and defendants and that the contract as revised be specifically enforced, and damages in the sum of \$30,000 and general relief are prayed for. Attached to and as an exhibit to defendants' amended cross-complaint is a contract which in substance shows, in addition to the recitals contained in defendants' pleadings, that the parties hereto entered into an agreement of sale by the terms of which the plaintiffs agreed to sell and the defendants agreed to purchase a certain interest in the lands here involved, together with water rights, for the sum of \$50,000. It is recited therein that the land is incumbered with a mortgage for this amount, and that defendants agree to pay their purchase price by fully paying and discharging the same in accordance with the terms of the agreement. Further provisions show that defendants were to have exclusive possession, management and direction of the property for a term of ten years, during which period they were to apply the entire gross income of the property to the payment of interest upon the note and mortgage and certain other expenses, including insurance and taxes, except the sum of \$150 per month which defendant Carl Mendenhall was to retain as a salary. By the terms thereof, however, defendants agreed in any event to reduce the amount of the mortgage at the end of the ten-year period down to the sum of \$10,000, at which time provision was made for a certain division of the profits between plaintiffs and defendants. By the agreement plaintiffs undertook to install a pumping plant upon the lands for the purpose of irrigating the same. The agreement further provided that in the event of defendants' failure to pay the interest or principal, and the taxes and other operating expenses stipulated for, that plaintiffs should be released therefrom and that defendants should forfeit any and all rights acquired thereunder, including their right to possession, and that the agreement should terminate; and it also contained a clause to the effect that the agreement was purely one of purchase and sale and that the parties were in no sense partners. It also appears by the very terms of this contract that defendants were bound to make certain payments irrespective of any profit derived from the land, and that their rights under the contract were declared to depend upon the prompt and faithful per-

formance of the agreement, failing in which they were to forfeit all rights acquired thereunder, including their right to possession.

[1, 2] It is manifest, therefore, that the demurrers were properly sustained to the causes of action alleged, and the defenses relied upon in the amended answer and the cross-complaint, as the first defense of the answer upon which the case went to trial was sufficient to afford defendants full opportunity to present their defenses of alleged ownership and right of possession under the contract. The seventh defense alleged a termination of the contract and the making of a new agreement whereby plaintiffs were only obligated to use their best efforts to sell the land and pay certain amounts to the defendants out of the proceeds of such sale, and that defendants were in the meantime to remain in possession of the premises. Assuming the agreement to have been made as alleged, it did not purport to pass an interest in the land to defendants, but merely an interest in the proceeds arising from the sale thereof. The alleged agreement, therefore, did not create an interest in land. *Miller v. Lerdo Land Co.* (Cal. Sup.) 198 Pac. 778.

[3] Prior to proceeding to trial of the case, defendants, upon application to the court, were permitted to amend their second amended answer and second amended cross-complaint. By these amendments defendants allege that during the season of 1920 they informed plaintiffs that they had suffered losses and would be unable to comply with the provisions of their contract, and that thereupon plaintiffs and defendants entered into an arrangement of settlement by the terms of which defendants acquired certain interests in the land to the extent of \$15,000, and that plaintiffs were to use their best efforts to effect a sale of the same and from the proceeds thereof were to pay to defendants the sum mentioned. They further alleged that the defendants in the meantime were to remain in possession and care for the land, and that pursuant to this agreement defendants did so remain in possession until prevented by plaintiffs, who caused an attachment to be levied on the farming implements. This amendment, given its most favorable interpretation, merely shows, as does the agreement in the second amended answer, that the original contract was terminated, and if we assume the allegations to be true, they simply attempt to set up a legal interest in the land, and the allegations therefore have no more force and effect than those contained in the first defense of the amended answer, which alleged ownership and right of possession. Trial having been had upon this issue, the judgment, in the absence of evidence, is conclusive upon this question.

The additional defenses of the amended answer and cross-complaint deal with the

validity and the relationship of the parties under the contract, and do not require consideration.

From what we have said it follows that the orders and judgment should be, and they are, hereby affirmed.

We concur: RICHARDS, J.; KERRIGAN, J.

57 Cal. App. 413

IRRIGATED VALLEYS LAND CO. OF CALIFORNIA v. ALTMAN et al. (Civ. 2419.)

(District Court of Appeal, Third District, California. April 24, 1922.)

1. Waters and water courses — 158½(2)—Evidence held to support findings entitling defendant to use of water.

In an action to restrain defendants from appropriating the water from a certain ditch, evidence held to support findings entitling defendants to the use of the water.

2. Corporations — 410—Secretary's powers as to disposition of lands and concomitant rights held coextensive with those of corporation.

Where the secretary of a corporation organized to buy and sell land was vested with power to sell and develop its lands and water rights, and by special act of the directors was also made sales agent and manager with power to sell its lands, so far as authority to dispose of its lands and concomitant rights was concerned, his powers were coextensive with those of the corporation.

3. Corporations — 410—Bound by secretary's act tending to promote authorized business.

Where a corporation's business was buying, selling, and improving farm lands, it was within the authority of its secretary, with plenary power to give an adjacent landowner the privilege of using the company's water to improve his crops, and, as this was an appropriate means of promoting the authorized business of the company, it was bound by its officer's act.

4. Waters and water courses — 157—A parol license acted on to use water held irrevocable.

Where licensee began to use water from an irrigation company's ditch under a parol license, and at the suggestion of the company had spent money in purchasing this land from a third party and preparing it to use the company's water, the license was irrevocable.

5. Waters and water courses — 154(1)—Irrevocable license to use water held a right appurtenant to the land.

Where the present owner's predecessor in interest had obtained an irrevocable license to water the land from an irrigation company's ditch, a contention that the present owner had made no expenditures on the company's representation, and hence was not entitled to use the water, was unsound, for when the present owner's predecessor in interest acquired an ir-

revocable license it became a right appurtenant to the land.

6. Waters and water courses ☞157—Irrigation company, by failure to protest against use of water, recognized validity of original license.

Where an irrigation company remained silent for years, although it had knowledge that the present owner's predecessor in interest had used the company's water on his land and the present owner had and was continuing to use the company's water, the company by its conduct recognized the validity of the original license, as quiescence is tantamount to acquiescence.

7. Estoppel ☞52—Nature of estoppel stated.

Where a person by his conduct induces another to believe in the existence of a particular state of facts and the other acts thereon to his prejudice, the former is estopped as against the latter to deny that the state of facts does not in truth exist.

8. Waters and water courses ☞138—Protest to tenant does not prevent landlord from acquiring against irrigation company easement to use water by estoppel.

A protest by an irrigation company against the appropriation of water for certain lands made to a tenant does not break the operation of an estoppel against the company to deny the right of the landlord to use this water.

9. Waters and water courses ☞138—Continuous use for five years gave easement by prescription.

Where after defendant's predecessor in interest had notified plaintiff irrigation company that he proposed to use water from plaintiff's ditch, and that plaintiff could not stop him, and there was a continuous use of the water under a claim of right for a period of more than five years, a finding that defendant acquired title to an easement to use the water by prescription was authorized.

10. Waters and water courses ☞137—Use continuous within prescription rule, where water used as often as necessary.

Where one claiming an easement uses it as often as it is necessary for him to do so, the use is generally held to be continuous, and this is particularly true with reference to easements connected with irrigation.

11. Waters and water courses ☞138—Right to use water both under irrevocable license and under easement by prescription not inconsistent.

In an action by an irrigation company to restrain defendant from using its water, there is no inconsistency between defendants' claims of a right to appropriate the water under an irrevocable license and a right to appropriate the water under an easement by prescription.

Appeal from Superior Court, Yolo County; W. A. Anderson, Judge.

Action by the Irrigated Valleys Land Company of California against D. J. Altman

and another. Judgment for defendants, and plaintiff appeals. Affirmed.

Dudley D. Sales, of San Francisco, for appellant.

A. C. Huston and Harry L. Huston, both of Woodland, for respondents.

HART, J. The plaintiff instituted this action for the purpose of securing a decree perpetually enjoining and restraining the defendants from using a certain ditch, known as the "Hungry Hollow Ditch" and the right of way over which said ditch traverses and which is the property of the plaintiff. The alleged wrongful use of said ditch by the defendants consists of the "diversion of water from said ditch by and through an irrigating canal which connected with the same and extended to a certain piece of real property owned by defendant, Schaupp, and leased by the defendant, Altman." Said real property embraces 160 acres, and for the sake of convenience will hereinafter be referred to as "the 160-acre tract."

The amended complaint sets out in detail the acts of the defendants constituting the alleged wrongful diversion of the water from said ditch. The answer to said complaint denies specifically the averments thereof and also sets up a number of special defenses which may be stated in substance as follows: (1) That plaintiff is estopped from denying that defendants have the right to the use of said ditch and right of way because of the representation by plaintiff to the predecessor in interest of defendants, one William Chaney, prior to the purchase of said tract by said Chaney, that the right to the use of said ditch and right of way would become, upon said purchase by said Chaney, appurtenant to said tract, and that he could enjoy said use without cost; that said Chaney thereupon purchased the said 160-acre tract on the faith of said representations and expended money in constructing ditches and preparing said tract for cultivation; and in connection with this latter averment it is further alleged that the defendants and their predecessors in interest have used said ditch and right of way under a license and with the consent of plaintiff, and "relying upon said license and consent have spent money in the construction of irrigating ditches and in preparing said land for cultivation"; (2) that the owners of said 160-acre tract were given the right to use said ditch and right of way for the purpose of obtaining water with which to irrigate said tract in an instrument whereby the right of way for said ditch was granted to the plaintiff company by the Bank of Woodland; that "at the time defendants' predecessor in interest purchased the 160-acre tract, plaintiff represented that said tract was contiguous to the said ditch,

and now the plaintiff is estopped to deny the truth of said statement." The right of the defendants to an easement in said ditch and right of way by prescription is also set up.

The cause was tried by the court sitting without a jury upon the amended complaint and the answer thereto, and the court thereupon filed its findings of fact and conclusions of law, upholding the special defenses of the defendants, and rendered and caused to be entered judgment accordingly. The appeal is by the plaintiff from said judgment under the alternative method.

The general contention of the appellant is that certain findings are not supported by the evidence, and also that the conclusions of law are inconsistent with the findings of fact. As to the latter proposition, the contention is, in effect, that certain findings vital to the judgment, conceding that they are bottomed by sufficient evidentiary support, do not warrant the conclusions of law deduced therefrom by the court below. In other words, it is claimed that, admitting that the facts embraced within these findings are true the trial court made an erroneous application of the law thereto.

The defendant Schaupp is the owner of the 160-acre tract and the defendant Altman the lessee thereof. The said 160-acre tract does not border upon the ditch, but adjoins on the west what is known as the "Foster Land," which does abut upon the ditch.

[1] The plaintiff was organized as a corporation in the month of October, 1909, from which time uninterruptedly down to the date of the trial one William Metzner was president thereof. Charles J. Cox, Jr., became the secretary of the corporation at or about the time of its organization, and held and discharged the duties of that office down to and including the year 1912. In this connection it should be stated that there were two persons officially associated with the corporation by the name of Charles J. Cox; they being father and son. The former was a director of the plaintiff. It should further be stated that, during the time he was secretary of plaintiff, Charles J. Cox, Jr., was engaged in the general real estate business in the city of San Francisco under the name of Cox & Co. Upon its organization the plaintiff adopted by-laws for the government thereof and its business. Section 8 of article 10 of said by-laws provided:

"It will be the duty of the secretary to negotiate all contracts for the purchase of lands, water power and water rights; to supervise the development and improvement of all lands belonging to the corporation, and to form and draw plans for the subdivision, general supervision and sale of lands, and to generally supervise the sale, purchase, development, and marketing of the lands of the corporation."

The plaintiff, in the year 1910, purchased from the bank of Woodland a 3,000-acre tract

of land, situated in Yolo county, having in view the subdividing of said tract into smaller farms and putting the same as so subdivided on the market for sale. In the month of September of said year 1910 (probably at the time that the tract referred to was acquired by the plaintiff), the said Bank of Woodland granted to plaintiff a right of way for a ditch; the purpose of the construction of which was to divert water from Cache creek, in said county, to the tract of land mentioned, the right to the use of so much water as might be necessary for said purpose or as might be conveniently permitted to be used therefor having been granted to the plaintiff by the Yolo Water & Power Company. Among the covenants contained in the instrument granting said right of way to plaintiff was the following:

"It being further agreed and understood that the owners of land now contiguous to said right of way, and each of them, shall have the right to the use of said ditch for the purpose of conveying water therein for the irrigation of their land, such use to be free to them and to each of them."

The plaintiff commenced the construction of a ditch over said right of way in the year 1910, shortly after the grant to it of said right by the Bank of Woodland. The said ditch taps Cache creek at a point opposite the town of Capay, in Yolo county, and, having been completed, runs in a northeasterly direction for a distance of about six miles, where it reaches the tract of land already referred to as having been acquired by the plaintiff from the said Bank of Woodland. Said ditch is designated and known as the "Hungry Hollow Ditch" and is, in point of fact, a part of the irrigating system of the Yolo Water & Power Company.

On November 15, 1909, Charles J. Cox, Jr., secretary of the plaintiff, addressed a letter to one William Chaney, then residing in Hollister, Cal., proposing to secure for him the 160-acre tract in question. His letter reads:

"Dear Will: Inclosed you will find a small diagram of the land belonging to the Irrigated Valleys Land Company, showing the ditches in proximity to Cache creek. The company is building these ditches now, subdividing this big 3,000-acre tract into small farms and selling it for \$125 per acre. The two pieces marked red on this map, consisting of 131 and 160 acres, respectively, adjoin our land and come under our ditch. I secured a contract on these two pieces Saturday, at \$65 an acre, as the owner, who is not a resident of this neighborhood, does not know of the improvements going on there. It is fine rich soil, and worth \$150 an acre under ditch; anybody buying this now will get the benefit of the ditches for nothing. The land company have all they can handle, and I would like to have some friend of mine buy this property. Would like to have you go up and see it this week, and hope to hear from you at your earliest convenience."

Chaney, testifying as a witness for the defendant, said that upon receiving the above letter, he wrote to Mr. Cox and asked him to give him further information with regard to the 160-acre tract; that Cox later visited him at his house, and asked him to go with him (Cox) to see the land, and the witness consented to and did do so.

"After inspecting the land," proceeded Chaney, "Cox told me if I bought it I could use the company's ditches, and that he wanted me to put out alfalfa, and he said it would be an advertisement for them and help sell their property."

Cox further informed witness that he (Cox) was the secretary and manager of the plaintiff. Acting upon the statements and representations made by Cox, Chaney bought the property on the day that he had the conversation with the former. He testified that he would not have bought the property if he had known or thought that he could not have irrigated it. He further stated that he had often seen Cox in and about the property that he bought in the company of prospective purchasers of the subdivisions of the plaintiff's tract. The witness said that after he purchased the property he had a conversation with Cox about mapping the 160-acre tract as part of the lands of the Woodland tract, and that Cox subsequently "showed me a map like this (a map being in the possession of the witness at the time he was testifying), and he said he had mapped that out and had marked it 'sold' in order to help the sales of the rest of the property." The witness testified that after purchasing and taking possession of the land—in the fall of 1910—he proceeded to prepare 40 acres of it for the raising of alfalfa, and that he seeded the land, built some laterals, and used the ditch in question for the purpose of irrigating the portion of the land so utilized. In the fall of 1911 he planted to alfalfa an additional 30 acres, and expended the sum of \$65.25 in putting a bulkhead into the main ditch and also \$50 to make a bulkhead in the lateral ditch, which he dug to carry the water from the main ditch to his tract. Altogether he expended approximately \$200 in making preparation for the use of the water upon his land. In addition to this it cost him about \$10 per acre to prepare the soil for the growing of alfalfa and the seeding of the same. He testified that he commenced irrigating from the ditch in the year 1911, and also used water from the ditch for the same purpose in the year 1912, and that there was no objection voiced against his use of the water from the ditch by any one connected with the plaintiff until the year 1912, when he received a letter dated August 31st of that year from plaintiff, in which it notified him that the company protested against his use of the water from

the ditch of the company, and informed him, that—

"The Irrigated Valley Lands Company recognizes no right in you, or any right as appurtenant to your land, to obtain water through the company's ditch, or any ditch which connects with said ditch. There is not sufficient water to irrigate the lands adjoining said ditch, without considering lands adjacent thereto."

Upon receiving said letter, Chaney called on W. C. Wallace, who had control for the company of the distribution of the water flowing into and through the Hungry Hollow ditch, and said to Mr. Wallace that he had received the letter referred to, and that that letter stated that there was not sufficient water to accommodate the company's lands and his land also, but that Wallace, nevertheless, turned the water into the defendant's ditch. The witness testified that he had a conversation with C. J. Cox, Sr., and a Mr. Wagner after he had purchased the land through the former's son. On that occasion Cox, Sr., who represented himself to Chaney as being a director of the plaintiff, and Mr. Wagner, while not directly telling him that he could use the water, said to him that they were anxious that he should put his land into alfalfa as soon as possible. From the general trend of the conversation with Cox, Sr., the witness understood that said Cox intended that he should use the water upon his land.

Chaney entered into an agreement for the sale of the land on the 21st day of November, 1912, to Frank Galentine. Galentine on the 16th day of August, 1913, assigned his contract with Chaney for the purchase of the land to W. E. Joerger. On the 4th day of December, 1917, Chaney and Joerger joined in a deed conveying the land to the defendant Schaupp.

W. C. Wallace, heretofore mentioned as the man in charge of the distribution of the water of the Hungry Hollow ditch, testified that he distributed water to Chaney during the years 1911 and 1912 and to Joerger, while the latter was in possession of the land, during the years 1913, 1914, and 1915. He also furnished water to Galentine when he was in possession of the land. The defendant D. J. Altman testified that he bought property near the land in question in the year 1913, and was in a position at all times thereafter where he could observe operations on the 160-acre tract after it had been purchased from one Schultz by William Chaney. He stated that the land had been irrigated from the ditch during the years 1911 and 1912, and that in 1913 he took possession of the 160-acre tract under a lease; that he knew that the land had been irrigated from the water flowing through the Hungry Hollow ditch from the year 1911 to the year 1918, inclusive. He was particularly asked

if the land was irrigated in the year 1916, and he replied that it was, and that he saw the water on the land. He stated that a pumping plant was installed on the 160-acre tract, but that enough water to irrigate the land could not be obtained from that source, and that the land was always irrigated by water obtained from the Yolo Water & Power Company and flowing through the main ditch in question. The pumping plant was finally abandoned and the engine sold. During the time that he was in possession of the land he stated that no one interposed any objection to the use of the water from the ditch until just prior to the commencement of this action, when he received a letter from the company, protesting against further use of the ditch by him. He also specified the number of different occasions in each year on which the portion of the 160-acre tract which was under cultivation was irrigated from the water of the ditch.

Metzner, president of the plaintiff, testified that—

The company never "entered into any agreement with the owner, or purported owner, of this 160-acre tract in reference to the use of water thereon taken from the Hungry Hollow ditch."

He stated that he had no knowledge of the diversion of the water from the ditch to the 160-acre tract until a short time prior to August 31, 1912, when the company addressed to Chaney the letter heretofore referred to, declaring that the company recognized "no right in Chaney or any right as appurtenant to his land" to obtain water through the company's ditch or any ditch connected with said ditch; that he had no knowledge thereafter of the use of said water by Chaney or any of his successors in interest until some time in 1918, when it was learned by the company that the defendant Altman was diverting water to said 160-acre tract from the ditch, and had diverted water from the ditch to the said 160-acre tract in the year 1917; that, upon learning this, the company addressed a letter to Altman, protesting against the taking of any water from the main canal of said company, and diverting the same to the 160-acre tract in question, and stating to him that, unless he ceased so taking and using said water, legal steps would be taken by the company to prevent him from further so diverting and using the same. Metzner testified that the company received no written reply to the letter addressed to Chaney, under date of August 31, 1912, but said that about a week or ten days after sending said letter to Chaney, he (Metzner) went to what is known as the "Home Ranch" of the company's lands in Yolo county, and that he there met Chaney; that Chaney, addressing him, said: "I got your letter, and I propose to use the water, and you can't

stop me." The witness said: "As far as I know, Mr. Chaney never continued to make an attempt to use it." A letter written by G. D. Parish, a tenant in possession of the 160-acre tract, under date of May 20, 1916, was received by the company, and therein Parish asked the permission of the company for the use of water to "wet a piece of grain and alfalfa" on said land. This letter was introduced in evidence and Metzner said that, while no written reply was made thereto, he later visited the properties of the company and there met Mr. Parish, and said to him that the company could not furnish him water at that time. Metzner further testified that C. J. Cox, Jr., under the firm name of Cox & Co., was made the selling agent of the lands of the plaintiff. This agency existed while said Cox was still secretary of the company.

G. D. Parish testified for the plaintiff in rebuttal that he had the 160-acre tract leased during the years 1916 and 1917; that he did not use the water on the premises in 1916, but did irrigate from the ditch in the year 1917. He stated that he did not have any alfalfa in 1916 because he had no water.

It should also be stated that it was shown that the distribution of the water was controlled by an employee of the plaintiff, and that said employee generally used his own judgment as to the turning in of the water upon the various pieces of land which used the water from the Hungry Hollow ditch.

The above statement represents substantially all the important testimony received at the trial.

The findings are not of specific facts, but are general in form, declaring that the allegations of the answer are true and those of the complaint untrue. As we have seen, the answer, besides specific denials, sets up the several different and distinct special defenses above referred to, and sets out with particularity the facts upon which each is founded. It follows that all of the material facts so alleged, as well as those facts which were brought out by the evidence in support thereof, are comprehended within the findings or were found to be true by the court, viz.: (1) That the grant of the right of way for the ditch to the plaintiff by the Bank of Woodland also specifically granted to the owner of "land now contiguous to said right of way" the right to the use of said ditch for the purpose of conveying water therein for the irrigation of their lands, "such use to be free to them and to each of them." (2) That Cox, Jr., was, at the time of the purchase of the 160-acre tract by Chaney, secretary of the plaintiff and its agent for the sale of the lands embraced within the tract for the special irrigation of which the right of way for a ditch was granted to it and the main ditch was built; that Cox, Jr., as secretary of the plaintiff, was vested with full

power to negotiate all contracts for the purchase of lands, water power, and water rights, and "to supervise the development of all lands belonging to the corporation"; that Cox, Jr., was also the selling agent of the plaintiff under the firm name of Cox & Co.; that said Cox induced Chaney to purchase the 160-acre tract upon the representation and promise to the latter that if he (Chaney) would purchase said tract, he could have the use of the ditch for the purpose of conveying water to his land for irrigating the same; that said Cox further stated to Chaney, during the negotiations for the sale of the 160-acre tract to the latter that it would be an advertisement and to the interest of the plaintiff's lands, and thus facilitate the sale of the subdivisions thereof, if he (Chaney) would purchase and sow the 160-acre tract to alfalfa and raise good crops thereon; that, solely upon the faith of the promise of Cox, Jr., that he could have the use of the said ditch, Chaney purchased the land; that Chaney would not have made said purchase but for said representation and promise; that Cox mapped the lands of the plaintiff and included therein as a part and parcel of the same the 160-acre tract, marking on said map the latter tract as having been sold. (3) That Chaney immediately entered into the possession of said 160-acre tract, expended large sums of money in preparing to convey the water from the main ditch to his land and in cultivating the said tract and in growing alfalfa and grain thereon; that he so used the main ditch in the years 1911 and 1912. (4) That in the month of August, 1912, the plaintiff demanded of Chaney in writing that he cease using the water of the ditch, and at the same time likewise notified him that the company did not recognize in him any right to obtain water through its ditch or any ditch which connects with said ditch, or that the right to use the ditch was appurtenant to the 160-acre tract; that within 10 or 12 days after the receipt of the said written notice or demand to stop the further use of the ditch for the purpose of conveying water to his land, Chaney said to Metzner (president of plaintiff), referring to the plaintiff's protest against his further use of the ditch, "I propose to use the water and you can't stop me"; that from that time on down to the commencement of this action on May 29, 1918, Chaney and his successors in interest, including the defendants, have continuously, uninterruptedly, notoriously, and under a claim of right used said ditch for conveying water for irrigating the 160-acre tract.

That the evidence, of which we have above presented an epitomized statement, is amply sufficient to support said findings is a proposition which it seems to us stands beyond the realms of doubt or disputation. The remaining question is therefore whether the court

deduced from said findings the correct conclusions of law.

It is not necessary, nor is such the intention, to express a definite opinion upon the question whether the 160-acre tract is "contiguous" to the main ditch within the meaning and intent of the grant of the right of way for a ditch by the Bank of Woodland to the plaintiff. We may, however, venture these suggestions in connection with this proposition: That it is probable that the bank by the insertion of that covenant in the grant intended to confer upon all owners of land in the immediate community or neighborhood in which the tract of the plaintiff is situated the right to the use of the ditch for irrigating purposes; and the word "contiguous" would not be wholly inapt in the expression of such meaning and intent under the circumstances of this case. In *Ann. Cas. 1918E, 798*, it is said that, while the primary meaning of the word "contiguous" is "in actual contact, touching, meeting or adjoining at the surface or border" (*Johnston v. Davenport Brick, etc., Co. [D. C.] 237 Fed. 668*), and that it must therefore always be so understood, unless the context shows it was otherwise intended (*Holston Salt, etc., Co. v. Campbell, 89 Va. 396, 16 S. E. 274*), still the meaning of the word depends largely on the subject-matter to which it is applied (*Griffin v. Denison Land Co., 18 N. D. 246, 119 N. W. 1041*). It is reasonable to suppose that if the right of way was granted by the bank for the exclusive use and benefit of the lands embraced within the plaintiff's 3,000-acre tract, the instrument granting the easement would probably have expressly so provided, or, in other words, restricted the employment of the ditch to such use, and therefore the fact of the omission from the grant of such a provision affords some support to the suggestion that the word "contiguous" was used in the grant as indicating an intention in the grantor to give to owners of land in the immediate vicinity of plaintiff's tract, and not included within the latter, the right to use the ditch for the irrigation of their lands. But, whatever may be the correct interpretation of the grant in that respect, it is clear that the judgment may and should be sustained upon other considerations.

[2] As secretary of the plaintiff, Cox, Jr., it will be observed, was vested with full power not only to sell the lands and water rights of the plaintiff, but was also given general power to develop the said lands for marketing purposes. He was also, moreover, by special action of the board of directors of the plaintiff, given authority to act as its sales agent and manager, with power to sell its lands. As secretary, in so far as the authority to dispose of the lands and concomitant rights of plaintiff was concerned, his powers were as broad as or coextensive with those of the corporation itself. And, as is said by Chief Justice Shaw in the very recent

case of *Woods Lumber Co. v. W. H. Moore, Trustee, etc.*, 183 Cal. 497, 501, 191 Pac. 905, 907 (11 A. L. R. 549):

"A corporation engaged in carrying on a business which it is authorized to do by its articles and the law under which it is organized has implied power to make all contracts which are 'essential to the successful prosecution of the business' (Civ. Code, § 354, subd. 8; *Bates v. Coronado B. Co.*, 109 Cal. 163; *Merc. Trust Co. v. Kiser*, 91 Ga. 636), or the making of which is an appropriate means by which it may be 'reasonably expected that the business in which the corporation is engaged will be advanced' (*Depot R. Synd. v. Enterprise Brewing Co.*, 87 Or. 560), or which are 'necessary and helpful to the conduct of its authorized business' (*Timm v. Grand Rapids Br. Co.*, 160 Mich. 371), or which tends directly to promote the business authorized by its articles and which it is doing. *Kraft v. Brewery Co.*, 219 Ill. 205; *Central L. Co. v. Kelter*, 201 Ill. 503; *Blue Island Br. Co. v. Fraatz*, 123 Ill. App. 26; *Horst v. Lewis*, 71 Neb. 365."

[3] That the plaintiff is authorized, either expressly or impliedly, to do all of these things for the successful prosecution of the business for the carrying on of which it was organized, there can be no manner of doubt; and, as above suggested, it is equally clear from the evidence that Cox, Jr., as secretary and sales agent of the plaintiff, was clothed with like authority. And, obviously, if the agreement that said Cox made with Chaney would, as Cox so conceived, and as we may assume from the evidence that it did, directly tend to promote the authorized business of the plaintiff, or be "an appropriate means" whereby it might reasonably be expected that the business of plaintiff would be advanced, then the act of making the agreement was within the scope of his authority as the agent of the plaintiff, and the latter is consequently bound thereby.

[4] It being true, then, that Cox possessed plenary power, as secretary and sales manager of the corporation, to make for and in behalf of the corporation the said agreement with Chaney, it follows that Chaney entered into the use of the ditch under a parol license from the plaintiff, and that, upon the incurring by him of expenditures of money in buying the land and also for the purpose of facilitating the use of the easement and in cultivating the tract according to the suggestion of Cox, Jr., the license became irrevocable. *Churchill v. Russell*, 148 Cal. 1, 82 Pac. 440; *Stoner v. Zucker*, 148 Cal. 516, 83 Pac. 808, 113 Am. St. Rep. 301, 7 Ann. Cas. 704; *Roseberry v. Clark*, 23 Cal. App. 549, 138 Pac. 923; *Smith v. Green*, 109 Cal. 228, 234, 41 Pac. 1022; *Blankenship v. Whaley*, 124 Cal. 300, 304, 57 Pac. 79; *Flickinger v. Shaw*, 87 Cal. 126, 131, 25 Pac. 268, 11 L. R. A. 134, 22 Am. St. Rep. 234; *Rerick v. Kern*, 14 Serg. & R. (Pa.) 271, 16 Am. Dec. 497; *Stepp v. Williams* (Cal. App.) 198 Pac. 661, 668, 669; *Raritan Waterpower Co. v. Veghte*, 21 N. J.

Eq. 475. See, also, comment of Prof. Freeman on the last-named case in 16 Am. Dec. 501 et seq.

In *Stoner v. Zucker*, supra, at page 520 of 148 Cal., at page 810 of 83 Pac. (113 Am. St. Rep. 301, 7 Ann. Cas. 704), the doctrine is thus explained:

"The recognized principle, therefore, is that where a licensee has entered [upon the premises of another] under a parol license and has expended money, or its equivalent in labor, in the execution of the license, the license becomes irrevocable, the licensee will have a right of entry upon the lands of the licensor for the purpose of maintaining his structures, or, in general, his rights under his license, and the license will continue for so long a time as the nature of it calls for."

In *Raritan Waterpower Co. v. Veghte*, supra, the rule is stated as follows:

"To the extent that the license is executed, equity will not disturb it or permit its revocation. Where improvements of a permanent nature have been made by a person on his own land, the enjoyment of which depends upon a right recognizable by the law, affecting the land of another, and to which his consent is necessary, and where such consent is expressly proved, or necessarily implied from the circumstances, and the improvements have been made in good faith upon it, equity will not permit advantage to be taken of the form of the consent, although not according to the strict mode of the common law, or within the statute of frauds; and to defeat such a purpose will, upon a proper bill filed, enjoin the licensor from accomplishing his fraud, or when he asks relief it will be refused, or if granted, will be allowed merely in the shape of compensation, but protecting the right of the licensee."

[5-7] Appellant, however, takes the position that the license whereby Chaney acquired the right to the easement cannot inure to the benefit of his successors in interest, inasmuch as the latter themselves made no expenditures in improving the property upon the faith of any representations made by Cox to Chaney, and that no representations were made to them. In other words, the contention is that an estoppel cannot be set up here for the reason that there were no representations or promises made by Cox, Jr., to any of the successors in interest of Chaney. The reply to this proposition is, though, that the license under which Chaney entered into the use of the ditch having become irrevocable, the right acquired thereby and thereunder became appurtenant to the 160-acre tract. Furthermore, the successors in interest of Chaney took the land with the ditch as constructed by the latter, and which connected with the main ditch, and the said ditch remained in the same condition from the time of its construction down to the date of the institution of this action, during which period of time the appellant made no attempt to interrupt the use of the ditch in any manner until August 31, 1912, and, later, April

30, 1918 (approximately a month prior to the commencement of this action), on which former date the letter heretofore referred to was addressed to Chaney, and on which latter date it addressed a letter to the defendant Altman, a tenant and not the owner of the 160-acre tract, objecting to the further use of the ditch for the purpose of irrigating said tract. It is not necessary to the working of an estoppel that in such a situation there should be direct or affirmative verbal representations. Such representations may arise by implication. In this case, the plaintiff, although, as we will later show in considering another branch of the case, having knowledge that the successors in interest of Chaney had used and were using the ditch, remained silent, addressing no protest against such use to the successors of Chaney, and thus by conduct recognized the validity of the license by which Chaney acquired the right to the easement and so acquiesced therein. As the law-writers say, "Quiescence is tantamount to acquiescence." In other words, "if a person by his conduct induces another to believe in the existence of a particular state of facts, and the other acts thereon to his prejudice, the former is estopped, as against the latter, to deny that that state of facts does in truth exist." 21 C. J. p. 1060. The ground upon which the estoppel rests is that the conduct constitutes an implied representation of the truth of the state of facts in question. Bigelow, *Estop.* (5th Ed.) p. 570. There can be no doubt—indeed, it must be assumed from the fact that the irrigation of the land was necessary to the successful growing of alfalfa and other grain—that the successors in interest of Chaney would not have bought the same but for their knowledge of the fact that said easement was appurtenant to said tract.

[8] Counsel for the appellant, however, declares that the letters from the plaintiff to Chaney and Altman, protesting against their use of the ditch, constitute convincing, if not conclusive, evidence that the respondents were not given the license pleaded in the answer. But the answer to this is that permission had been granted to Chaney to use the ditch, and the same had developed into an irrevocable license before said letters were received by either of the parties named. Moreover, Altman, as we have seen, was only a tenant or lessee of the 160-acre tract, and in such case such a protest, addressed to a mere tenant of the property against the use of the easement, cannot break the operation of the estoppel.

[9, 10] But the judgment may securely rest upon the finding that the defendant Schaupp acquired title to the easement or the right to the use of the ditch by prescription. As seen, the plaintiff, in a letter to Chaney, under date of August 31, 1912, notified him to cease using the ditch, but a few days thereafter Metzner, president of the plaintiff, according

to his own testimony met Chaney, and they discussed the matter of the receipt of said letter, and Chaney then declared to Metzner that he proposed to use the ditch or the water, "and you can't stop me." The evidence clearly shows that from that time until and immediately preceding the date of the commencement of the present action Chaney and his successors in interest continuously used the ditch under a claim of right, or, in other words, for a period of more than five years from the date of said conversation between Metzner and Chaney. It is true that one witness testified that in the year 1916 no water from the ditch was used on the land, the explanation being that the spring of 1916 was a late, wet season, and that there was really no necessity for using the ditch. This testimony came from the 1916 lessee of the 160-acre tract. This though, if true, would not be such an omission in the use of the ditch as to have the effect of breaking the continuity of the user. The failure, if any, to use the ditch in the year 1916 was not due to any act of the owner, but to the fact only that the circumstances were such that water from the ditch was not needed. The omission amounted neither to a nonuser nor evidence of an intention to abandon the easement. In other words, as counsel for the defendants well say, "continuous use" does not necessarily mean "constant use." Where one who claims an easement uses it as often as it may be necessary for him to do so, the use is generally held to be continuous, and this is particularly true with reference to easements connected with irrigation. *Hesperia Land & Water Co. v. Rogers*, 83 Cal. 10, 23 Pac. 196, 17 Am. St. Rep. 209; *Bodfish v. Bodfish*, 105 Mass. 319.

There was, however, other testimony to the effect that water was conveyed to the 160-acre tract from the ditch in the year 1916. And from the entire evidence the court remained well within its discretion in finding that the defendants claimed and exercised the right to use the ditch openly and continuously and uninterruptedly and in hostility to the claim of the plaintiff for a period of over five years immediately preceding the date of the commencement of this action. Metzner, it is true, testified that he had no knowledge of the use of the ditch by Chaney and his successors in interest, and had no means of ascertaining whether the ditch was being so used; but he also testified that he had instructed the foreman of the plaintiff having charge of the distribution of the water flowing in the ditch to watch and report if any attempt was made to irrigate the 160-acre tract from the company's ditches. But, notwithstanding this instruction, as the evidence shows, the employees of the appellant who had charge of the ditches and the distribution of the water thereof continued, during the prescriptive period, to supply water for the 160-acre tract through the ditch

in question. Furthermore, it was shown that Cox, Sr., who was a director of the company at the time, had a conversation with Chaney after the latter had purchased the 160-acre tract, and that said Cox stated to Chaney that the company was anxious that he should put the land into alfalfa as soon as possible. It was also shown, as we have seen, that Cox, Jr., was often near the 160-acre tract after the sale thereof to Chaney, accompanied generally by persons to whom he desired to sell subdivisions of the plaintiff's tract. From all this and the fact that water was actually supplied to the 160-acre tract by means of the main ditch during every year from 1912 to 1918, inclusive, the court could well have concluded that if it was true that the appellant had no knowledge of the use of the easement by Chaney and his successors in interest, it certainly had ready means for ascertaining the fact. But, under all the circumstances of the case as they were developed at the trial, it is hardly reasonable to believe that the appellant did not know at all times that its ditches were being used by the several owners of the 160-acre tract. Indeed, the knowledge of Cox, Jr., the secretary, and also that of its several foremen, whose special business or duty it was to distribute the water flowing through the main ditch to those entitled thereto, that the ditch was being used by Chaney and his successors, was the knowledge of that fact of the appellant itself, since not only said Cox as secretary, but also said foremen, were the agents of appellant with full power to act for it in all the matters committed to them by the plaintiff.

But it is further argued that, from the fact that the owner in the year 1915 installed a pumping plant on the 160-acre tract, capable, as is the claim of irrigating the entire acreage, and from the further fact that a tenant in 1916 asked permission of the company to irrigate the tract from its ditches, the irresistible conclusion is, and the court should have so found, that the appellant could not have known, nor did it have any reason to believe, that the 160-acre tract was being supplied with water conveyed through the company's ditches. But there is no showing here that the appellant had any knowledge of the existence of the establishment of the pumping plant; and the fact that a tenant of the owner of the land in 1916 asked permission of the company to irrigate said land from its ditches would not necessarily show that said ditches had not been used or were not being used for the purpose of conveying water to the lands of the defendants, or that the appellant did not know that they were being so used. At any rate, the trial court, it seems, did not attach any significance to the circumstances here referred to, concluding, as we may presume, and as it had a right to do, that the other facts and circum-

stances in the case, tending to show the continuous and uninterrupted use of the easement, were sufficient to overcome the probative effect of any facts or circumstances leading to an opposite conclusion upon the question of adverse user.

[11] Lastly, we may briefly consider the point, made at the threshold of appellant's argument, that the defense based on the license and that of title to the easement by adverse user are inconsistent, in that possession by license is not adverse and cannot ripen into a title. If the license were revocable there would no doubt be force in that contention; but, as we have shown, the license became irrevocable, and it was within the right of defendants to set up either or both of the said defenses as the basis of their title to the easement. The situation is no different from a case where a party, suing to quiet title to land, would set up and prove a conventional title thereto and at the same time title by adverse possession. *Porters Bar Dredging Co. v. Beaudry*, 15 Cal. App. 751, 763, 115 Pac. 951. It follows, also, that there is no inconsistency between the findings and the conclusions of law for the reason suggested.

We have discovered no substantial reason for disturbing the judgment herein, and it is accordingly affirmed.

We concur: FINCH, P. J.; BURNETT, J.

57 Cal. App. 260

DYMENT v. BOARD OF MEDICAL EXAMINERS OF STATE OF CALIFORNIA
et al. (Civ. 3677.)

(District Court of Appeal, Second District, Division 2, California. April 5, 1922. Rehearing Denied May 3, 1922. Hearing Denied by Supreme Court June 1, 1922.)

1. Physicians and surgeons § 11(3)—Charge physician had obtained license to practice by fraud not sufficiently specific.

A charge that petitioner had procured his certificate to practice medicine through fraud and misrepresentation without a statement of the facts constituting the fraud is not sufficiently specific to sustain an order of the board of medical examiners revoking petitioner's certificate under St. 1913, p. 732, § 14, as amended by St. 1917, p. 109, § 9.

2. Physicians and surgeons § 11(3)—Procedure in trial before medical board need not be technical.

The procedure in trials before medical boards for revocation of a license to practice medicine need not, either as to pleadings or evidence, be marked by the refinements and subtleties which are characteristic of the conduct of actions in courts of law.

On Hearing in Supreme Court.

3. Pleading ⚡8(15)—**General allegation of fraud in obtaining physician's certificate insufficient.**

A general charge, alleging fraud and misrepresentation without stating the facts on which it is based, is insufficient.

4. Physicians and surgeons ⚡11(3)—**Board need not determine sufficiency of charges before hearing.**

The board of medical examiners need not, before the hearing, determine the sufficiency of charges against a physician whose license is sought to be revoked.

5. Physicians and surgeons ⚡11(3)—**Objection to sufficiency of charges unnecessary to review on certiorari.**

Though a physician may question the sufficiency of charges before the hearing for the revocation of his license, his failure to do so does not give the board power or jurisdiction to revoke the certificate if the charges are in fact insufficient, and if the board enters an order revoking his certificate the physician may maintain certiorari to have it annulled for want of jurisdiction.

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Application by Philip Dyment against the Board of Medical Examiners of the State of California and the members of the board for a writ to review an order of the board revoking petitioner's license to practice medicine. From a judgment affirming the order of the board, petitioner appeals. Reversed, with directions to annul the order of the board.

L. E. Dadmun, of San Diego, for appellant.

Harry A. Encell, of San Francisco, and Frank M. Smith, and Charles D. Ballard, both of Los Angeles, for respondents.

WORKS, J. On December 21, 1917, respondent board of medical examiners of the state of California issued to petitioner a certificate authorizing him to practice medicine and surgery. The document was of the kind known as a reciprocity certificate; that term being applied to a certificate issued without examination, under section 13 of the Medical Practice Act (Stats. 1913, p. 722, as amended Stats. 1917, p. 107) upon the production by an applicant for leave to practice medicine and surgery in California of a license certificate issued by the medical board of a sister state. Section 14 of the same act as amended (Stats. 1917, p. 109) authorizes the board of medical examiners to revoke any certificate issued by it when procured by the fraud and misrepresentation of the applicant. On August 30, 1920, there was filed with the board a complaint that petitioner had procured his reciprocity certificate through fraud and misrepresentation,

and, after steps taken to acquire jurisdiction over petitioner and on October 19, 1920, the board made its order revoking the certificate. Thereafter petitioner applied to the superior court for a writ of review in the premises, and it was issued. Upon a hearing pursuant to the writ judgment was rendered, affirming the order of the board, and petitioner appeals from the judgment.

In response to the complaint filed with the medical board appellant presented to that body a letter signed by himself in which, among other things, it is said:

"The said Philip Dyment hereby demurs to the charges in the complaint. * * * Said demurrer is to the effect that the complaint is deficient in that it is not sufficiently definite and specific. * * * Inasmuch as section 14, chapter 354, of the Statutes of 1913 set out twelve distinct and separate definitions of 'unprofessional conduct,' the defendant Philip Dyment demands to know and has a right to know which particular statute he is accused of violating and how. If on receipt of such amended charges and specifications I find that the charges are then sufficiently definite, specific, and sufficient to warrant a proper defense, I will make my answer according to the provisions of said section 14."

This letter was plainly effective as a demurrer to the complaint, but the medical board, going forward upon the theory that only an answer on the facts under oath was permissible under the statute, proceeded in the absence of appellant to try the charges against him as upon a default and after the time fixed by the statute for answering had elapsed, with the result that the certificate of appellant was revoked as already stated. The board never at any time passed upon the demurrer.

Appellant contends that he had the right to demur to the complaint, and that the medical board had no jurisdiction to proceed under the charge against him without a ruling upon the demurrer which he presented. Respondents, on the contrary, insist that the right to demur does not exist in the case of such proceedings as that instituted before respondent medical board against appellant. It is true that the enactment regulating such proceedings does not provide for demurrers. As the statute stood at the time the charge against appellant was pending (Stats. 1917, p. 109), one against whom complaint was made before the board was required to "file his written answer, under oath, within 20 days next after the service on him" of the citation provided for in the act. This is far from meaning, however, that such a person might not demur, or might not by some other method object to the sufficiency of the written charge lodged against him. The right to present such a question in every form of action or proceeding, whether civil, criminal, or

quasi criminal is practically universal under the genius of Anglo-Saxon institutions, if not under all systems for the administration of justice. It may almost be said to be a natural right, for the idea that a man may be brought to trial upon an insufficient charge is opposed to the sense of justice inherent in the human breast. This fact has found tacit recognition in many cases in which proceedings such as that pressed against appellant before the medical board have been brought in question in the courts. The regularly constituted judicial tribunals have uniformly considered the question of the legal sufficiency of complaints making such charges whenever the point has been presented to them under writs of review or in kindred proceedings (*Munk v. Frink*, 75 Neb. 172, 106 N. W. 425; *Board of Medical Examiners v. Eisen*, 61 Or. 492, 123 Pac. 52; *Richardson v. Simpson*, 88 Kan. 684, 129 Pac. 1128, 43 L. R. A. (N. S.) 911; *Freeman v. State Board*, 54 Okl. 531, 154 Pac. 56, L. R. A. 1918D, 436; *State Board v. Jordan*, 92 Wash. 234, 158 Pac. 982); the courts of our own state being among those which have held this attitude (*Lanterman v. Anderson*, 36 Cal. App. 472, 172 Pac. 625; *Suckow v. Alderson*, 182 Cal. 247, 187 Pac. 965). If such a question is to arise concerning these complaints—and we have already said that upon principles inherent to the administration of justice it must arise—the place for its initial presentation is before the tribunal with which the complaint is originally lodged. If a charge against a physician is made to a board of medical examiners, it is due the board that the question of the sufficiency of the complaint be ascertained at once, rather than after the proceeding has been terminated before the board and has gone to the courts, with the possible result that the board's order of revocation is annulled because of defects in the charge. A solution of the question before the board is equally due the practitioner complained against. The settlement of the point while the proceeding is yet before the initial tribunal will not only conduce to a more speedy administration of justice in the interest of all concerned—and the interest of the general public in such a question is far from negligible—but it will conduce to a great saving of expense to those directly interested. We conclude that appellant had the right to test the sufficiency of the complaint against him while the proceeding was yet before the board, either by demurrer or after some other method, and that the board was in error in proceeding to a hearing on the facts without passing upon the demurrer which was interposed by appellant. Because of the conclusion reached by us on the point next to be considered, we need not express an opinion upon the question whether, in cases in which a complaint

is finally determined to be sufficient, a respondent in such a proceeding must have filed his answer under oath at the same time with his demurrer, or, at least, within the 20 days fixed by statute for answer, or suffer default upon the overruling of the demurrer.

[1] Appellant contends not only that he had the right to demur to the complaint against him filed with the medical board, but that the demurrer should have been sustained. This is the only remaining point made by appellant which we shall consider. The complaint fails to state the facts constituting the fraud and misrepresentation by means of which it is alleged that appellant procured his reciprocity certificate. The averment is that the person making the complaint "charges Philip Dymont with having been guilty of unprofessional conduct by violating section 14 of chapter 354 of the Statutes of 1913 and acts amendatory thereof of the state of California, in that he (Philip Dymont) procured by fraud and misrepresentation a certificate to practice medicine and surgery in the state of California." We are of the opinion that the complaint is insufficient.

[2] It is of course, needless to cite authorities upon the proposition that neither as to pleadings nor as to evidence must the procedure in trials before medical boards be marked by the refinements and subtleties which are characteristic of the conduct of actions in courts of law. The cases upon this point are both uniform and numerous. Still, giving to the rule its full scope, a complaint in such a proceeding must give an alleged erring practitioner such notice of the nature of the charge against him as will enable him to formulate a defense. *Munk v. Frink*, supra; *Richardson v. Simpson*, supra; *Freeman v. State Board*, supra. This the complaint now before us does not do. It is probably not possible to conceive of the many different practices by means of which an applicant fraudulently might procure the issuance to him of a certificate licensing him to practice medicine and surgery, and a complaint against him for having brought such an attempt to fruition ought to notify him of the specific acts committed by him in the attempt.

The work done by the medical boards of the various states in purging the ranks of the medical profession of quacks and charlatans is a most commendable one. The public interest demands the prosecution of that work with vigor, dispatch, and thoroughness and without undue interference by the courts. It is equally important, however, that no man be brought to trial, even before a medical board, upon a charge which does not notify him of the nature of the offense attempted to be pleaded against him.

It is due the California medical board in the present instance to observe that the body acted under legal advice at all stages of the proceeding before it, and it is not surprising that the views of its counsel should have been followed. We, however, cannot be satisfied that the advice given was sound.

Judgment reversed, with directions to the trial court to enter judgment annulling the order made by the board of medical examiners of the state of California by which the reciprocity certificate of appellant was revoked, and directing the board to take such further proceedings as it may be advised to take in the proceeding against appellant pending before it, all in accordance with the views expressed in this opinion.

We concur: FINLAYSON, P. J.; CRAIG, J.

Opinion of Supreme Court in Bank Denying Hearing.

PER CURIAM. [3] We are satisfied with the conclusion of the District Court of Appeal that the complaint made to the board of medical examiners is not in law a sufficient charge of unprofessional conduct to give the board jurisdiction to revoke the certificate or license authorizing the appellant to practice medicine. It contains no specific allegations of fact, but merely states that he "procured by fraud and misrepresentation a certificate to practice medicine." Such method of charging fraud has always been held insufficient; the specific facts must be stated. 9 Ency. of Pl. & Prac. 686; 31 Cyc. 55.

[4] But we do not agree with the theory that it was necessary for the board to determine the sufficiency of that complaint prior to the time of the hearing thereof. The act does not contemplate a formal method of procedure. The person charged may at the hearing object either formally or informally to the sufficiency of the complaint.

[5] But, whether he does or not, the complaint must be sufficient in its statement of facts to show actual unprofessional conduct by the person charged, or it will not give the board power or jurisdiction to revoke his certificate, and if a revocation is ordered on such a complaint the holder thereof may maintain a proceeding in certiorari to have it annulled for the want of jurisdiction of the board to make the order, as well where he did not make the objection to the board as where he did object.

The petition for a rehearing in the Supreme Court is denied.

SHAW, C. J., and LAWLOR, WILBUR, LENNON, SLOANE, SHURTLEFF, and WASTE, JJ., concur.

57 Cal. App. 366

OVERLAND PUB. CO. v. UNION LITHOGRAPH CO. et al. (Civ. 4127.)

(District Court of Appeal, First District, Division 2, California. April 18, 1922. Hearing Denied by Supreme Court June 15, 1922.)

1. Monopolies ⇨12(2) — Agreement to sell labor only to certain class held legal.

Under St. 1907, p. 984, as amended by St. 1909, p. 594, providing that labor, skilled or unskilled, is not a commodity, an agreement of printing associations to sell their labor only to persons coming within a certain class was legal, and involves no restraint of trade.

2. Constitutional law ⇨88—Right of laborer to work or refuse to work for any man or class of men inviolate.

It is the right of every man to engage to work for or to deal with, or to refuse to work for or to deal with, any man or class of men as he sees fit, whatever his motive or whatever the resulting injury, without in any way being held accountable therefor.

3. Monopolies ⇨24(1), 28—Agreement to sell labor only to certain class not ground for injunctive relief or recovery of damages.

Where printing associations entered into an agreement providing that they would sell their labor only to persons coming within a designated class is not ground for injunctive relief or for damages.

4. Monopolies ⇨28—Special damages resulting from practices in restraint of trade must be pleaded.

An action cannot be maintained against an association because of the attempt to restrain competition among its own members without pleading and proving special damages to the business or property of the plaintiff.

5. Monopolies ⇨24(1)—No right to injunction for injury by monopoly, but plaintiff may recover double damages.

St. 1907, p. 984, as amended by St. 1909, p. 594, gives no right to injunctive relief to a private person in the violation of the provisions of the act, but such person is merely given the right to recover double damages.

Appeal from Superior Court, City and County of San Francisco; H. M. Owens, Judge.

Suit by the Overland Publishing Company, a corporation, against the Union Lithograph Company, a corporation, and others. From a judgment of the superior court denying an injunction and damages, plaintiff appeals. Affirmed.

Hoefler, Cook & Snyder, of San Francisco, for appellant.

Harry G. McKannay, of San Francisco, for respondents Union Lithograph Co. and others.

Heidelberg & Murasky, of San Francisco, for respondent unions.

LANGDON, P. J. This is an appeal by the plaintiff from a judgment against it entered after general demurrers to the complaint had been sustained. The complaint asks for injunctive relief and for damages; its allegations are lengthy and complex. In substance, they are as follows:

Plaintiff is a corporation doing business under the laws of California. Certain named defendants and some 200 others, whose names are unknown to plaintiff, composed an organization known as the "Printers' Board of Trade." Said association is formed for the purpose, among others (as set forth in its by-laws) "to investigate and check injurious trade practices, and encourage the opposite" in the business of printing and publishing, which is the business carried on by the several members of the association. Certain of the named defendants, together with about 1,300 others whose names are unknown to plaintiff, composed an association known as "S. F. Typographical Union No. 21." Certain named defendants and 500 other persons whose names are unknown to plaintiff compose an association of persons engaged in the business of printing pressmen and assistants known as the "S. F. Printing Pressmen & Assistants Union No. 24." Certain named defendants, with numerous other persons whose names are unknown to plaintiff, compose an association of persons engaged in the printing trades in the city and county of San Francisco under the name of "Franklin Printing Trades Association." The executive officers of each of these associations are also joined as defendants.

The complaint continues with allegations, in effect, as follows: That on or about March 1, 1920, plaintiff was engaged in the city and county of San Francisco in carrying on and doing business as a printer and publisher in said city and county, and had invested in its business capital in excess of \$25,000, and had built up an established trade and employed on the average more than 25 persons in said business; that in the month of March, 1920, the said association known as "Printers' Board of Trade of San Francisco" caused an agent or representative of said association to approach the managing officers of plaintiff and to demand that plaintiff become a member of said board of trade; that plaintiff, for its own good reasons, declined to join said board of trade. On January 17, 1921, plaintiff received from said board of trade a written communication, signed by the secretary thereof, inviting plaintiff to become a member of said board of trade, and reciting that the monthly dues of members would amount to \$2, plus \$1 for each employee in plaintiff's composing room and press room. Plaintiff again advised the said board of trade that it did not desire to become a member thereof.

It is alleged that on November 23, 1920, a

written agreement was entered into by and between the defendant association, "Franklin Printing Trades Association," and the association known as the "Printers' Board of Trade" (in said agreement referred to as the "Employers' Association") and the association known as the "S. F. Typographical Union No. 21." Said agreement is referred to as the "Typographical Agreement" and it is alleged that it provides, in paragraph fifth thereof, as follows:

"In order that the union may secure the adoption and carrying out by all commercial printing concerns within its jurisdiction of the scale of wages and working conditions herein specified, and have the responsibility of the employers for their observance and performance, the union requests and the employers hereby agree that the employers will admit to membership in their association all reputable printing concerns; and in consideration hereof, and of the assumption of the responsibility by the employers for any and all violations of said scale of wages and working conditions by every member of the employers, the union agrees that its members will work only for such printing concerns as are members of the employers, provided that the employers shall not arbitrarily, or for any but good cause, refuse admission to or deny retention of membership in the Employers' Association."

The complaint sets forth that during the years 1919 and 1920, the representatives of the printers' board of trade sought to induce plaintiff to join said board of trade and threatened to enforce the provisions of said Typographical Agreement above set forth and compel the members of said unions who were working for plaintiff to leave such employment. Plaintiff was also visited by representatives of the unions involved, who stated that if plaintiff did not join the association known as Printers' Board of Trade of San Francisco, the said two union associations would be compelled and would, in pursuance of paragraph 5 of said Typographical Agreement, order the withdrawal from the employ of plaintiff of all members of said two union associations. Plaintiff refused to join the printers' board of trade and the union employees left plaintiff's employ.

It is alleged that if plaintiff persists in its refusal to become a member of the printers' board of trade, the persons alleged to have quitted its employ will "refuse to resume work and refuse to longer continue in the employ of plaintiff"; "that without the co-operation of the aforesaid quitting members of said S. F. Typographical Union No. 21, it will be impossible, within a period of three or four days, for plaintiff to continue its printing and publishing operations." It is then alleged that plaintiff has on hand important large contracts for printing and is under written contract to publish certain magazines and periodicals and that time is of the essence of such contracts, and that

by reason of the acts and things charged against the defendants, plaintiff will be prevented from carrying out said contracts, and will become liable in damages thereon.

There are also allegations to the effect that the unions involved here are members of the American Federation of Labor Unions, which controls a magazine with a wide circulation among its members and affords "a ready, convenient, powerful and effective vehicle for the dissemination of information as to persons, products and manufacturers boycotted or to be boycotted"; that "if the defendants * * * continue in the course which they have consummated and threatened of boycotting this plaintiff and advising others to boycott plaintiff, it will result in the very great injury of plaintiff."

[1] We shall pause here in our enumeration of the allegations of the complaint so as to consider the effect of those already set forth. The Typographical Agreement, in so far as it is set forth in the complaint, is one which is perfectly legal and involves no restraint of trade. Provisions substantially the same as those pleaded herein were considered in the case of *People v. Epstein*, 102 Misc. Rep. 476, 170 N. Y. Supp. 68, 70. The agreement in that case was between the Photo-Engravers' Board of Trade of New York and members of a Photo-Engravers' Union. The reasoning of the court in that case is applicable in considering the portion of the Typographical Agreement before this court in the present case. The so-called Cartwright Act (Stats. 1907, p. 984, as amended by Stats. 1909, p. 594), upon which plaintiff relies in bringing this action, contains a provision that labor, whether skilled or unskilled, is not a commodity within the meaning of this act. The portion of the Typographical Agreement pleaded by plaintiff is a contract concerning labor. It is an agreement by the unions to sell their labor only to persons coming within a designated class.

[2] It is the right of every man to engage to work for or to deal with, or to refuse to work for or to deal with any man or class of men as he sees fit, whatever his motive or whatever the resulting injury, without being held in any way accountable therefor. *Parkinson v. Bldg. Trades*, 154 Cal. 581, 599, 98 Pac. 1027, 21 L. R. A. (N. S.) 550, 16 Ann. Cas. 1165; *Pierce v. Stablemen's Union*, 156 Cal. 70, 75, 103 Pac. 324. These rights may be exercised in association with others so long as they have no unlawful object in view. *Parkinson v. Building Trades*, supra, 154 Cal. at page 599, 98 Pac. 1027, 21 L. R. A. (N. S.) 550, 16 Ann. Cas. 1165. Thus, where building contractors and a group of workmen made an agreement which restricted the opportunities of a contractor not a party thereto, it was said that—

Though the business of the third party was interfered with, the courts could give no re-

lief, since "the law could only make it possible for the complainant to do business in the way it chooses by compelling the defendants to do business in the way they did not choose."

* * * When equal rights clash, the law cannot interfere." *National Fireproofing Co. v. Masons Bldrs. Ass'n*, 169 Fed. 259, 94 C. C. A. 535, 26 L. R. A. (N. S.) 148.

In the case of *Pierce v. Stablemen's Union*, 156 Cal. 75, 103 Pac. 327, it was said:

"We think that to-day no court would question the right of an organized union of employees, by concerted action, to cease their employment (no contractual obligation standing in the way), and this action constitutes a 'strike.' We think, moreover, that no court questions the right of those men to cease dealing by concerted action, either socially or by way of business, with their former employer, and this latter act, in its essence, constitutes the primary boycott."

"The direct object or purpose of a combination furnishes the primary test of its legality. It is not every injury inflicted upon third persons in its operation that renders a combination unlawful. It is not enough to establish illegality in an agreement between certain persons to show that it works harm to others. An agreement entered into for the primary purpose of promoting the interests of the parties is not rendered illegal by the fact that it may, incidentally, injure third persons. * * * A laborer, as well as a builder, trader, or manufacturer, has the right to conduct his affairs in any lawful manner, even though he may thereby injure others. So several laborers and builders may combine for mutual advantage, and, so long as the motive is not malicious, the object not unlawful, nor oppressive, and the means neither deceitful nor fraudulent, the result is not a conspiracy, although it may necessarily work injury to other persons. The damage to such persons may be serious—it may even extend to their ruin—but if it is inflicted by a combination in the legitimate pursuit of its own affairs, it is damnum absque injuria." *National Fireproofing Co. v. Mason Builders' Ass'n*, 169 Fed. 259, 265, 94 C. C. A. 535, 541 (26 L. R. A. [N. S.] 148).

"An association of individuals may determine that its members shall not work for specified employers of labor. The question ever is as to its purpose in reaching such determination. If the determination is reached in good faith for the purpose of bettering the condition of its members and not through malice or otherwise to injure an employer the fact that such action may result in incidental injury to the employer does not constitute a justification for issuing an injunction against enforcing such action." *Bossert v. Dhuy*, 221 N. Y. 342, 359, 117 N. E. 582, 585 (Ann. Cas. 1918D, 661).

In this state, the doctrine has been announced even more broadly. In the case of *Parkinson Co. v. Bldg. Trades Council*, 154 Cal. at p. 599, 98 Pac. 1034, 21 L. R. A. (N. S.) 550, 16 Ann. Cas. 1165, it is said:

"In case of a peaceable and ordinary strike, without breach of contract, and conducted without violence, threats, or intimidation, this court would not inquire into the motives of the strik-

ers—their acts being entirely lawful, their motives would be held immaterial.”

[3] In the light of the foregoing cases, we think it clear that in so far as the allegations of the complaint so far enumerated are concerned, they state no ground for either injunctive relief or for the recovery of damages.

But the complaint continues, in another section thereof, with allegations concerning the practices of the printers' board of trade. There are no allegations establishing a causal connection between the plaintiff's grievance, i. e., the withdrawal of the union printers and these averments regarding the methods of the printers' board of trade. The latter are made upon information and belief, and are substantially as follows: That said board now is and for more than three years last past has been engaged in “a combined scheme and effort to violate the laws of the state of California and of the United States of America in such case made and provided, by causing the prices of articles and services made and furnished by various members of the said Printers' Board of Trade of San Francisco, to be fixed grossly in excess of an amount that would yield to the persons making the charge and collecting said prices, a fair and reasonable profit”; that in pursuance of said scheme and effort various members composing the said printers' board of trade meet daily in the office of the said printers' board of trade in the city and county of San Francisco, and said board of trade requires that all of the new contracts and proposals for business involving an amount in excess of \$15, then under submission to members of said Printers' Board of Trade of San Francisco, be reported and submitted at such meetings, and that, thereupon, by lot or agreement tentative prices are fixed upon said new contracts and it is likewise determined which member of the printers' board of trade shall perform the services or furnish the materials contemplated by such proposals or contracts; that thereupon all of the members other than the member so decided upon refrain from bidding for the doing of said work or the furnishing of said material except in an amount above the amount so fixed. It is alleged that by reason of these facts a person seeking to have work done or materials furnished is compelled to pay the price fixed as aforesaid by said members of said printers' board of trade; that said price so fixed is arrived at through corrupt, unjust, and illegal methods as aforesaid, practiced by said Printers' Board of Trade of San Francisco, and the person desiring the work or materials believes that the price so fixed is obtained as a result of competitive bidding; that as the result of said unjust and illegal practices aforesaid, competition *between the members* of said Printers' Board of Trade of San Francisco (which Board em-

braces practically 95 per cent. of the concerns engaged in the printing trade in the city and county of San Francisco) is destroyed and rendered impossible and that said acts constitute an unjust, discriminating and unlawful restraint upon trade and commerce, both intrastate and interstate.

Appellant contends that these allegations, if proven, constitute the Printers' Board of Trade a trust within the meaning of the so-called Cartwright Act. Act 4166, General Laws of California (1915) Deering; Stats. 1907, p. 984, as amended by Stats. 1909, p. 594. Conceding, for the purposes of this opinion that this be true, the said association would, in consequence, be subject to forfeiture of its charter rights, franchises, and privileges, and to dissolution upon proceedings taken by the Attorney General or the district attorney. Section 2, Stats. 1907, p. 984. But this is not such a proceeding. This is an action by a private corporation, and, as such, is governed by the provisions of section 11 of said act. In that section it is provided that an action may be brought by “any person who shall be *injured in his business or property* by any other person or corporation * * * by reason of anything forbidden” in said act.

In the present case the plaintiff makes no allegations of any such injury or damage. The general allegation of its complaint:

“That by means of each and all of said acts done and threatened by the defendants aforesaid, respectively, as hereinbefore set forth, the trade and commerce of the plaintiff with its patrons and customers * * * has been and will continue to be forcibly suspended, and unless the relief hereinafter prayed shall be granted * * * plaintiff will lose valuable copyrights because of its inability to continue its usual operations; and that plaintiff by reason of the premises has suffered, and will suffer in an increasing degree, damages * * * in excess of \$75,000”

—is insufficient. There is no allegation of the particulars in which the plaintiff has been or will be damaged by the restraint of competition among the members of the printers' board of trade. The only damage to plaintiff which is alleged, i. e., the loss of contracts, copyrights, etc., arises from the alleged inability of plaintiff to continue its operations, due to the fact that it cannot secure union labor. This matter we have disposed of in the first part of this opinion. We consider it *damnum absque injuria*. There is no allegation of loss to plaintiff arising because of the alleged practices of the printers' board of trade in restricting competition *among its own members*. On the contrary, it is perfectly apparent that plaintiff's business could not be injured by such practice, but must be benefited thereby. If, as plaintiff alleges, 95 per cent. of the persons engaged in the printing business voluntarily form an association and restrain themselves

from competing with one another, plaintiff, being free from such restraint, has the fewer competitors with whom to contend. Indeed, plaintiff does not complain of loss or damage because of the want of competition among the members of the printers' board of trade, of which plaintiff is not a member. If plaintiff could secure union labor and continue to operate its business, the activities of the printers' board of trade in restricting competition among its own members would not injure plaintiff in the least. It is alleged that these practices have continued for three years. Apparently they have not injured plaintiff, but have probably meant to it a business opportunity. It is the withdrawal of the union labor and the consequent inability of plaintiff to operate its business in competition with the members of the printers' board of trade which is its real complaint.

[4] Plaintiff cannot maintain an action against the Printers' Board of Trade because of these alleged practices without pleading and proving special damages to his business or property by reason thereof. There are no facts alleged in the complaint showing damage to plaintiff because of said defendant's methods of doing business.

In the case of *Munter v. Eastman Kodak Co.*, 28 Cal. App. 664, 153 Pac. 739, it is said:

"While, in a criminal prosecution against persons for maintaining a trust or combination in restraint of commerce or trade, the gist of the offense is in the formation and maintenance of such trust or combination, and the fact of the existence of the combination for the purpose of doing some prohibited act is all that need be proved to support and sustain the charge, yet, in a civil action for damages based upon our anti-trust statute, it is incumbent upon the complaining party, not only to allege and prove the existence of an unlawful trust or combination but also to allege and prove that his business or property has been injured by the very fact of the existence and prosecution of such unlawful trust or combination. Or, as was said by this court in *Krigbaum v. Sbarbaro*, 23 Cal. App. 427, 433 [138 Pac. 364]: 'To be "injured in business or property" within the contemplation of said law, as we understand it, is where the injury has directly resulted from the fact of the existence of the trust—that is to say, where the business or property has directly sustained injury solely by reason of the restrictions in trade or commerce which are fostered by such trust or combination. In other words, while one whose business or property has been injured solely because of the restrictions in trade carried out by a trust organized and maintained for that purpose may maintain an action under the provisions of the anti-trust law for double the damages he has actually suffered from the injury so inflicted, yet he could not maintain an action based upon said law if the injury, although directly the result of the wrongful acts of the trust or the constituent members thereof, did not arise by reason of the restrictions in trade or com-

merce carried out by such trust or combination.'"

[5] Furthermore, the statute gives no right to injunctive relief to a private person in a case of violation of the provisions of the act, but such a person is merely given a right to recover double damages. Section 11, Stats. 1907, p. 984, as amended Stats. 1909, p. 594. See, also, *Natl. Fireproofing Co. v. Mason Builders' Ass'n*, 169 Fed. 259, 94 C. C. A. 535, 26 L. R. A. (N. S.) 148.

The demurrers were properly sustained; the judgment is affirmed.

We concur: **NOURSE, J.; STURTEVANT, J.**

57 Cal. App. 352
LOS ANGELES SHIPBUILDING & DRY-DOCK CO. v. INDUSTRIAL ACC. COMMISSION OF CALIFORNIA et al. (Civ. 3835.)

(District Court of Appeal, Second District, Division 2, California. April 15, 1922. Hearing Denied by Supreme Court June 12, 1922.)

1. Admiralty ⚓10—Nature of work done test as to whether contract maritime.

In determining whether a contract be maritime, the test is, not locality, as in the case of torts, but the subject-matter of the contract, the nature of the work to be done.

2. Admiralty ⚓11—Contract to construct vessel nonmaritime.

A contract for the construction of a vessel is nonmaritime and not within admiralty jurisdiction.

3. Admiralty ⚓13—Marine machinist's services on uncompleted vessel lying in navigable waters not of maritime nature.

Where the general employment or activities of a marine machinist on an uncompleted vessel lying in navigable waters at the time of his injury had no direct relation to navigation or commerce, the services were not of a maritime nature.

4. Admiralty ⚓20—State cannot abolish rules of recovery for injury in maritime contract.

Where work is performed under a maritime contract, no state has power to abolish maritime rules concerning the measure of recovery, and substitute therefor indemnity under a workmen's compensation act.

5. Admiralty ⚓20—In nonmaritime contracts obligation to compensate employee for injury attaches.

Where a contract of employment is nonmaritime and the work is not of a maritime character, Workmen's Compensation Act fastens upon the relation of employer and employee the obligation to compensate for injuries received in the course of employment.

6. Master and servant — 346—Compensation Act imposes quasi ex contractu liability.

Liability imposed by the Workmen's Compensation Act may be described as quasi ex contractu; the law attaching, as an incident, to the relation of master and servant an obligation to compensate for injuries received in the course of employment.

Application of the Los Angeles Shipbuilding & Drydock Company against the Industrial Accident Commission of the State of California and another for certiorari to review an order awarding compensation for injuries. Award affirmed.

Louis M. Lissner, of Los Angeles, for petitioner.

A. E. Graupner, of San Francisco (Warren H. Pillsbury, of San Francisco, of counsel), for respondents.

FINLAYSON, P. J. This is a proceeding in certiorari to review an award of the Industrial Accident Commission in favor of one M. Toutain, a marine machinist who was injured while installing machinery in a vessel that was being constructed by Toutain's employer, the petitioner here. The vessel had never been in commission. It was an incomplete structure at the time of the injuries. It had, however, been launched and had been drawn up beside a dock for completion, where it was afloat and riding the navigable waters of Los Angeles Harbor at the time of the accident. Claiming that the commission's award was based upon a maritime tort, petitioner contends that the respective rights and duties of the parties must be determined and controlled by the maritime law, and that therefore the application of the California Workmen's Compensation Act would be an unauthorized invasion of the admiralty jurisdiction of the federal courts.

By article 3, section 2, of the Constitution of the United States the judicial power of the United States extends "to all cases of admiralty and maritime jurisdiction."

The Judicial Code of the United States (40 Stats. at L. 395), by sections 24 and 256 (U. S. Comp. St. §§ 991 [3], 1233), vests exclusive jurisdiction in the federal courts "of all civil causes of admiralty and maritime jurisdiction, saving to suitors in all cases the right of a common-law remedy where the common law is competent to give it, and to claimants the rights and remedies under the Workmen's Compensation Law of any state." The concluding part of this saving clause, that which purports to save to claimants the rights and remedies afforded by a state workmen's compensation act, was added to the federal Judicial Code on October 6, 1917, by an amendment commonly known as the Johnson Amendment. In *Southern Pacific*

Co. v. Jensen, 244 U. S. 205, 37 Sup. Ct. 524, 61 L. Ed. 1086, L. R. A. 1918C, 451, Ann. Cas. 1917E, 900, and in *Clyde Steamship Co. v. Walker*, 244 U. S. 255, 37 Sup. Ct. 545, 61 L. Ed. 1116, it was decided that a state compulsory workmen's compensation act is opposed to the federal Constitution in so far as its terms apply to maritime injuries received in the performance of work of a maritime nature, performed in the course of employment under a maritime contract, and in *Knickerbocker Ice Co. v. Stewart*, 253 U. S. 149, 40 Sup. Ct. 438, 64 L. Ed. 834, 11 A. L. R. 1145, it was decided that, in passing the Johnson Amendment, Congress transcended its constitutional power to legislate concerning rights and liabilities which are within the maritime jurisdiction, and that therefore the clause saving to claimants the rights and remedies under the Workmen's Compensation Law of any state is ineffective and void in so far as its operation might interfere with the characteristic harmony and uniformity of the law maritime in its interstate and international relations.

[1-3] It is earnestly urged by petitioner that the case at bar is within the doctrine of these decisions of the United States Supreme Court. In each of those cases the injury was received in the course of an employment under a maritime contract or while the injured servant was performing work of an essentially maritime character. In the instant case the injured employee was not engaged in the performance of a maritime contract, nor were his services of a maritime nature. In determining whether a contract be maritime the test is, not locality, as in the case of torts, but the subject-matter of the contract, the nature of the work to be done. *Doey v. Clarence P. Howland Co.*, 224 N. Y. 30, 120 N. E. 53. A contract for the construction of a vessel is nonmaritime and not within the admiralty jurisdiction. *Thames Towboat Co. v. Francis McDonald*, 254 U. S. 242, 41 Sup. Ct. 65, 65 L. Ed. 245; *Grant Smith-Porter Ship Co. v. Rhode*, 257 U. S. —, 42 Sup. Ct. 157, 66 L. Ed. —. Although the uncompleted vessel upon which he was hurt was lying in navigable waters, Toutain's services were not of a maritime nature. Neither his general employment nor his activities at the time had any direct relation to navigation or commerce. *Grant Smith-Porter Ship Co. v. Rhode*, supra.

Notwithstanding Toutain's employment was nonmaritime, petitioner, assuming that the injury was the result of a maritime tort, argues that, because courts of admiralty have jurisdiction of claims for damages growing out of torts committed on navigable waters, it would destroy that uniformity which the federal Constitution was designed to accomplish in matters maritime if our state

Workmen's Compensation Law (St. 1913, p. 279, as amended by St. 1917, p. 831) were applied to such an injury. We are unable to agree with this contention. In our opinion this case is controlled by the recent decision of the United States Supreme Court in *Grant, etc., Ship Co. v. Rhode*, supra, a case wherein it was alleged that the employee received his injuries as the result of a maritime tort, it being alleged that he was hurt by reason of his employer's negligence in constructing and maintaining a faulty scaffolding on a vessel afloat on navigable waters. In that case *Rhode*, as libellant, brought a suit on the admiralty side of the United States District Court to recover damages for injuries sustained by him while at work as a carpenter or joiner on a partially completed vessel lying at a dock in the Willamette river in the state of Oregon. The uncompleted vessel was lying in navigable waters at the time of the injuries. Negligence of the employer in the construction and maintenance of the scaffolding was alleged as ground for the recovery of damages. It was held that, though the general admiralty jurisdiction extends to a proceeding to recover damages resulting from a tort committed on a vessel lying on navigable waters within a state, nevertheless the exclusive features of the Oregon Workmen's Compensation Act are applicable to such a case, and that therefore the state statute abrogated the right to recover damages in an admiralty court which otherwise would have existed. In other words, it was held, in effect that where the work is nonmaritime and is done pursuant to a nonmaritime contract, the rights and liabilities of the parties have no direct relation to navigation, and need not be measured by those rules of the sea the uniform operation of which is essential to any general system of maritime law; and that therefore in such cases, and notwithstanding that the work is done on navigable waters, the remedy afforded by a state workmen's compensation act is the exclusive remedy, even though the injury may have been the result of the employer's maritime tort.

Because the Oregon Workmen's Compensation Act (Laws 1913, p. 188) is an elective statute, giving to both employers and workmen the option to except or reject its provisions, whereas our statute is compulsory, petitioner claims that the principle of the *Rhode* Case is not applicable here. With this contention we find ourselves unable to agree. In the first place, we fail to see any ground for the assumption that the award under review here was based upon a tort, maritime or nonmaritime. Nowhere in the record is there the slightest hint that the injury was the result of any negligence or fault. To entitle Toutain to the compensation provided for by our Workmen's Compensation Act it was not necessary that there

should be any wrongful act or omission. That act allows compensation for all injuries arising out of employment irrespective of negligence or fault. The payments provided for by the act are founded simply upon the injury, and are entirely disconnected with any theory of fault on the part of the employer or right on the part of the employee established by law prior to the passage of the act, save in instances of "serious and willful misconduct." The basic principle of the act is that the cost of injuries incidental to modern industry should be treated as a part of the cost of production. That purpose is effected without the creation of a delictual liability. *Doey v. Clarence, etc., Co.*, supra; *Berton v. Dry Dock Co.* (D. C.) 219 Fed. 765. See, also, *Quong Ham Wah Co. v. Ind. Acc. Comm.*, 184 Cal. 35, 192 Pac. 1021, 12 A. L. R. 1190.

[4, 5] But as we understand the doctrine of the *Rhode* Case, it matters not whether the injury be the result of a tort—a delictual omission or commission—or whether it happened without any fault on the part of the employer. Nor is it a matter of moment that the state Compensation Act be either elective or compulsory. Where, as in the *Jensen*, *Walker*, and *Stewart* Cases, the servant is injured while performing work of a maritime nature, or while employed under a maritime contract, the parties must be deemed to have contracted with each other in contemplation of the general system of maritime law and with the knowledge that their respective rights and liabilities would be measured and defined by that law. And since it was the design of the federal Constitution to preserve a proper harmony and uniformity in the maritime law, it follows that where work is performed under a maritime contract no state has power to abolish the well-recognized maritime rules concerning the measure of recovery and substitute therefor the indemnity that is afforded by a workmen's compensation act. But where, as in the case before us, the contract of employment is nonmaritime, and the work is not of a maritime character, the Workmen's Compensation Law fastens upon the relation of employer and employee the obligation to compensate for injuries received in the course of employment. *North Alaska Salmon Co. v. Pillsbury*, 174 Cal. 1, 162 Pac. 93, L. R. A. 1917E, 642; *Quong Ham Wah Co. v. Ind. Acc. Comm.*, supra. The contract being nonmaritime, the parties must be deemed to have entered into it with the knowledge that the law has attached to their relation of master and servant an obligation to pay the statutory compensation for any injury which may be received in the course of the employment. In *Doey v. Clarence, etc., Co.*, supra, the New York Court of Appeals, speaking of the Workmen's Compensation Law of that state, says that an award

under that law is made "upon the theory that the statute giving the commission power to make an award is read into and becomes a part of the contract."

[6] It is true that in no strict sense does the obligation of the employer to compensate the employee for injuries spring from the contract of employment as a contractual obligation. Ours is a compulsory statute, and the proposition that a compulsory statute is a contract has been definitely repudiated in this state. *North Alaska Salmon Co. v. Pillsbury*, supra. The liability imposed by the statute is in a class by itself. For want of a better term it may be described as quasi ex contractu. *Quong Ham Wah Co. v. Ind. Acc. Comm.*, supra. But though the parties do not contract to create the rights and liabilities which are prescribed by the statute, nevertheless, if their contract be nonmaritime, as in the instant case, there is no reason why it may not be deemed to have been entered into with reference to the state statute—with a knowledge that, to the relation of master and servant which is created by the contract, the law attaches, as an incident to that status, an obligation to compensate for injuries received in the course of the employment. This being so, the following excerpt from the *Rhode Case* is applicable here:

"In each of them [the *Jensen*, *Stewart*, and other decisions of the federal Supreme Court] the employment or contract was maritime in nature, and the rights and liabilities of the parties were prescribed by general rules of maritime law essential to its proper harmony and uniformity. Here the parties contracted with reference to the state statute; their rights and liabilities had no direct relation to navigation, and the application of the local law cannot materially affect any rules of the sea whose uniformity is essential."

The award is affirmed.

We concur: WORKS, J.; CRAIG, J.

57 Cal. App. 792

LOS ANGELES SHIPBUILDING & DRY-DOCK CO. v. INDUSTRIAL ACC. COMMISSION OF CALIFORNIA et al. (Civ. 3824.)

(District Court of Appeal, Second District, Division 2, California. April 15, 1922. Hearing Denied by Supreme Court June 12, 1922.)

Application of the Los Angeles Shipbuilding & Drydock Company against the Industrial Accident Commission of the state of California and another for certiorari to review an order awarding compensation for injuries. Award affirmed.

Louis M. Lissner, of Los Angeles, for petitioner.

A. E. Graupner, of San Francisco (Warren H. Pillsbury, of San Francisco, of counsel), for respondents.

FINLAYSON, P. J. This is a proceeding in certiorari to review the award of the Industrial Accident Commission in favor of one J. M. Bush. The facts are similar to those stated in the opinion filed this day in *Los Angeles Shipbuilding & Drydock Company v. Industrial Accident Commission et al.* (Cal. App. No. 3835) 207 Pac. 417. The opinion in that case disposes of the fundamental questions involved here and the award of the commission is therefore affirmed.

We concur: WORKS, J.; CRAIG, J.

57 Cal. App. 379

ROACH BROS. & CO. v. LACTEIN FOOD CO. (Civ. 2426.)

(District Court of Appeal, Third District, California. April 18, 1922. Hearing Denied by Supreme Court June 15, 1922.)

1. Pleading §248(4)—Amendments to complaint by buyer of goods more fully explaining contract held not to change cause of action.

In an action by a buyer of goods against a seller on a contract, where it would have been proper and competent to have proved all the terms of the contract under the general issue as framed by the pleadings originally filed, amendments to the complaint based upon the contract, and containing averments which more elaborately explained the terms of the contract, and specifically referring to matters involved therein, which were not so referred to in the original complaint, did not change the cause of action or introduce new issues.

2. Pleading §250—Damages asked in amended complaint may be larger than those asked in original complaint.

A party suing for damages for any tort may ask for a larger amount of damages in his amended complaint than in the original complaint.

3. Sales §81(5)—Refusal to supply goods contracted for held a breach of contract.

Where a contract for the sale of goods called for the sale of all the seller's surplus goods in such amounts as the buyer might require for the space of a year, the refusal of the seller to supply the buyer with goods in the required quantity on demand, when the seller had such a quantity of goods, was a breach of the contract.

4. Sales §151—Letter held to be a repudiation in toto of contract of sale.

Where a contract called for the sale of all a seller's surplus goods of a certain kind that a buyer should order for one year, a letter from the seller to the buyer, written after the buyer had sent a second order for goods, stating that the seller would not allow the buyer to sell the goods in certain territory according

to their first contract, was a repudiation in toto of the contract, and not merely a refusal to supply the goods called for in the second order.

5. Sales §418(7)—Loss of profits on an article sold, but not delivered, not recoverable where no allegation they could not be bought in open market.

Under Civ. Code, §§ 3300, 3308, as to damages for breach of contract, and section 3354, providing that the value of property to a buyer or owner, deprived of its possession, is the price at which he might have bought an equivalent thing in the market, in buyer's action for seller's refusal to deliver, in which plaintiff did not allege that the goods bought could not be purchased in the open market, he could not recover the amount of profits lost by him through such default.

Appeal from Superior Court, Stanislaus County; L. W. Fulkerth, Judge.

Action by Roach Bros. & Co., a corporation, against the Lactein Food Company. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

Dennett & Zion, of Modesto, and H. A. Stout, of Oakland, for appellant.

E. B. Mering, of San Francisco, and T. B. Scott, of Modesto, for respondent.

HART, J. This is an action for damages for the breach of a certain contract, alleged to have been entered into between the plaintiff and the defendant.

The defendant was, for a long time prior to and at the time of the making of the contract declared upon in the complaint, engaged in the business of manufacturing condensed buttermilk, known as "Lactein," or "Hen and Hog Buttermilk," in the city of Modesto, Stanislaus county. It was alleged in the complaint as originally filed that, on the 30th day of April, 1919, said plaintiff and said defendant entered into an agreement which was to continue one year from said date, and whereby the defendant granted to said plaintiff the exclusive option to purchase all the surplus "Hen and Hog Buttermilk" in certain designated amounts and sizes, and for certain prices. It was alleged in said complaint that said agreement was in writing, and was duly executed and delivered by said parties; that thereafter, pursuant to said agreement, the defendant delivered to the plaintiff one carload of said Lactein, and that plaintiff accepted and paid for the same; that thereafter plaintiff demanded that said defendant deliver said Lactein according to the terms of said agreement, but that defendant refused to deliver said Lactein, and "further refused to be bound by said agreement, and all without just cause or reason." There was no direct allegation in the complaint, in its original draft, stating the number of carloads of said Lactein with which the defendant agreed to supply the

plaintiff, notwithstanding which omission said complaint further alleged that, "Had said defendant delivered said 19 carloads of said Lactein or Hen and Hog Buttermilk, the value of said Lactein or Hen and Hog Buttermilk to the plaintiff herein would have been \$27,360; that, by reason of said refusal of said defendant to carry out said contract, said plaintiff has been damaged in the sum of \$4,408, the excess of said value over said purchase price," for which sum judgment is prayed.

The defendant, answering the complaint, and after certain formal denials, admitted that the contract referred to in the complaint was entered into between the parties on the day therein named, and that under said contract the defendant was to furnish said plaintiff for a period of one year from the date of said agreement Hen and Hog Buttermilk, at the prices set forth in the complaint, on the condition, however, that said defendant had the product on hand to sell to the said plaintiff; admitted delivering one carload of Hen and Hog Buttermilk to the plaintiff, and that the plaintiff accepted and paid for the same; admitted that the plaintiff demanded another carload of Hen and Hog Buttermilk, but denied that plaintiff demanded any Lactein, and admitted that defendant refused to deliver said material, giving as the reason therefor that the plaintiff violated the terms of the contract, and so surrendered its rights under the same, as follows: That among the terms of said agreement the retail price thereof was to be \$15.10 for 52-gallon barrels, but that plaintiff sold said material at prices lower than the prices so agreed upon, and that it did "actually sell one carload of said Hen and Hog Buttermilk at a price so far below the prices set forth in said contract that the defendant could not deliver the same without great loss"; that said agreement provided that said plaintiff was not to sell or deliver said material to any person or firm purchasing Lactein from the said defendant, but "after the delivery of said carload said defendant sold a carload of said Hen and Hog Buttermilk to the agent (of defendant) for the sale of Lactein in the county of Sacramento, state of California," in violation of the terms of said agreement.

Plaintiff later filed an amendment to the complaint, alleging, among other things, that the defendant was organized as a corporation on the 1st day of March, 1918, by M. P. Long, E. H. Zion, and J. R. Gilbert; that the capital stock of said corporation was 2,500 shares, of the par value of \$10 each; that 2,410 shares of said stock were issued, of which 1,007 were issued to J. R. Gilbert; that said Gilbert on the day of the organization of said corporation sold and transferred to certain persons in Modesto 407 shares of said stock at the price of \$10 per share;

that at all times herein mentioned the market value of said stock was \$10 per share; that said Lactein Company, on the 30th day of April, 1919, had on hand a surplus of about 600 barrels of Lactein or Hen and Hog Buttermilk, "and were then accumulating said Lactein at the rate of 250 barrels per month, all of which they were unable to dispose of"; that on said date W. B. Gilbert was the president of the plaintiff, and that "said defendant was anxious to secure the assistance of said plaintiff to dispose of said surplus Lactein, and said plaintiff was desirous of securing a contract with said defendant for the sale of said Lactein."

It was then alleged that the parties on the 30th day of April, 1919, entered into a verbal contract whereby the defendant granted to plaintiff an exclusive option to purchase all the surplus Hen and Hog Buttermilk for the prices and on the terms stated in the complaint as originally drawn. It further alleged in said amendment that plaintiff "has drawn up and annexed hereto, marked 'Exhibit A', the verbal contract as made by the parties, and as intended by the parties. The same is made a part hereof." It was alleged that the prices designated were to be for carload lots of 30,000 pounds minimum capacity, and the purchase price was to be paid in cash within 10 days of date of shipment, less 2 per cent. discount for cash; that defendant further "agreed to secure the entire present output of buttermilk and other milk products of the Newman Creamery, and convert the same into Hen and Hog Buttermilk, and hold the same subject to the above option"; that it was expressly understood and agreed and a part of the consideration of the agreement that "said defendant should purchase and pay for at least 20 carloads of said product during the first year, and that all the covenants and provisions therein contained were mutual, and the promises and agreements of the one party are in consideration of the promises and agreements of the other party herein."

It was further alleged that, at the time of the making of said contract, "L. L. Dennett was the regular counsel of the defendants and was in their employ; that at said time said L. L. Dennett was not the counsel for the plaintiff herein, and was not in its employ; that in the making of said contract W. B. Gilbert acted as representative of the plaintiff; that said L. L. Dennett was not in the employ of W. B. Gilbert, nor was he his counsel: that it was mutually agreed between the parties that said L. L. Dennett should reduce said contract to writing; that thereafter said L. L. Dennett drew up an agreement which was executed by the plaintiff and the defendant; that a copy of said agreement is hereto annexed, marked 'Exhibit B,' and is made a part of the amendment to the complaint." It was further alleged that plaintiff agreed to procure for

said defendant the 600 shares of stock of the Lactein Food Company then held by said J. R. Gilbert, and cause the same to be sold and transferred to said defendant for the sum of \$3,500. It was also alleged that the Hen and Hog Buttermilk to be furnished by the plaintiff to the defendant should be equal in every respect to the product then and thereafter made by said defendant, and sold under the trade name of "Lactein," and also that said product should be sold by said plaintiff under the name of "Hen and Hog Buttermilk," and that the business was to be carried on by plaintiff with buyers under the name of "Dairy Products Company." It was alleged that said contract executed by the parties failed to express the actual agreement of the parties in the following particulars: First, it fails to set forth the surplus milk that plaintiff was to receive; second, it fails to grant unto plaintiff the option to purchase any milk; third, it fails to mention the covenant of the defendant to secure the milk from the Newman Creamery and subject the same to the option of the plaintiff; fourth, it fails to set forth the covenant of the plaintiff to secure for the defendant the stock in the Lactein Food Company.

The allegations in the complaint as originally drafted, to the effect that the defendant, in pursuance of said contract, delivered to plaintiff and plaintiff accepted and paid for one carload of Lactein, and that on or about the 12th day of May, 1919, plaintiff demanded one carload of said Lactein, and that defendant refused to deliver the same, and "then and there gave notice that it would not perform said contract nor be bound by the same," were repeated in the amendment to the complaint. It is alleged that plaintiff "has at all times been ready, willing, and able to accept and pay for said Lactein according to the terms of said contract." It is further alleged (paragraph 10) that, "pursuant to the terms of said verbal contract, this plaintiff did, on or about the 30th day of April, 1919, cause to be transferred to defendant said 600 shares of stock in said defendant company, and said company paid therefor said \$3,500, according to the terms of said verbal contract."

The prayer of the complaint as amended prays for "judgment of the court that said contract be reformed so as to conform to the form attached to this amendment to the complaint, and for such and other further relief as, considering the premises, is meet and proper, and for costs."

A second amendment to the complaint was filed, in which it was alleged, among other things, after formally realleging paragraphs 1, 2, 3, 4, 5, 9, and 10 of the amendment to the complaint:

"Paragraph 3. That the average carload according to said contract and as demanded by the market was made up as follows: 80 52-gal-

lon barrels or not less than 40 52-gallon barrels, 20 25-gallon barrels, 30 10-gallon barrels, and 50 5-gallon barrels; that under the terms of said contract said defendant could have produced for this plaintiff 100 carloads of the above average of Lactein during said first year of said contract and plaintiff could have disposed of the whole thereof; that, according to the terms of said contract, the amount that would have been due and payable to defendant for said 100 carloads of Lactein would have been \$120,800; that the value of said 100 carloads of Lactein to this plaintiff would have been \$144,000.

"Paragraph 4. That by reason of said refusal of said defendant to carry out said contract said plaintiff has been damaged in the sum of \$23,200, the excess of said value over said purchase price."

Judgment is asked for the last stated amount. The defendant demurred to the amendment and second amendment to the complaint and moved to strike out certain averments contained therein, the demurrers being overruled, and the motions denied. Thereupon it answered the allegations of said amendments, embodying in the answers denials and admissions contained in the answers to the complaint as originally filed, and meeting such other new matter as the second amendment to the complaint contained either by way of denial, admission, or special defense.

We have presented above an extended statement of the averments of the several pleadings filed by the plaintiff for two particular reasons, to wit: First, because therein the terms of the contract, for the breach of which the plaintiff brought this action, are quite fully stated, thereby making it unnecessary to reproduce the contract itself herein; and, second, because it is claimed, as we shall later see, that the effect of the amendments to the complaint was to state a new and different cause of action, based upon an entirely different contract from that pleaded in the complaint as originally filed.

The court, among other things, found that paragraph 5 of the amendment to the complaint does not express the terms of the agreement, but that the terms of the agreement as actually made by the parties are set forth in the contract designated as "Exhibit B," and made a part of the amendment to the complaint; that, if the defendant had delivered 19 carloads, as provided by the terms of said contract, there would have been due and unpaid the defendant the sum of \$18,401.50; that the value of said 19 carloads of Lactein to the plaintiff would have been \$22,201.50; that by the refusal of defendant to deliver said 19 carloads of Lactein plaintiff has been damaged in the sum of \$3,800; that the allegations of paragraph 7 of the amendment to the complaint, to the effect that the contract executed by the parties fails to express their actual agreement in the particulars

above indicated, are untrue; that paragraph 8, alleging certain prices which the plaintiff agreed to pay per barrel for said Lactein, the cost of Lactein to the defendant, the net profit to the defendant by the sale of the Lactein to the plaintiff under the contract, and that "the surplus of the Modesto plant was 250 barrels per month, and the production in addition to this surplus after the contract with the Newman Creamery Company was made, would give an additional surplus of 600 barrels per month," is untrue; that paragraph 10 of the answer to the complaint, as originally filed alleging that the refusal of defendant to deliver said material to said plaintiff was due to certain breaches of the contract by the plaintiff, is untrue. As to the second amendment to the complaint, the court finds that the allegation of paragraph 2, to the effect that, "by the judgment of this court in the amendment to the complaint in this action, said court has reformed said contract, and declared the contract set forth herein to be the reformed contract of the said parties," is untrue; that paragraphs 3 and 4 are true. As conclusions of law the court declared that the written contract annexed to the complaint, and marked "Exhibit B," "is the true contract executed by the parties; that by said contract the plaintiff was bound to receive 20 carloads of Hen and Hog Buttermilk, and also the defendant was bound to furnish the same; that defendant furnished one car and refused to furnish more, and that, by reason of said refusal, plaintiff has been damaged in the sum of \$3,800."

Judgment was entered accordingly, and from said judgment the defendant prosecutes this appeal, supporting the same by a record prepared according to the alternative method.

The defendant urges six specific and different points, any one of which, it is claimed, will, if found tenable, require a reversal of the judgment.

Our conclusion is that the judgment must be reversed, for the reason that the court, as a basis for the relief awarded the plaintiff for the alleged breach of the contract, adopted an erroneous measure of damages. We are, though, of the opinion that the other points, in so far as they may be regarded as affecting or impairing the validity of the judgment, are devoid of substantial merit; yet, in view of a new trial, we think that two of these should be briefly noticed herein, viz.: First, that a new and different cause of action from that stated in the complaint as originally filed is set up in the amendments to the complaint; second, that there was no breach of the agreement for the reason that, as is the claim, there was no time specified at which the material should be furnished to plaintiff, and that, therefore, it was within the discretion of the defendant to furnish the material at any time during the year that the contract was to exist.

[1] 1. The cause of action stated in the original complaint was based upon a breach of a contract whereby the defendant agreed to sell to the plaintiff and the plaintiff agreed to purchase from the defendant a certain amount of Hen and Hog Buttermilk during the year commencing with the 30th day of April, 1919, at certain specified prices. The amendments to the complaint were based upon said contract, although the averments thereof more elaborately explain the terms of the convention. This, however, did not have the effect of changing the cause of action or of introducing issues into the case which were not there by virtue of the complaint as originally filed. It is true that the amendments to the complaint specifically referred to matters involved in the contract which were not so referred to in the original complaint. But it would have been perfectly proper and competent or within the issues to have proved all the terms of the contract, under the general issue as framed by the pleadings as originally filed, and this would, of course, have included the additional averments set forth in the amendment to the complaint as to the terms of the contract. The amendments to the complaint, as we have seen, set out in substance the terms of the contract as found by the court and admitted by the defendant to have been the contract which was entered into between it and the plaintiff.

[2] It is, however, true that the averments of the second amended complaint call and the prayer prays for a larger amount of damages than was asked for in the latter pleading. We do not know of any rule of law or any reason against the right of a party suing for damages for any tort to amend his complaint so as to authorize a judgment for a larger amount of damages for such tort than that which was asked for in the complaint as originally filed, if the evidence warranted it. Moreover, it is obvious that the defendant was not prejudiced by a demand for a larger amount of damages than that asked for in the complaint as originally filed, even if the allowance of said amendment so far as it concerned the amount of damages might be said to involve error, since the amount of damages awarded by the court was far below the sum prayed for in the amendments and even below the amount asked in the original complaint. *Stohman v. Martin*, 28 Cal. App. 338, 347, 152 Pac. 319.

[3, 4] 2. There is nothing in the point that there was no breach of the contract, because, as appellant contends, it had an entire year within which to perform, or at the very least a reasonable time to perform after demand. The contract is for the sale and purchase of a commercial commodity, and a fair and reasonable construction thereof is that the defendant was to furnish the Lactein to

the plaintiff whenever the latter should demand it, provided, of course, that the defendant had on hand such a supply of the article as the plaintiff might require or call for. In other words, we do not think that the defendant was at liberty under the contract to refuse to supply the plaintiff with Lactein in the required quantity at any reasonable time at which the former might demand it. In this connection it is further contended that, if the defendant was in default at all, it was merely for its refusal to supply the plaintiff on its second demand or order for Lactein. The record does not support this contention. To the contrary, it appears from the evidence that the defendant, through its general manager and president, addressed a letter, under date of July 7, 1919, to the plaintiff or its agent, Mr. Gilbert, stating, among other things:

"It will be impossible for us to allow you to sell H. and H. (Hen and Hog Buttermilk) in this territory, as per our first contract; we wish to state that we will make a contract with you turning over the state of Arizona to you and allowing you a commission on any H. and H. sold in this territory, although we intend, if possible, to discontinue the sale of H. and H. entirely."

This letter, it will be observed, was after the plaintiff had made its second demand upon the defendant for Lactein. The trial court construed it to be a repudiation in toto of the contract, and so found, and we think the letter sufficiently supports the court's finding in that particular.

[5] We now return to the proposition that the court erred, to the prejudice of the defendant, in adopting as the measure of damages in this case the profits which the plaintiff would probably have derived from the material mentioned in the contract had the same been supplied to it by the defendant according to the terms of the agreement. Sec. 3300, Civ. Code. Said section provides:

"For the breach of an obligation arising from contract, the measure of damages, except where otherwise expressly provided by this Code, is the amount which will compensate the party aggrieved for all the detriment proximately caused thereby, or which, in the ordinary course of things, would be likely to result therefrom."

We are persuaded that the measure of damages in this case, as the record stands before us, is that prescribed by sections 3308 and 3354 of the Civil Code. The first-named section reads:

"The detriment caused by the breach of a seller's agreement to deliver personal property, the price of which has not been fully paid in advance, is deemed to be the excess, if any, of the value of the property to the buyer, over the amount which would have been due to the seller under the contract, if it had been fulfilled."

Section 3354 provides:

"In estimating damages, except as provided by sections 3355 and 3356, the value of property, to a buyer or owner thereof, deprived of its possession, is deemed to be the price at which he might have bought an equivalent thing in the market nearest to the place where the property ought to have been put into his possession, and at such time after the breach of duty upon which his right to damages is founded as would suffice, with reasonable diligence, for him to make such a purchase."

The terms of the contract which the court found that the parties actually entered into are substantially set forth in the amendment to the complaint, the averments of which are in substance reproduced hereinabove. The specific provisions of the contract are that the party of the first part "is the manufacturer of a condensed buttermilk known as Lactein or Hen and Hog Buttermilk * * * and desires to sell said product and said party of the second part desires to purchase said product under the terms and conditions hereinafter specified; that it is agreed by and between the parties hereto, in consideration of the conditions and covenants and of the payment of \$1 each to the other, receipt whereof is hereby acknowledged, that the said party of the first part will sell to the said party of the second part," the article mentioned at the prices specified; that "the purchase price is to be paid in cash within ten days from date of shipment, less 2 per cent. discount for cash." Thus it will be seen that the contract is plainly one for the sale and purchase of the article therein referred to. There is nothing in the contract to indicate that the matter of profits to be derived by the plaintiff from the sale of the article entered into the agreement as a consideration or as an element thereof.

These are cases of contracts for the sale and purchase of certain commodities in which the measure of damages adopted by the court in this case would be applicable. These are where the circumstances are such that the vendee cannot go into the open market and supply himself with the same article, in which case the loss of profits would be a just element in the admeasurement of damages. *McKay v. Riley*, 65 Cal. 623, 4 Pac. 667; *National, etc., Mfg. Co. v. Producers' R. Co.*, 169 Cal. 740, 745, 147 Pac. 963, and cases therein cited. The case of *Parkinson v. Langdon*, 36 Cal. App. 80, 171 Pac. 710, like the cases just cited, is one in which profits entered into the contract as a part of the consideration therefor. There is no allegation in any of the pleadings filed by the plaintiff that the latter, after the breach, was unable to purchase Hen and Hog Buttermilk in the open market; nor, so far as we are advised by the record, is there any evidence therein tending to show that Hen and Hog

Buttermilk, such as was manufactured by the defendant, could not be purchased in the open market. The only testimony upon the question of damages was that given by W. B. Gilbert, who testified as to the amount of profits lost by the plaintiff by reason of the failure of the defendant to supply the former with the article according to the terms of the agreement. This is the only testimony to which counsel for the plaintiff refers in support of his contention that the amount of damages found by the court as having been suffered by the plaintiff for the breach of the contract is sufficiently buttressed, evidentially, and from this we have the right to conclude that there is no other testimony in the case upon the question of damages. The finding of the court upon the question of damages is in accord with this testimony, and is based thereon. This testimony was, under the circumstances of this case as disclosed by the record, clearly incompetent, from which proposition it necessarily follows that there is in the record no basis for a proper or legal admeasurement of damages in this case.

The judgment is reversed, and the cause remanded.

We concur: FINCH, P. J.; BURNETT, J.

57 Cal. App. 546

CHING WING v. SOUTHERN PAC. CO. et al.
(Civ. 3885.)

(District Court of Appeal, Second District, Division 1, California. May 2, 1922. Hearing Denied by Supreme Court June 29, 1922.)

1. Railroads — 350(7)—Question of primary negligence in not keeping lookout for pedestrian held for jury.

In an action for death of pedestrian struck by a train while lying on track at a crossing after having been stunned by an automobile, in which it was claimed that the employees of the railroad were negligent in not keeping a proper lookout, evidence held to warrant submission of the question of primary negligence, as against the contention that the only issue in the case was the question of the liability of the railroad under the last clear chance doctrine.

2. Railroads — 346(5) — Burden of proving contributory negligence on defendant.

In action for death of pedestrian struck by train while lying on track at a crossing after having been stunned by an automobile, the burden of proving contributory negligence was on the defendants.

3. Negligence — 83—"Last clear chance" doctrine stated.

The "last clear chance" doctrine necessarily presupposes a condition where the injured party has, by his own negligence, placed himself in a position of danger, and where the party causing his injuries, in addition to whatever primary act of negligence may be chargeable against him, after perceiving the dangerous situation of the injured party, acts with further negligence and injury results.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Last Clear Chance.]

4. Railroads — 338 — Last clear chance doctrine held inapplicable.

In an action for death of a pedestrian struck by train at a crossing after an automobile threw him to the track, held, that last clear chance doctrine was inapplicable.

Appeal from Superior Court, Los Angeles County; L. H. Valentine, Judge.

Action by Ching Wing, as the administrator of the estate of Wong On King, against the Southern Pacific Company, a corporation, and others. Judgment for plaintiff, and defendants appeal. Affirmed.

W. I. Gilbert, of Los Angeles, for appellants.

Harry M. Irwin and Waldo M. York, both of Los Angeles, for respondent.

JAMES, J. Plaintiff, having alleged in his complaint that defendants, by acts of negligence, caused the death of his intestate Wong On King, was awarded damages in the sum of \$7,500 by a jury. Judgment fol-

lowed accordingly, and defendants have appealed.

On June 30, 1916, Wong On King was crossing Alameda street in the city of Los Angeles when an automobile collided with him, causing him to fall across the track of the defendant Southern Pacific Company. He was apparently stunned by the fall and, while lying on the track, his legs were crushed by the wheels of a locomotive tender. This injury caused his death. The locomotive of which the tender was a part was owned by defendant company. Defendant Jordan was the engineer in charge of the locomotive and was being assisted at the time by the defendant Thorne as fireman. It is the contention of the appellants that the court erred in the giving of a certain instruction, and in modifying another which was offered on the part of the defendant. As to the errors complained of affecting the instructions as given and modified, appellants insist that under the evidence the case should have been submitted to the jury upon one theory only; that theory being that a situation was presented which might make applicable the doctrine of "last clear chance." It does not appear to be contended that, assuming that the evidence disclosed a case which might authorize a recovery because of the primary negligence of the defendants, the instructions as given were erroneous. The court refused to instruct the jury that the rule of recovery could be under the "last clear chance" doctrine only, but gave an appropriate instruction setting forth that, if the jury found that the deceased, while traveling across the street, was exercising reasonable care and prudence, and that while so doing the locomotive of defendant company was, through the negligence of the operators thereof, propelled upon him, causing his death, plaintiff should recover. In other instructions given the "last chance" rule was correctly and adequately explained and it was left for the jury to determine whether the facts warranted its application in the case.

[1] A brief statement of the evidence, given a light most favorable to the plaintiff, will show that there was no error in the giving of the instruction first referred to. At about 1:30 o'clock of the day in question Wong On King was at the southeast corner of Marchessault and Alameda streets. He was proceeding to cross to the opposite side of the street. Marchessault street enters Alameda street from the east. Upon Alameda street are laid double tracks of the defendant corporation. A freight train of the defendant had proceeded northward along the easterly track and had cleared the street intersection when Wong On King started to cross Alameda street. Emerging from Marchessault street an automobile proceeded to

cross Alameda street at the right of and near to Wong On King. As the latter reached the easterly track of the railway, the automobile made a sudden turn to the left and collided with Wong On King, knocking him to the street, where he lay with his legs across the easterly rail and his body between the two rails of the track. The automobile proceeded to the left and south for some yards or rods on Alameda street, where it came to a stop. The locomotive was following the freight train on the easterly or north-bound track. This locomotive was backing northward, the tender being in front. It was traveling at approximately six miles per hour, and, according to the engineer's testimony, maintained a distance of 360 to 400 feet from the rear of the receding freight train. Alameda street was straight for at least a number of blocks south from the point of the accident. At the time of the happening of the latter there was considerable traffic of vehicles along its paved surface. It did not appear in evidence that any of this traffic came between the engine and the fallen Chinaman from the moment that the automobile threw the man to the street up to the time that the wheels of the tender ran over his limbs. An eyewitness stated that when Wong On King started to cross the street the witness saw the engine approaching from the south at a point at about Jeannette street, which was shown to be 345 feet away from Marchessault. As the engine approached the fallen man, several persons attempted to attract the attention of the operatives on the locomotive, and finally the call of a truckman did reach the ear of the fireman, who in turn signaled the engineer and the engine was brought to a standstill—not, however, until some of the wheels of the tender had passed over the limbs of the Chinaman. The body of the tender of the locomotive was 14 feet high, 8 feet wide, and 37 feet and 7 inches long. The sides of the engine cab were not so wide as the tender, but the engineer and fireman, by projecting their heads in the customary manner through the windows of the cab, could bring their eyes a few inches outside the lines of the tender—as the fireman stated, "maybe one or two inches." They could not see over the top of the tender. At the time in question the fireman and engineer were in their accustomed places, the fireman being on the right side of the cab as the engine proceeded backward, and the engineer on the left. The fireman stated that, looking up the track in the direction they were going, he could see the east rail therefrom a point about 25 feet ahead of the tender; that he could not see the west rail nearer than a point between 150 and 200 feet away. The engineer testified similarly,

but stated that from his side he had a clear view of the westerly track except for a distance of about 35 feet immediately ahead of the tender, but that he could not see any part of the easterly track nearer than a point 150 feet away. Both of the operatives were charged by instructions from their employer to keep a sharp lookout ahead, and it does not appear that attention to any other necessary duties prevented them from so doing at the time in question. The fireman stated that he observed the automobile in question cross the tracks when it was 120 feet away from the tender of the locomotive. He did not explain why in such circumstances he failed to observe the prostrate Chinaman lying upon the easterly rail after the automobile crossed. By the testimony of some of the plaintiff's witnesses, the jury might well have inferred that the locomotive was farther than 120 feet away from the corner of Marchessault and Alameda streets when the automobile struck Wong On King.

[2-4] It is not disputed by appellants as a correct rule of law that, if the Chinaman was in no wise negligent in crossing the street at that time and place, the negligence of any third person, having no privity with him in the act, could not be used to establish the defense of contributory negligence. The burden was upon the defendants to show that Wong On King was guilty of some act of contributory negligence. The evidence failed to disclose any such negligence. The evidence did show a case where the jury was altogether justified in concluding that the operatives on the locomotive did not use reasonable care in observing the track ahead of them. Where the rule of "last clear chance" applies, it necessarily presupposes a condition where the party injured has, by his own negligence, placed himself in a situation of danger, and where the party causing his injuries, in addition to whatever primary act of negligence may be chargeable against him, and after perceiving the dangerous situation of the first party, acts with further negligence and injury results. The evidence does not seem to disclose a case where the doctrine of last chance was applicable at all; either the operatives of the locomotive were negligent and responsible, or the accident was the inevitable result of circumstances for which no such responsibility would exist. The giving of the instruction complained of, therefore, did not constitute error. For like reasons the trial judge did not err in modifying as he did the instruction offered by the appellants.

The judgment is affirmed.

We concur: CONREY, P. J.; SHAW, J.

57 Cal. App. 432

Ex parte PAPPAS. (Cr. 616.)(District Court of Appeal, Third District,
California. April 24, 1922.)**1. Indictment and information ☞ 117—Charge construed to be of conducting business at unlicensed place.**

Complaint for violation of Yolo county ordinance No. 72, held to charge, not conducting place of business for selling liquor without procuring the necessary license, but conducting it at a place other than one of the ten which under the ordinance could be licensed.

2. Intoxicating liquors ☞ 13, 132—Consistent state legislation not repealed by Eighteenth Amendment and Volstead Act.

The Eighteenth Amendment and the Volstead Act, while superseding the license features of state and county enactments, do not repeal the features thereof not inconsistent with them.

3. Intoxicating liquors ☞ 13, 132—County ordinances held not wholly regulatory as regards effect thereon of Eighteenth Amendment and Volstead Act.

Yolo county ordinance No. 72 held not to be wholly regulatory, and so necessarily wiped out in toto by the Eighteenth Amendment and the Volstead Act, but to be in part prohibitory; it making all but certain parts of the county dry at all times and the remaining parts dry except on the concurrence of three things.

4. Intoxicating liquors ☞ 13—No assumption that county ordinance would not have been enacted could the Eighteenth Amendment, making inoperative license features, have been foreseen.

It cannot be assumed that Yolo county ordinance No. 72, making dry most of the county and the remainder dry except on the concurrence of three things, would not have been enacted could it have been foreseen that its license provisions would be rendered inoperative by the Eighteenth Amendment; so the entire ordinance cannot be held void on that ground.

Original habeas corpus proceeding by Teddy Pappas for a writ to be directed to the sheriff of Yolo County. Writ discharged, and petitioner remanded.

A. C. Huston and Harry L. Huston, both of Woodland, and S. W. Cross, of Sacramento, for petitioner.

C. C. McDonald, Dist. Atty., of Woodland, for respondent.

PREWETT, Justice pro tem. [1] Teddy Pappas was convicted in a justice's court of the crime of violating ordinance No. 72 of the county of Yolo. He will be referred to in this opinion as the petitioner.

The operative portions of the complaint against him read as follows:

"Did then and there willfully and unlawfully keep, conduct and establish a place where alcoholic liquors were sold, served and distributed and were kept for the purpose of sale and distribution, *and the place not being then and there a licensed place of business* as provided in ordinance No. 72 of said county of Yolo. * * *" (The italics are ours.)

The chief point urged in behalf of petitioner is that he is charged with conducting a place of business where alcoholic liquors are sold without first procuring the necessary license. Much of the argument and many of the authorities on the part of petitioner are directed to this point; but it is sufficient to say that he is not charged in the complaint with conducting the place of business in question without procuring the necessary license so to do. He is charged merely with conducting it in a place *other than* a licensed place.

To appreciate fully the import of the charge as laid in the complaint it is necessary to examine in detail the provisions of the ordinance with the violation of which petitioner stands charged. Chief of these is section 3, which reads as follows:

"Sec. 3. From and after the first day of October 1911, it shall be unlawful for any person, corporation, firm, company, association or club, within the limits of the county of Yolo, to keep, conduct or establish, as principal, agent, employee or otherwise any place where alcoholic liquors are sold, served or distributed or are kept for the purpose of sale or distribution, except at the ten licensed places mentioned and described in section one hereof. * * *"

Section 1, thus referred to, describes the ten excepted places. For convenience, we have divided into paragraphs the provision thus excepting them. It reads as follows:

"* * * (1) Except at a fixed place of business described in this ordinance,

"(2) And in the license authorizing the same,

"(3) Duly issued to the person conducting the said business."

We employ the usual terms "wet" and "dry."

The ordinance further provides that all places in the county other than the said ten excepted places are "dry" territory, and makes it a misdemeanor to sell alcoholic liquors or to conduct a place for its sale within them. Section 2a provides that a license may issue to carry on business at the ten excepted places. And a place remains "dry" until such license is issued. Otherwise stated, a place remains prohibition territory until a license is actually issued to the person who conducts a business thereat. In addition, of course, the place must be one of the ten described in the ordi-

nance. All three of the conditions set out as paragraphs 1, 2, and 3 must concur in order to render it "wet" territory. And even then it is "wet" only in a limited degree. It is "wet" only as to the person who conducts a place of business thereat, and who has a license which authorizes the business, and this license must be issued to him.

It is thus seen that the pleader merely negatives the fact that the place stated in the complaint is one of the ten excepted places. There is no intimation in the complaint that the petitioner is charged with the offense of carrying on the business without first procuring the necessary license. The language criticized describes the territory, rather than the act of the offender.

[2] The petitioner insists that he could not lawfully be charged with the offense of failure to procure the license required by the ordinance, since it is conceded that the license provisions are all superseded by the Eighteenth Amendment and the Volstead Act, and he cites many authorities to sustain this point. But since he is not charged with such failure, it would be unprofitable to examine these authorities at length. It is further conceded that this national legislation does not operate a repeal of county and state enactments that are not inconsistent therewith. If authorities were needed in support of this concession, reference may be had to *In re Volpi* (Cal. App.) 199 Pac. 1090, and *People v. Capelli* (Cal. App.) 203 Pac. 837. Our conclusion that the petitioner is not charged with conducting a business without first procuring the necessary license nor with failure to procure a license eliminates many questions pressed upon our attention by his counsel.

[3] The petitioner makes the further point that the ordinance in question is regulatory rather than prohibitory, and it is argued therefrom that all regulatory provisions are necessarily wiped out by the Eighteenth Amendment and the Volstead Act.

We are assured that this court, in the case of *Golden v. Justice's Court*, 23 Cal. App. 802, 140 Pac. 60, while considering this identical ordinance, held it to be regulatory. It is quite true that the court in that case uses this expression: "The purpose of said ordinance is the regulation of the business of selling intoxicating liquors," etc.

But the court had no occasion to distinguish between regulatory and prohibitory provisions, and the remark of the court was not addressed to such distinction. The court, in that case, in no manner negatives the fact that all the county, save the ten excepted places, is "dry" territory. It is express authority to the contrary.

It would constitute a gross misreading of the opinion to hold that the court meant that all portions of the ordinance are regulatory. Counsel in their briefs assure us

that only about 1 per cent. of the county is "wet" territory within the purview of the ordinance, although all save 2 or 3 of the 40 or 50 paragraphs in the ordinance deal with the regulation of the liquor traffic therein.

[4] We are asked to declare the entire ordinance void for another reason. We are asked to assume that the board would not have enacted the ordinance if it could have foreseen that all the license provisions would be rendered inoperative by the Eighteenth Amendment. But this view does not appear to be sound. A law or ordinance may be composed of such interrelated parts that an unforeseen failure of one part may justify the assumption that, in its mutilated form, it would not have been enacted. But we find no such case here. The board of supervisors divided the county into two parts—about 99 per cent. "dry" and the remaining 1 per cent. provisionally "wet." The two divisions are distinct, and they are in no wise interdependent. Prohibition is neither greater nor less in the "dry" territory by reason of the provision for license in the ten excepted places. Conversely, the right to licenses in the license territory is in no way dependent upon the fact that other portions of the county are "dry." So far as appears from the ordinance itself, the board prohibited the sale of liquors in certain parts of the county, because, with reference to those parts, it so desired. If it really desired that such sales should be prohibited in these parts, we can indulge no inference that such desire was in any way dependent upon the further desire that licenses might be issued in ten designated places. And the failure of its intent with references to these ten places in no way argues that its intent with reference to the larger portion of the county has failed.

It is necessary to recall, in this connection, that the entire county was "dry" the moment the ordinance was adopted, and that it so remained until the three excepted conditions ripened into realities. The ordinance appears to have been very carefully drawn so as to exclude any inference that the ordinance itself created any part of the county into "wet" territory. It was all "dry" at all times until the concurrence of the three specified conditions converted it into "wet" territory. This meant that it was prohibition territory, and not merely that it was territory within which it was made unlawful to sell liquors without a license. Indeed, we do not discover any provision in the ordinance which makes it unlawful to commence or carry on business or to sell liquors without a license. It is this that clearly distinguishes this case from the Louisiana case cited by counsel, *State v. Green*, 148 La. 376, 86 South. 919.

In that case the statute expressly prohibited the selling of liquors without a license. It was wholly a regulatory statute, and the court properly held that there could be no inference that the Legislature intended to provide a penalty except for the failure to procure the proper license. In the case at bar we are only incidentally concerned with the effect of the Eighteenth Amendment and the Volstead Act (41 Stat. 305) in the ten excepted places. In support of the claim that the will of the board of supervisors has failed as to these ten excepted places, we are referred to *Sprague v. Thompson*, 118 U. S. 90, 6 Sup. Ct. 988, 30 L. Ed. 115. But that case is not in point. In that case the state had attempted unlawfully to discriminate between coasters and other ships coming into her ports, permitting the former to enter without being subject to pilot's fees. The court held that the purpose of the Legislature had failed, and that the whole act was void. It seems to have held in effect that it could not be ascertained whether the Legislature (in view of the unconstitutionality of its effort) would have provided that all should come in free or that all should pay the proper fees.

Commonwealth v. Nickerson, 236 Mass. 281, 128 N. E. 273, 10 A. L. R. 1568, is practically identical with the case before us. In that case the statute provided for general prohibition, except as local option, through a vote of the municipalities, might authorize a sale under license. In the Yolo ordinance, it is provided that the whole county is "dry" until the board, under section 2c, exercises its option to order the issue of a license. This limitation applies only to the ten described places. The Supreme Court of Massachusetts in commenting on this condition says:

"As a matter of statutory construction, the prohibition is general; the license is exceptional. The latter is dependent upon the efficacy of the valid local vote and the genuine license. This being the purpose and plan of the statute, its prohibitory features are not so dependent upon those respecting license as to be swept away when those as to license are stricken down by the Eighteenth Amendment."

In the light of the foregoing quotation, it may be said that the board of supervisors ordained that the entire county should be "dry" save and except as it, from time to time might at its option grant licenses in certain excepted places.

The ordinance as to the portion of the county involved in this proceeding is held to be valid. The writ is discharged, and the petitioner remanded.

We concur: FINCH, P. J.; HART, J.

57 Cal. App. 438

Ex parte PAPPAS. (Cr. 617.)

(District Court of Appeal, Third District,
California. April 24, 1922.)

1. Indictment and information $\S$ 117—Complaint construed to be not for selling without a license, but for selling in dry territory.

The averment in the complaint for violation of Yolo County Ordinance No. 72, § 1, "the defendant not then and there having a license," held intended to aid the description of the place of sale as "dry" territory, and not as a charge of selling without a license; the complaint clearly averring the sale of liquor at a place other than those designated for licenses.

2. Indictment and information $\S$ 117—Construction of complaint contrary to pleader's evident intent, and rendering the whole meaningless, to be avoided.

Construction of part of a complaint which would not only defeat the evident purpose of the pleader, but render the whole complaint meaningless, is to be avoided.

3. Habeas corpus $\S$ 30(2)—Mere defects in complaint cannot be reached by it.

Mere defects of obscurity or ambiguity in a complaint cannot be reached by habeas corpus, as it cannot serve the purposes of a writ of error.

Original habeas corpus proceeding on behalf of Gust Pappas for a writ to be directed to the Sheriff of Yolo County. Writ discharged, and petitioner remanded.

A. C. Huston and Harry L. Huston, both of Woodland, and S. W. Cross, of Sacramento, for petitioner.

C. C. McDonald, Dist. Atty., of Woodland, for respondent.

PREWETT, Justice pro tem. This proceeding is identical with case No. 616 (Ex parte Teddy Pappas [Cal. App.] 207 Pac. 483) this day decided, save that in this the complaint charges a violation of section 1 of the ordinance in question, while Teddy Pappas was charged with a violation of section 3 thereof. Gust Pappas did not in person initiate this proceeding, but it is found convenient to refer to him as the petitioner. Every point involved herein, except that relating to the mere form of the charge, has been decided in said case No. 616 adversely to his contention.

Section 1 of the ordinance, under which the charge is laid, reads as follows:

"Sec. 1. From and after the first day of October 1911, it shall be unlawful for any person, firm, corporation, association or club, as principal, agent, employee or otherwise, within the limits of Yolo county, to sell, furnish, distribute, deliver or give away any alcoholic liquors in any quantity, except at a fixed place of business designated in this ordinance and in the license authorizing the same duly issued to the person conducting the said business, in the

manner hereinafter described." (The italics are ours.)

The complaint against the petitioner, the material portions of which we quote, does not contain the subdivisions into paragraphs. These are here designated by numbers for convenience in reference. Said material portions read as follows:

"Did then and there willfully and unlawfully sell, furnish, distribute, deliver and give away alcoholic liquors within the limits of said Yolo county and

"(1) The said place where the defendant sold, furnished, distributed, delivered and gave away said alcoholic liquors then and there not being a fixed place of business designated in ordinance No. 72 of Yolo county; and

"(2) The said place where the said defendant sold, distributed, delivered and gave away said alcoholic liquors not being then and there a licensed place of business for selling, furnishing, distributing, delivering and giving away said alcoholic liquors as provided in said ordinance No. 72 of Yolo county; and

"(3) Said defendant not then and there having a license to sell, furnish, distribute, deliver or give away alcoholic liquors as provided in said ordinance No. 72."

[1] Petitioner insists that he is charged in the third paragraph of the complaint with selling liquors without having theretofore procured a license so to do. It is conceded that he could not, since the passage of the Volstead Act, procure such a license, and he argues therefrom that he is charged with an impossible crime. He would have us read the complaint as though it contained only the following allegation:

"The defendant sold liquors within the limits of Yolo county not then and there having a license so to do."

For the sake of brevity, we will use the popular terms "wet" and "dry." It becomes necessary to examine the several conditions specified in the ordinance which constitute prerequisites to the right to sell liquors in the ten excepted places. The ordinance divides the county into two classes of territory: (1) The ten excepted places within which liquors could under certain circumstances be sold; (2) the entire remaining portion of the county, stated to be more than nine-tenths of the county. This remaining portion was, under the ordinance and yet is, "dry."

But these ten excepted places are not unconditionally "wet"; and this fact explains the necessity for the several allegations designated in the complaint as paragraphs 1, 2, and 3. Under the terms of the ordinance the "dry" territory comprises all the county that is not "wet." The "wet" territory is not always "wet." It is in the one class or the other according as the conditions specified in the complaint as said paragraphs 1, 2, and 3 do or do not exist. A place may be "wet" territory to-day and prohibition territory to-morrow. In order to constitute "wet" terri-

tory the three following conditions must concur: (1) A fixed place of business designated in the ordinance; (2) and also designated in the license authorizing it; (3) and the license must have been issued to the person conducting the business.

A complaint attempting to describe "dry" territory might be sufficient if it pleaded the nonexistence of any one of said three conditions, since all three must concur. A complaint alleging that the place was one for which no license had been issued to the person conducting a business thereat would have described "dry" territory—the allegation describing not the person, but the place. No less does it charge a crime because it sets out the absence of all three of the necessary conditions, all of which must concur to constitute "wet" territory. The complaint does not charge the petitioner with carrying on a business at all; hence the impossibility of charging him with carrying it on without first procuring the necessary license. The ordinance does not provide for a license to sell or give away liquors in general, but only for a license to sell or give them away at one of ten specifically described places. A party could not have procured a license to sell or give away liquors at one of the ten excepted places save and except that he was the person who was carrying on the business thereat.

But the matter may be viewed from another angle. Conceding that a close reading of the allegation "the defendant not then and there having a license" would, if standing alone, warrant the claim of petitioner that he is charged with a failure to procure the proper license, still the entire complaint must be examined, and it must be interpreted in the light of all of its allegations. It is clearly averred that the petitioner sold liquors in Yolo county at a place not designated as one of the ten excepted places. This, of necessity, describes the place as "dry" territory. No more nor less does it describe it as "dry" territory, because it further avers that the place was not a licensed place of business; and no more nor less does it so describe because it further avers that the petitioner did not then and there have a license. It seems to follow, therefore, that the pleader cannot have intended to charge the petitioner with failure to procure a license, since such failure, because it is shown that the place was not a fixed place of business, is not inhibited in the ordinance. Even in the pre-Volstead days, it would not have charged the crime of failure to procure a proper license. It does not do so now.

[2] It is therefore not only possible, but inevitable, that we read the averment "the defendant not then and there having a license" as being intended to aid the description of the place as "dry" territory. The construction contended for by the petitioner would not only defeat the evident object of

the pleader, but would render the whole complaint meaningless. Such constructions are to be avoided. In re Mitchell, 120 Cal. 384, 52 Pac. 799; Golden v. Justice's Court, 23 Cal. App. 778, 140 Pac. 49.

[3] At most, the allegation of which the petitioner complains is a mere obscurity or ambiguity, and it is well settled that the writ of habeas corpus cannot be made to serve the purposes of a writ of error. Mere defects in a complaint cannot thus be reached. Ex parte Williams, 121 Cal. 328, 53 Pac. 706; In re Avdalas, 10 Cal. App. 507, 102 Pac. 674.

The writ is discharged and the petitioner remanded.

We concur: FINCH, P. J.; HART, J.

(57 Cal. App. 492)

BRISCOE v. GUARANTY MORTGAGE CO.
et al. (Civ. 4209.)

(District Court of Appeal, First District, Division I, California. April 28, 1922.)

1. Venue ⇨41—One nonresident defendant cannot change venue without showing non-residence of all defendants.

Under Code Civ. Proc. § 395, a nonresident defendant in a personal action in which there are several defendants cannot have the place of trial changed to the county of his residence without showing that none of the other defendants are residents of the county in which the action was brought.

2. Venue ⇨22(3)—Holder of note is necessary party to suit to cancel it for fraud.

In a suit to rescind a purchase of corporate stock for fraud, and to cancel a note given in payment for the stock, brought against the payee of the note and the subsequent holder, the holder of the note is a necessary party, so that the venue cannot be changed to the county of the corporation's residence without a showing that the holder is a nonresident of the county where the action was brought.

3. Cancellation of instruments ⇨37(6)—Complaint need not allege subsequent holder of note was party to fraud.

In a suit to cancel a negotiable instrument for fraud, brought against the payee and the subsequent holder, the complaint was not defective as respects the subsequent holder in that it did not allege that he was a party to the payee's fraud, in view of Civ. Code, § 3136, as added by St. 1917, p. 1541, as to defective title; and section 3140 providing that, when the title of any person who negotiated the instrument was defective, the burden is on the holder to prove he was an innocent holder.

Appeal from Superior Court, Fresno County; D. M. Cashin, Judge.

Acción by J. J. Briscoe against the Guaranty Mortgage Company and another. From an order denying the motion of the named defendant for a change of venue, that defendant appeals. Affirmed.

Leo J. McEnerney, of San Francisco, for appellant.

George Cosgrave, of Fresno, for respondent.

KNIGHT, Justice pro tem. This is an appeal by defendant Guaranty Mortgage Company, a corporation, from an order denying its motion for a change of place of trial from Fresno county to the city and county of San Francisco. The motion was based upon the grounds that the city and county of San Francisco at the time of the commencement of the action was the residence of the defendant Guaranty Mortgage Company, and that the causes of action sued upon accrued in said city and county of San Francisco.

The action is one to rescind an agreement to purchase corporate stock upon the ground of fraud, and upon the ground that the agreement to purchase said stock was procured in violation of the so-called "Corporate Securities Act" (St. 1917, p. 673) of the state of California, and to cancel two promissory notes, one for the principal sum of \$6,500, and the other for the principal sum of \$3,500, given by plaintiff in payment of the purchase price of said stock. It is alleged in the complaint that the note for the sum of \$3,500 was assigned by said defendant Guaranty Mortgage Company to the defendant B. J. Sheagren, and that the latter was at the time of the commencement of the action the owner and holder thereof. The prayer of the complaint is that the agreement for the purchase of said stock be canceled, that defendant Sheagren be required to deliver up said note for \$3,500, and that the defendant Guaranty Mortgage Company be required to deliver up said note for \$6,500, and that both of said notes be thereupon canceled, and that plaintiff have such other and further relief as to the court may seem meet and agreeable to equity.

[1] The defendant Sheagren did not join in the action for the change of place of trial, and there was no proof offered on the hearing of said motion to show that he was not a resident of Fresno county. Under such circumstances the motion was properly denied. The rule applicable here is stated in Donohoe v. Wooster, 163 Cal. 114, 124 Pac. 730, as follows:

"Where there are several defendants in a personal action, a nonresident defendant, moving alone, is not entitled to have the place of trial changed to the county of his residence in the absence of a showing that none of the other defendants are residents of the county in which the action was brought. (Code Civ. Proc. § 395; Hearne v. De Young, 111 Cal. 371 [43 Pac. 1108]; Quint v. Dimond, 135 Cal. 572 [67 Pac. 1034]; County of Modoc v. Madden, 136 Cal. 134 [68 Pac. 491]; Sullivan v. Lusk, 7 Cal. App. 186 [94 Pac. 91].)"

[2] Appellant endeavors to escape the effect of the rule above stated by claiming

that the defendant Sheagren is not a necessary party to the action, and that the complaint fails to state a cause of action against him, in that it contains no allegation that Sheagren was a party to the alleged fraud or had notice or knowledge thereof.

This contention cannot be sustained. It is alleged in the complaint that Sheagren is the holder of one of said promissory notes which plaintiff by this action seeks to have canceled, which of itself is sufficient ground for making him a party defendant. It would be impossible to obtain a valid judgment for the cancellation of said note without making him a party defendant, and, in order to state a cause of action against him, it was not necessary to allege that he was a party to the fraud or had knowledge thereof.

[3] Section 3136 of the Civil Code, as added by St. 1917, p. 1541, provides that the title of a person who negotiates an instrument is defective when he obtains the instrument under such circumstances as amount to fraud, and section 3140 of the same Code provides that—

"When it is shown that the title of any person who has negotiated the instrument was defective, the burden is on the holder to prove that he or some person under whom he claims acquired the title as holder in due course."

Inasmuch as it is alleged in the complaint that the title of the defendant Guaranty Mortgage Company, who negotiated the instrument, was defective on account of the alleged fraud, the burden therefore rests with the defendant Sheagren, as assignee, to show, and for that purpose to affirmatively allege as a defense, that he is a holder in due course. The case of *Rhode v. Dock-Hop*, 184 Cal. 367, 194 Pac. 11, 129 A. L. R. 437, relied upon by appellant, is not in point here, for the reason that there the action was one to recover unpaid balances due on the subscription for corporate stock, and did not involve a negotiable instrument. The rule declared by section 3140 of the Civil Code applies peculiarly to negotiable instruments.

The order appealed from is affirmed.

We concur: TYLER, P. J.; KERRIGAN, J.

(57 Cal. App. 601)

HOPKINS v. PALO VERDE MUT. WATER CO. (Civ. 3901.)

(District Court of Appeal, Second District, Division 1, California. May 4, 1922.)

Waters and water courses —263—Evidence held to show landowner not entitled to damages for failure of water company to furnish water.

In an action against a water company for damages for failure to furnish water, evidence

held to warrant finding that plaintiff was not denied water, and that failure to receive it was occasioned by her own fault in not properly applying therefor.

Appeal from Superior Court, Riverside County; George H. Cabaniss, Judge.

Action by Volene Tegner Hopkins against the Palo Verde Mutual Water Company. Judgment for defendant, and plaintiff appeals. Affirmed.

D. B. Chapin and Paul Blackwood, both of Los Angeles, for appellant.

I. W. Stewart, of Oxnard, and Arvin B. Shaw, Jr., of Los Angeles, for respondent.

JAMES, J. Plaintiff brought this action to recover damages for the alleged refusal of the defendant to furnish water with which to irrigate certain arid land owned by her. Judgment was in favor of the defendant. Plaintiff has appealed.

Prior to December, 1918, plaintiff became possessed of considerable acreage of land in Riverside county, which was contiguous to the canal of the defendant corporation. The latter was a mutual water company, and plaintiff, desiring to become a member thereof in order to obtain water, arranged for the purchase of 145 shares of defendant's stock. The price of this stock exceeded the sum of \$5,000. Plaintiff, at the time of the purchase, paid no money on account, but gave her notes which were payable with interest and gave a mortgage on her land to secure the payment thereof. She also, under the requirement of the company, deposited the stock with the latter as collateral. By January, 1919, she owed the defendant the sum of \$550.66, that being the amount of three overdue semiannual installments of interest on the water stock account. At that time her land was incumbered with three liens: First, a trust deed securing the payment of \$7,500; second, a mortgage securing the purchase price of the water stock; and, third, a trust deed securing an apparent loan of \$15,000 made in favor of a Riverside bank. At the end of the year 1918 the Riverside bank was pressing the plaintiff for payment of the amount due it. She had defaulted in the matter of the payment of at least one assessment regularly levied for maintenance purposes by the defendant water company prior to that time. This assessment the bank had paid in order to protect its security. Plaintiff anticipated a probable foreclosure by the bank and in December, 1918, removed a pumping plant from the land and placed it on adjoining property. At the time she did this she told persons with whom she had conversations that she wanted to save the pumping plant and not allow the bank to sell it with the land. She admitted at the trial that the reason given for removing the plant was as stated,

but also stated that it was removed because it needed a new foundation. So far as appears, the new foundation was never built, and it did appear in evidence that neither the pump, nor any of its accessories, was ever replaced in its original location. She testified that some time in February a suit was brought on her behalf enjoining the bank from proceeding with foreclosure or sale of the property and that she was advised by her attorney that that suit would secure to her possession of the land for at least another year. Meanwhile there were no crops planted or growing upon the land except 20 acres of alfalfa; none other were grown or planted at any time prior to the commencement of this action or the trial thereof.

On January 21, 1919, the auditor of the defendant sent to the plaintiff a letter calling plaintiff's attention to the fact that interest money was overdue on the water stock account and stating:

"As your account is over six months in arrears, the board of directors have instructed us to shut off the water and make no more deliveries until this interest account is settled. This action will not be taken if payment is received by us on or before the 27th of January."

It was the claim of the plaintiff that because of this action of the company she was deprived of the use of her land; that her alfalfa crop failed for want of water; all to her damage in a sum in excess of \$11,000, for the recovery of which she brought this suit during the latter part of April, 1919. She testified that upon several occasions, prior to the first of April, she called at the office of the defendant and inquired whether she could have water, and was informed that it would not be delivered to her because of the nonpayment of interest. About April 1st she appeared before the board of directors' meeting at the office of the company and made request that water be furnished her. Several of the directors testified that she was told at that time that her crops would not be allowed to suffer. There was testimony that she said at that time that she wanted water for her alfalfa but that she might not want it for two or three weeks; that she went away apparently satisfied. Under established valid regulations of the defendant company, stockholders desiring water were required to file written application therefor, stating the time when they desired the water delivered. The defendant then had the option (under its rules) to furnish the water on the precise day stated or one day in advance thereof, or one day after. The plaintiff had at numerous times prior to the year 1919 received water which was always delivered to her after the filing of the written order, and she was very familiar with the requirement that the request should

be so expressed in writing, and upon blanks provided for that purpose.

The main contention of appellant is that notification given her on January 21, 1919, that water would not be furnished until the overdue interest amounts had been paid, was never revoked, and that there was a continued refusal on the part of the defendant to supply her with water up to the time she brought this action. She contends that the refusal was unjustified and argues that her right to have water furnished her under her stock ownership could not be made conditional upon payment of interest due on account of the purchase price of the stock. The trial court found in effect that the defendant did withdraw the notification of January 21st at the directors' meeting of about April 1st, when the plaintiff appeared at the meeting. The court further found that the land of plaintiff was adapted to the growing of cotton and that at the time of the meeting of the board of directors there remained a period of 75 days before the end of the cotton planting season, which was an adequate period of time within which plaintiff might have prepared her land, irrigated it, and planted the crop. Without deciding the question, it may be assumed that the defendant did not have the right to deprive a stockholder of water because only of default made in the matter of the payment of interest on the purchase price of water stock. Even allowing that assumption, the findings of the trial judge are plainly sustainable upon the evidence. First, there was a great deal of testimony to the point that the plaintiff was clearly informed by the president and others of the directors about April 1, 1919, that she could have whatever water was necessary to meet her needs. She knew well the requirement that she should present a written order for the water, but she made no such order. She chose, rather, shortly after the date last referred to, to bring this action for damages. There was testimony, as has been hereinbefore stated, that she announced at the time she met the directors that her alfalfa did not need the water then. One witness testified that she there said: "My alfalfa is all right yet, but I don't know how long it will be so." This testimony negatives any idea that the loss of or damage to the alfalfa crop, which was the only crop grown up to that time in that year, was due to any failure of the defendant to furnish water from January 21st to the April date. It was shown that the crop to which the land was best adapted for that year was cotton, and plaintiff's testimony as to the rental value of the land was generally based upon its assumed use for the purpose of growing that crop. No preparation had been made to receive water in 1919, although plaintiff testified that she had made "plans" for the ditching of the ground. All the circumstances

indicated very strongly, however, that, because of threatened foreclosure proceedings, plaintiff had not anticipated going to the expense of producing any crop other than the alfalfa already planted, during the year 1919.

This suit bears strongly the color of a speculative attempt to reap damages where none could justly be claimed. It seems unnecessary to review authorities cited in the briefs of either counsel. The main question is one of fact, as to the determination of which the decision of the trial court, made upon substantial evidence, is unassailable.

The judgment is affirmed.

We concur: CONREY, P. J.; SHAW, J.

57 Cal. App. 458

PROWD v. GORE et al. (Civ. 3805.)

(District Court of Appeal, Second District, Division 1, California. April 26, 1922.)

1. Citizens ☞2—"Citizens of the United States" means person born in, or naturalized under laws of, the United States.

A citizen of the United States is a person of any race or color born within the limits of, or who has been naturalized under the laws of, the United States.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Citizen.]

2. Citizens ☞2—"Citizen of the state" means a citizen of the United States domiciled in the state.

By "citizen of the state" is meant a citizen of the United States whose domicile is in such state.

3. Citizens ☞2—"Citizen" not convertible with "resident," but often used synonymously.

The word "citizen," while not convertible with the word "resident," is often used synonymously with it, without any implication of political privileges.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Resident.]

4. Civil rights ☞2, 6—Constitutional law ☞210—"Citizen" entitled to privileges in theaters includes residents not citizens, in view of equal protection clause.

The term "citizen," as employed in Civ. Code, § 51, declaring "all citizens within the state entitled to the full and equal privileges of theaters," and section 52 thereof, making "whoever denies to any citizen privileges enumerated in section 51," etc., liable in damages for not less than \$100, is not restricted to citizens of the United States or of any of the states, but includes unnaturalized residents of foreign birth, white or black, as otherwise these sections would deny equal protection of the laws, guaranteed by Const. U. S. Amend. 14.

5. Civil rights ☞6—Theater proprietor liable for wrongful exclusion by manager of theater.

Whether Civ. Code, § 52, rendering liable in an action for damages any one who excludes a person from a theater because of race or color, is penal or not, a person so excluded by the manager of a theater can recover thereunder against the theater proprietor, who neither ordered nor knew of this or a like exclusion, as, by section 2338, and also by general law, a principal is liable for the wrongful acts committed by his agent in the transaction of the business of the agency.

Appeal from Superior Court, Los Angeles County; Edwin F. Hahn, Judge.

Action by John Emery Prowd against A. L. Gore and others. From a judgment for plaintiff, defendants appeal. Affirmed.

Schweitzer & Hutton, of Los Angeles, for appellants.

E. Burton Ceruti, of Los Angeles, for respondent.

SHAW, J. Action to recover damages. It appears from the findings herein that defendants A. L. and M. Gore were, on March 7, 1921, the owners and proprietors of the Burbank Theater in Los Angeles, of which defendant Wolfe, as their employee, was manager; that on said date plaintiff, who is a member of the negro race and who was at said time a citizen of the United States and a resident of California, over the age of 21 years, purchased a ticket which entitled him to a seat on the lower floor of said theater; that, although upon presentation of his ticket, plaintiff was admitted to the theater, the defendants, their agents, and employees, solely on account of his race and color and for no other reason, refused to give plaintiff a seat on the lower floor of the theater, to which, as the purchaser of said ticket, he was entitled; that by reason of such discrimination on account of his race and color he was humiliated and damaged in the sum of \$100.55. Judgment followed in accordance with these findings, from which defendants have appealed.

The ground relied upon by appellants for a reversal of the judgment is the insufficiency of the evidence to justify the finding that plaintiff was a citizen of the United States and of the state of California, or that defendants Gore, by direction or otherwise, participated in the act of their employees in discriminating against plaintiff.

The action is based upon the provisions of sections 51 and 52 of the Civil Code, the first of which sections provides that "all citizens within the jurisdiction of this state are entitled to the full and equal * * * privileges of * * * theaters * * * subject only to the conditions and limitations established by law, and applicable alike to all citizens"; and the second provides that

"whoever denies to any citizen, except for reasons applicable alike to every race or color, the full * * * advantages, facilities, and privileges enumerated in section fifty-one of this Code, * * * or whoever makes any discrimination, distinction or restriction on account of color or race, or except for good cause, applicable alike to citizens of every color or race whatsoever, in respect to * * * his treatment in, any * * * theater, * * * for each and every such offense is liable in damages in an amount not less than one hundred dollars, which may be recovered in an action at law brought for that purpose." The only evidence touching the question of citizenship was that of plaintiff, to the effect that he was at the time in question a resident of Los Angeles, living at 1382 East Fifteenth street. The contention of appellants is that this evidence fell short of showing that plaintiff was a citizen of the state of California, in the absence of which, they insist, plaintiff could not maintain the action. In support of their contention they cite numerous cases involving diversified citizenship as a condition of the right to invoke the jurisdiction of the federal courts.

[1-4] In our opinion, these cases are not applicable to the question here presented. Neither race nor color is involved in the term "citizen." When used alone and without words of qualification, the term may have different meanings, depending upon the context in which it is found. As said in *Union Hotel Co. v. Hersee*, 79 N. Y. 454, 35 Am. Rep. 536, "the word must * * * be taken in the sense which best harmonizes with the subject-matter in reference to which it is used." When we speak of a citizen of the United States we mean one who is born within the limits of or who has been naturalized by the laws of the United States; and when we speak of a citizen of a state we mean a citizen of the United States whose domicile is in such state. While the word is not convertible with "resident," nevertheless it is often used synonymously with such term without any implication of political privileges. As employed in sections 51 and 52 of the Civil Code, the term "citizen" is not used in a restricted sense—that is, a citizen of a state or citizen of the United States—but in the broad and unrestricted sense, implying that one is a resident of the state and as such entitled to invoke the jurisdiction of its courts to protect a right guaranteed to all, without reference to race or color, who reside within its jurisdiction. To hold otherwise would render the statute obnoxious to the Fourteenth Amendment of the federal Constitution, under which a state may not "deny to any person within its jurisdiction

the equal protection of the laws." In our opinion, it was not the intent of the Legislature to restrict the operation of the statute to those only who were subjects of the United States government, and exclude therefrom unnaturalized residents of foreign birth, whether white or black. The evidence shows that plaintiff was a resident of the state, which fact entitled him to maintain the action. Whether or not he was a citizen of the United States, with all the rights implied by such term, is immaterial.

[5] It appears that neither defendant A. L. nor M. Gore was cognizant of the act of their employees in discriminating against plaintiff by refusing to permit him a seat on the lower floor of the house. Neither had they given any instruction to their employees to exclude or discriminate against patrons of the negro race; and hence appellants insist that the judgment as to defendants Gore should be reversed. This contention is based upon the claim that the statute is penal in character, and that defendants Gore cannot be held liable for a wrong committed by their employees. Conceding the statute to be penal, we are nevertheless of the opinion that defendants are liable for the acts of their manager, defendant Wolfe, in discriminating against plaintiff. Section 2338, Civil Code, declares:

"Unless acquired by or under the authority of law to employ that particular agent, a principal is responsible to third persons for the * * * wrongful acts committed by such agent in and as a part of the transaction of such business."

In *Otis Elevator Co. v. First National Bank*, 163 Cal. 39, 124 Pac. 707, 41 L. R. A. (N. S.) 529, it is said:

"It is the general doctrine of the law, as it is our statutory rule, that a principal is liable to third parties not only for the negligence of its agent in the transaction of the business of the agency, but likewise for the frauds, torts or other wrongful acts committed by such agent in and as part of the transaction of such business."

Moreover, the provision does not purport to be a penal statute. No criminal offense is created thereby, and no provision is made for criminal prosecution nor the recovery by the state of any fine or the imposition of a penalty for a public wrong. It merely fixes a minimum measure of damages for a private tort, to be recovered by an aggrieved party for his own benefit. *Gruetter v. Cumberland Tel. & Tel. Co.* (C. C.) 181 Fed. 248.

The judgment is affirmed.

We concur: CONREY, P. J.; JAMES, J.

57 Cal. App. 793

SMITH v. GORE et al. (Civ. 3806.)

(District Court of Appeal, Second District, Division 1, California. April 26, 1922.)

Appeal from Superior Court, Los Angeles County; Edwin F. Hahn, Judge.

Action by Ira Smith against A. L. Gore and others. From a judgment for plaintiff, defendants appeal. Affirmed.

Schweitzer & Hutton, of Los Angeles, for appellants.

E. Burton Ceruti, of Los Angeles, for respondent.

PER CURIAM. This action is based upon facts identical with those involved in the case of John Emery Prowd, Plaintiff, v. A. L. Gore, M. Gore, and F. L. Wolfe, Defendants, Civil No. 3805, 207 Pac. 490, an opinion in which is by this court filed herewith. Upon the authority of what is there said, the judgment herein is affirmed.

57 Cal. App. 558

PEOPLE v. FOLEY. (Cr. 1008.)

(District Court of Appeal, First District, Division 2, California. May 3, 1922.)

1. Robbery — 24(3)—Evidence held to sustain conviction.

In prosecution for robbery, evidence held to identify defendant as one of the perpetrators of the crime.

2. Criminal law — 822(13)—Instruction held not to mislead jury to believe that more than a reasonable doubt was necessary for acquittal.

In prosecution for robbery, instruction, stating that "all evidence tending to show that the accused was in another place at the time of the offense is in direct conflict with that which tends to prove that he was at the place where the crime was committed and actually committed it," held not to mislead jury to believe that more than a reasonable doubt as to the presence of the defendant at the time and place of the robbery was necessary for his acquittal, in view of other portion of the instruction stating that the defendant was to be given the benefit of every reasonable doubt.

3. Criminal law — 824(13)—Failure to instruct that defendant's failure to testify raised no presumption against him held not error in absence of request therefor.

In prosecution for robbery, failure to instruct jury that defendant's failure to testify raised no presumption against him held not error, in absence of a request therefor, even though the defendant personally conducted a portion of his defense.

Appeal from Superior Court, Alameda County; George Samuels, Judge.

Thomas Foley was convicted of robbery, and he appeals. Affirmed.

Nathan C. Coghlan, of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and John H. Rioridan, Deputy Atty. Gen., for the People.

LANGDON, P. J. This is an appeal by the defendant from a judgment of conviction of the crime of robbery. The offense alleged in the indictment was the robbery of the Bank of Alameda County, located at Alvarado, Cal. Two prior convictions for felonies were also charged against the defendant, to which he pleaded guilty.

The president, cashier, and another employee of the bank testified that on October 13, 1920, at about 11 o'clock in the morning, four men arrived at the bank in an automobile. While one of them remained outside on guard, the other three entered the bank and, after shooting the president through the shoulder, secured about \$23,000 in money and escaped in the automobile after having locked the employees of the bank in a vault.

Appellant calls to our attention the fact that some of the witnesses for the prosecution were not absolutely positive in their identification of the defendant as one of the perpetrators of the crime. It is true that two of the witnesses were reluctant to positively identify the defendant. One of these witnesses, however, stated that the defendant "resembled the man that was there"; that his "features, and all, resembled the man that was there." Another witness, while not positive in his identification, stated that he recognized the defendant by some peculiarity on his cheek bone and hair, and by his hands, which were unusually small. Owing to the fact that the men who robbed the bank donned masks upon entering the building, it was difficult for the witnesses, who had not observed them until they were masked, to be absolutely positive in identifying the defendant because such identification, necessarily, depended upon a recognition of such physical peculiarities as were unhidden by the mask. But the effect of any reluctance upon the part of these witnesses to state beyond all possibility of doubt that the defendant was one of the men who entered the bank upon the occasion in question is entirely overcome by the positive identification of defendant by the witness Matoza. Matoza was a customer of the bank and arrived there while the robbery was going on. He heard the shots fired, and one of the men on guard forced him to enter the bank. He was later locked in the vault with the employees of the bank. He testified positively that he saw the defendant at the bank; that defendant was the first of the three men to enter the bank. He stated that he identified defendant by his face and his eyes, having seen defendant enter the bank before he was masked. The bank cashier also positively identified the defendant.

He saw the defendant go around to the directors' room and meet there the president of the bank. At that time defendant was adjusting his mask. Two shots were fired. This witness also saw the defendant gather up the money. Upon cross-examination this witness swore, positively, that defendant was one of the men who robbed the bank. He stated that he could not be mistaken; that he had a picture in his mind of the entire incident which he would never forget.

[1] Taken as a whole, the record contains abundant evidence in the testimony of the eyewitnesses to the robbery, to identify the defendant as one of its perpetrators. Added to this there is the unequivocal testimony of the witness Kirk. He testified that on the afternoon of October 13, 1920, he was injured while at his work and was obliged to return to his home in Alameda. There he found the defendant in company with Jack Beebe, a man whom Kirk had previously known and who has been convicted of participation in this bank robbery. The witness was sent with a note to the so-called "Howard Street Shack" in San Francisco, to be delivered to "Spanny" Valente. Kirk delivered the note and Valente returned with him to his home in Alameda, where the defendant and Beebe awaited them. Kirk then saw the defendant and his companions sorting and counting a large amount of money, some of it loose and some of it in packages. The defendant remained secluded at the home of this witness for two nights, and during that time the witness heard defendant talking with his companions about the details of the bank robbery.

Indeed, the evidence connecting the defendant with the crime is so convincing and so abundant in the record that it would seem idle to discuss this point at all were it not that the attorney for the appellant urges upon our attention the fact that the defendant at the trial insisted upon conducting, personally, much of his defense, although he had an attorney who was present in court and who attempted to conduct his case for him. In reply to the suggestion that the defendant was handicapped by his lack of legal learning, it is only necessary to observe that the part which defendant took in examining the witnesses was taken upon his own insistence in open court. It is also pertinent to observe that although the defendant was without training in legal procedure, he, nevertheless, showed great acuteness in questioning the witnesses, and it is apparent that his participation in the defense of his case in no way weakened or jeopardized his cause.

[2] Objection is made to a portion of an instruction that—

"All evidence tending to show that the accused was in another place at the time of the offense is in direct conflict with that which tends to prove that he was at the place where

the crime was committed, and actually committed it."

It is argued that this instruction would lead the jury to believe that something more than a reasonable doubt as to the presence of the defendant at the time and place of the robbery was necessary for his acquittal; that the jury might understand that a preponderance of evidence in favor of the defendant was necessary to justify a verdict of "not guilty." It is difficult for us to see how such a construction could be placed upon this language, and especially so in view of the fact that the trial court, in the same instruction, went on to say that in this conflict of evidence the defendant was to be given the benefit of every reasonable doubt.

[3] It is also urged that the trial court erred in not giving the jury an instruction to the effect that the failure of the defendant to testify in his own behalf raised no presumption against him. Defendant would have been entitled to such an instruction had he requested it, but the record does not disclose that he did so. It was said in the case of *People v. Flynn*, 73 Cal. 511, 15 Pac. 102:

"The defendant did not take the stand as a witness in his own behalf, and the court did not instruct the jury in reference to his failure to do so. It is claimed that 'it was the duty of the court to charge the jury that no presumption of guilt followed from his failure to testify in his own behalf, and that they could not consider his failure to testify in arriving at a verdict.' It does not appear from the bill of exceptions that any such instruction was asked. If counsel for defendant desired such an instruction to be given, they should have asked it at the proper time; and as they failed to do that they cannot now be heard to complain. (*People v. Haun*, 44 Cal. 100; *People v. Ah Wee*, 48 Cal. 239; *People v. Marks*, 72 Cal. 46.)"

Appellant contends that he should not be held to this well-settled rule because he, personally, conducted a portion of his defense. This contention is without merit upon the record before us. As we have stated, defendant was provided with counsel. In the course of the trial, he twice insisted upon taking the conduct of the case into his own hands, but demanded, for at least a part of the time, that his counsel remain beside him in the courtroom and advise with him. The court and counsel acceded to defendant's demands and great latitude was allowed him in the conduct of his case. After he had, personally, examined some of the witnesses, he again turned the case over to his counsel, but toward the end of the trial he demanded that he be allowed to "take the lead" himself and stated that he desired his counsel to withdraw. The court then excused counsel from acting any further, stating that this was done upon the request of the defendant. It appears, therefore, that the defendant had the benefit of legal advice during almost the en-

fire course of the trial, and that when he was left without legal assistance, it was because of his own demand and insistence. Under such circumstances, this fact should not militate against the well-settled rule of law above referred to. Most especially is this true in view of the entire record, which leaves no doubt of the justness of this verdict.

There are no other matters requiring discussion.

The judgment is affirmed.

We concur: STURTEVANT, J.; NOURSE, J.

57 Cal. App. 533

Ex parte JARVIS. (Cr. 1058.)

(District Court of Appeal, First District, Division 2, California. May 2, 1922.)

1. Contempt — Findings of fact held sufficient to sustain charge of contempt of court by tampering with jury.

Findings that defendant had filed a complaint against a person charging him with burglary, and that at the trial, after the jury had heard testimony and before the case had been submitted to the jury, during a recess of court, defendant approached two jurors and stated to them that, if he had known the identity of the person charged with burglary, he would not have sworn to the complaint in the case, and that he said to the jurors, "You fellows should acquit that fellow," were sufficient to sustain a charge of contempt of court.

2. Contempt — Affidavit of juror sought to be influenced held sufficient to give court jurisdiction in proceeding for contempt.

In a proceeding for contempt of court in trying to influence jurors, an affidavit of a juror showing that defendant was the complaining witness in a prosecution for burglary pending before the court, and that on the same day he gave his testimony in the case he stated to the affiant and another juror, "You fellows should acquit that fellow," although it contained no express averment that defendant knew that the person addressed was a juror in the case, nor that defendant intended to influence the decision of the juror, was sufficient to confer jurisdiction on the court.

In the matter of Robert Jarvis in habeas corpus. Application for writ of habeas corpus prayed to be directed to the sheriff of Alameda county to secure the release of petitioner. Writ denied.

Gilman & Harnden, of Oakland, for petitioner.

Ezra W. Decoto, Dist. Atty., and T. P. Wittschen and Chas. W. Snook, Deputy Dist. Attys., all of Oakland, for respondents.

LANGDON, P. J. This matter comes before us on a petition for a writ of habeas

corpus. The petition states that the petitioner is unlawfully imprisoned, detained, confined, and restrained of his liberty by Frank Barnett, sheriff of the county of Alameda, state of California, at the county jail in the city of Oakland, county of Alameda, state of California, by virtue of an order of the superior court of the state of California in and for the county of Alameda adjudging petitioner in contempt of court for a violation of an order of said court and in interfering with the processes of said court. Petitioner alleges that the order committing said Robert Jarvis is in excess of the jurisdiction of said superior court; that the said affidavit or complaint upon which the original proceeding is based is insufficient in that said affidavit fails to allege that the said Robert Jarvis had any knowledge that said Katrina Wassman was a jury woman in the case then before said court at said time, and further that said Robert Jarvis had any knowledge of any orders issued to said jurymen in said matter, or intended to violate any orders or proceedings of said court; that said affidavit wholly fails to state that said Robert Jarvis intended or did influence the decision of said jury woman or said jury in any manner whatsoever or at all; further, that the evidence introduced upon the hearing of said contempt proceedings wholly fails to substantiate the charges set forth in said affidavit in whole or in part.

The affidavit in the contempt proceedings was made by Katrina Wassman, who was serving as a juror in a case then pending before the superior court of Alameda county, and, omitting the title and prayer of the affidavit, it is as follows:

"Mrs. Katrina Wassman, being duly sworn, deposes and says:

"That she is a citizen of the United States and of the state of California over the age of 21 years.

"That on the 14th day of February, 1922, Robert Jarvis swore to a complaint against one Peter Martioli in the police court of the city of Oakland charging said Martioli with the commission of felony, to wit, burglary; that on the 24th day of February, 1922, said Peter Martioli was duly and regularly held to answer on said charge of burglary to the above-entitled court by the Honorable Mortimer Smith, judge of said police court; that said action was thereafter immediately transferred to the above-entitled court and assigned to department No. 5 thereof; that ever since said time said action has been and is now pending in said court and said department, and is entitled 'People of the State of California v. Peter Martioli, No. 8196.'

"That on the 30th day of March, 1922, in the above-entitled court a jury was duly impaneled and sworn to try said cause, and that affiant and Marie Dorfel were two of said jurors so impaneled and sworn; that said cause proceeded to trial on said 30th day of March,

1922; and that during said trial on said date said Robert Jarvis was called as a witness for the people and gave testimony in said cause.

"That thereafter on said date, to wit, during the regular noon recess at about 12:10 p. m., and before said cause was submitted to the jury for their verdict, and before said jury was discharged, the said Robert Jarvis approached affiant on the steps of the courthouse in said county of Alameda, state of California, as affiant was leaving said building; that the said Robert Jarvis at said time and place made remarks to affiant, the exact purport and meaning of which affiant cannot state.

"That the said Robert Jarvis thereupon followed said affiant across from the west side of Broadway, Oakland, Cal., to the east side of Broadway, Oakland, Cal., where affiant seated herself in the automobile of a fellow jury woman, to wit, Mrs. Marie Dorffel, said Marie Dorffel having been duly sworn, examined, and accepted as a juror in the said case of the People of the State of California v. Peter Martioli; that while affiant was seated in said automobile as aforesaid Robert Jarvis stood by the side of said automobile and stated to affiant that if he had known the identity of the defendant he would never have sworn to the complaint in this case, and, addressing himself to said affiant and said Marie Dorffel, the said Robert Jarvis said, 'You fellows should acquit that fellow.'

[1] Upon this affidavit this matter came on regularly to be heard before the superior court, and after many witnesses, together with the petitioner, were examined in open court, and after hearing the arguments of counsel, the court made findings of fact and an order of commitment as follows:

"The above-entitled matter coming on regularly to be heard the 11th day of April, A. D. 1922, and being heard on said 11th day of April, A. D. 1922, and upon the 12th and 17th days of April, A. D. 1922, after continuances regularly had upon an order to show cause heretofore and on the 3d day of April, A. D. 1922, made and issued by this court requiring the above-named Robert Jarvis to appear before said court, department No. 5 thereof, on said 11th day of April, A. D. 1922, then and there to show cause why he should not be punished for contempt of court as alleged and set forth in a certain affidavit made and filed in the above-entitled action in said court by one Katrina Wassman on said 3d day of April, A. D. 1922, and said Robert Jarvis being personally present in court, and the above-entitled court having called said matter for hearing and trial, and witnesses having appeared and having been sworn, and having testified in support of said question of contempt alleged in said affidavit of Katrina Wassman and for and on behalf of said Robert Jarvis, and the said evidence and the whole thereof and the law pertaining to said matter having been duly and fully considered by the above-entitled court, and it appearing to the said court and the court now finding as follows, to wit:

"That on the 14th day of February, 1922, Robert Jarvis swore to a complaint against one Peter Martioli in the police court of the city of Oakland charging said Martioli with

the commission of felony, to wit, burglary; that on the 24th day of February, 1922, said Peter Martioli was duly and regularly held to answer on said charge of burglary to the above-entitled court by the Honorable Mortimer Smith, judge of said police court; that said action was thereafter immediately transferred to the above-entitled court and assigned to department No. 5 thereof; that ever since said time said action has been and is now pending in said court and said department, and is entitled 'People of the State of California v. Peter Martioli, No. 8196.'

"That on the 30th day of March, 1922, in the above-entitled court, a jury was duly impaneled and sworn to try said cause, and that Katrina Wassman and Marie Dorffel were two of said jurors so impaneled and sworn; that said cause proceeded to trial on said 30th day of March, 1922.

"That during said trial on said date, and while said Katrina Wassman and said Marie Dorffel were sitting as jurors in said cause, said Robert Jarvis was called as a witness for the people of the state of California, and gave testimony in said cause; that said Robert Jarvis knew that said Katrina Wassman and said Marie Dorffel were jurors in the said cause of the People of the State of California v. Peter Martioli; that upon the completion of his said testimony said Robert Jarvis remained within the courtroom where the trial of the said cause was being conducted.

"That thereafter on said date, to wit, at about 12:10 o'clock p. m., the court took a recess until 2 o'clock p. m.; that immediately previous to taking said recess the jury so impaneled to try said cause was instructed and admonished by the court that it was their duty not to converse among themselves or with any one else on any subject connected with the trial, nor to form or express any opinion thereon until the cause was finally submitted to them, whereupon said jury was excused until the hour of 2 o'clock p. m. of said day; that said Robert Jarvis at the time of said admonition was personally present in the courtroom.

"That thereafter on said date, to wit, during the regular noon recess at about 12:10 p. m., and before said cause was submitted to the jury for their verdict and before said jury was discharged, the said Robert Jarvis was approached by Katrina Wassman, said juror, on the steps of the courthouse in said county of Alameda, state of California, as said Katrina Wassman was leaving said building; that the said Robert Jarvis at said time and place made certain remarks to Katrina Wassman, said juror concerning the trial of said cause of People of the State of California v. Peter Martioli, Defendant.

"That said Robert Jarvis thereupon followed said Katrina Wassman, said juror, across from the west side of Broadway, Oakland, Cal., to the east side of Broadway, Oakland, Cal., where said Katrina Wassman seated herself in the automobile of a fellow jury woman, to wit, Mrs. Marie Dorffel, said Marie Dorffel having been duly sworn, examined, and accepted as a juror in the said case of the People of the State of California v. Peter Martioli; that while said Katrina Wassman, said juror, was seated in said automobile as aforesaid, Robert Jarvis stood by the side of said automobile and stated

to said Katrina Wassman that if he had known the identity of the defendant he would never have sworn to the complaint in said case, and, addressing himself to the said Katrina Wassman, said juror, and said Marie Dorffel, the said Robert Jarvis said, 'If I had known that Martioli was the man, I wouldn't have had him arrested,' and further said, 'You fellows should acquit that fellow':

"Now, therefore, it is ordered, adjudged, and decreed that said Robert Jarvis be, and he is hereby, declared to be guilty of contempt of this court in the following particulars, to wit, in that the said Robert Jarvis, the said witness, then and there on the 30th day of March, 1922, in the manner aforesaid, unlawfully and willfully interfered with the proceedings of this court in the trial of the cause hereinabove named, and disobeyed the order of this court in the manner aforesaid, in that the said Robert Jarvis, said witness, did corruptly attempt to influence said Katrina Wassman, said juror, in respect to her verdict in and decision of said cause and proceeding pending before her by means of oral communications had with her except in the regular course of proceedings by means of persuasion and entreaty as hereinabove set forth; and now, whereas said Robert Jarvis has been duly adjudged guilty of contempt as hereinabove set forth:

"It is therefore ordered, adjudged, and decreed that the said defendant, Robert Jarvis, pay a fine of \$200, and that, if he fail to pay said fine, he be imprisoned in the county jail of the said county of Alameda until the fine be satisfied in the proportion of one day's imprisonment for every \$2 of said fine."

[2] We think that the facts found by the court are amply sufficient to sustain the charge of contempt of court, and the only question in the case is as to the sufficiency of the affidavit to give the court jurisdiction. While it is true there is no express averment in the affidavit that petitioner knew that Mrs. Wassman was a juror in the case before the court, nor an express averment that petitioner intended to influence the decision of said juror, we think upon the face of the affidavit the knowledge of petitioner that Mrs. Wassman was a juror and the intention of petitioner to influence her decision in the matter then pending before the jury sufficiently appear. The affidavit shows that petitioner was the complaining witness in the case pending before the court; that on the same day that he gave his testimony in the case he followed the juror Wassman from the courthouse across Broadway street where she was seated in an automobile and stated to said juror: "You fellows should acquit that fellow." As was said in *Ex parte Creeley*, 8 Cal. App. 713, 719, 97 Pac. 766, 768:

"It was not necessary for the affidavit on which the proceedings were based to state any more than the facts, and they appear to be fully stated. The fact that the petitioner called out to the jury in a distinct tone of voice, 'Don't convict my friend Ruef,' appears to be

all the fact that could be stated. No one but petitioner could look into his mind and tell the intent, object, and purpose of the remark. The remark itself from its very language tends to establish that petitioner knew Ruef was on trial; that the jury to whom the remark was made had charge of the case, and the power to either convict or acquit. Petitioner saw the jury and the deputy sheriffs in charge of them—four in number—and knew that Ruef was being tried. He must be presumed to have intended the ordinary consequences of his own deliberate act."

So in the instant matter the language set forth in the affidavit, "You fellows should acquit that fellow," can convey no other meaning than that the person to whom it was addressed was a juror in the case, and the language clearly shows an intention to influence the decision of the juror. The cases cited by petitioner do not overrule *Ex parte Creeley*, supra, and, under the authority of that case, the affidavit was sufficient to confer jurisdiction upon the court, and the findings of the court show a clear case of contempt.

The writ is discharged, and the prisoner remanded to the custody of the sheriff of Alameda county.

We concur: STURTEVANT, J.; NOURSE, J.

57 Cal. App. 551

Ex parte COLE. (Cr. 872.)

(District Court of Appeal, Second District, Division 2, California. May 2, 1922.)

Criminal law — 1208(5), 1218—Police court of Los Angeles held to have jurisdiction of vagrancy prosecution and sentence to city jail.

Los Angeles being a city of the first and one-half class, St. 1913, pp. 469, 476, §§ 2 and 15, and not Pen. Code, § 647, apply to a prosecution for vagrancy, and the police court of such city did not exceed its jurisdiction in sentencing one, convicted of vagrancy, to imprisonment for 180 days, to be confined in the city jail and not in the county jail.

Application by George D. Cole for a writ of habeas corpus prayed to be directed to the Chief of Police of the City of Los Angeles to secure his release after conviction of vagrancy. Writ discharged, and petitioner remanded.

C. Franklin Baxter, of Los Angeles, for petitioner.

Erwin W. Widney, City Prosecutor, and J. Friedlander, Deputy City Prosecutor, both of Los Angeles, for the People.

CRAIG, J. The petitioner was prosecuted in the police court of the city of Los Angeles. He was charged with vagrancy under section

647 of the Penal Code of California, subdivision 5 thereof, and was convicted and sentenced to be confined in the city jail of Los Angeles for a period of 180 days. We are asked to hold that the police court exceeded its jurisdiction in pronouncing this sentence and particularly in that the petitioner was sentenced to the city jail, whereas it is contended that the law directs such imprisonment to be in the county jail. As authority for this claim it is said that article 10 of the charter of Los Angeles established a police court, and that section 647, Penal Code, is controlling as to the penalty for the offense of which petitioner was convicted. The provision of the charter above mentioned was held to be void by the Supreme Court in *Fleming v. Hance*, 153 Cal. 162, 94 Pac. 620. The same case also decided that although the present charter of the city of Los Angeles provides for the establishment of a police court, the city has not taken advantage of its authority in that regard, and that therefore the scope of legislative control remains as provided in section 1 of article 6 of the Constitution, in which the Legislature is given power to create police or other inferior courts in any incorporated city or town.

Sections 2 and 15 of chapter 267 of the Statutes of 1913 apply here, and not section 647 of the Penal Code. These sections expressly authorize the judgment pronounced against the petitioner. Los Angeles is a city of the first and one-half class and the provisions last mentioned confer jurisdiction on the police court of a city of that class over misdemeanors, punishable by fine or imprisonment or both, committed in the city where such police court is held and provide further that upon conviction of such an offense the person "shall upon the order of the judge before whom such conviction is had, be imprisoned in the city jail," etc.

The writ is discharged, and the petitioner remanded.

We concur: FINLAYSON, P. J.;
WORKS, J.

57 Cal. App. 529

FASSIO v. E. L. GOLDSTEIN CO.
(Civ. 4122.)

(District Court of Appeal, First District, Division 2, California. May 1, 1922. Hearing Denied by Supreme Court June 29, 1922.)

1. Work and labor — 10—Owner who retained building on discovery that contractor had obtained contract by fraud liable for reasonable value not exceeding contract price.

Owner, who retained building after construction thereof, on discovery that the contractor had obtained the contract by fraud, was liable merely for the reasonable value not exceeding contract price.

2. Contracts — 94(1)—Construction contract held void for fraud.

Construction contract, let after the architect who had called for bids had induced other contractors to submit bids greatly in excess of the cost, and in excess of the bid made by the contractor when contract was awarded, and after owner had been misled as to the amount of steel required in the construction of the building, held void for fraud.

3. Witnesses — 268(13) — Cross-examination as to issue not raised by pleadings held reversible error.

In contractor's action against owner for balance of contract price in which it was proved that the contract was void for fraud, and in which the issue of the reasonable value was not raised by the pleadings, cross-examination of contractor's superintendent as to contractor's profit on the building held ground for reversal.

Appeal from Superior Court, City and County of San Francisco; E. P. Shortall, Judge.

Action by Vincenzo Fassio, doing business under the firm name of the Mission Concrete Company, against the E. L. Goldstein Company, a corporation. Judgment for plaintiff, and defendant appeals. Reversed, with directions.

Sloss, Ackerman & Bradley, of San Francisco, for appellant.

G. R. Perkins, of San Francisco, for respondent.

STURTEVANT, J. [1] The plaintiff sued and relied on an express contract; the defendant pleaded an equitable defense sounding in fraud and mistake. If the defense was sustained by the evidence, then, under the pleadings as they were framed, there could be no recovery because, if there was actually fraud or mistake in drawing the contract the whole contract was vitiated. Conceding that the defendant received and now retains the building, its liability, if any, would rest upon the basis of the reasonable value thereof not exceeding the contract price. However, the pleadings did not put in issue the reasonable value of the building.

[2] We turn then to a consideration of the undisputed facts proved by the defendant in support of its equitable defense. The defendant had employed Mr. Stewart as its architect. What the relations were which existed between Mr. Stewart and the plaintiff does not fully appear, but that such relations were somewhat intimate will appear as we proceed. Having prepared plans and specifications for the defendant, Mr. Stewart called for bids for the general construction work. He also called for bids to do the steel work. Bids for the general construction work were called for from five or six different contractors, including the plain-

tiff. The plaintiff put in its bid for \$30,500. Acting upon the request of Mr. Stewart, R. J. H. Forbes put in a bid. Before doing so he applied to the plaintiff to give him a figure which he should submit. In the same way L. J. Diebel put in a bid for \$33,620. Barrett & Hilp, acting upon their own initiative, put in a bid for \$37,487. Before any of those bids were received, Gunn, Carle & Co. put in a bid of \$10,989 on the steel, estimating the amount of steel at 104 tons; whereas, the steel necessary for the building amounted to 104,000 pounds or 52 tons. That, in putting in said bid, Gunn, Carle & Co. was acting as the agent of the plaintiff appears from undisputed facts. In the first place, the bid of Gunn, Carle & Co. was, at first, accepted. But, notwithstanding that fact, Mr. Stewart obtained authority from the defendant to do so and awarded the steel contract to this plaintiff. Well knowing these facts, such act, on the part of Mr. Stewart, was approved in advance by Gunn, Carle & Co. That company, without objection, so abandoned its rights to a contract in which it had a profit of over 100 per cent. In the second place, although the bid of Gunn, Carle & Co. was made in the month of June, 1919, and the alleged mistake was soon after discovered by that company, nevertheless as late as December 15, 1919, that company wrote the defendant that the amount of steel incorporated in the defendant's building was "in round numbers, 100 tons of reinforcing bars. This 100 tons includes about 30,000 square feet of fire mesh and several sizes of wire used in wrapping columns, etc." After Gunn, Carle & Co. had written and submitted its bid, Mr. Stewart requested Mr. Carle to ask the Pacific Coast Steel Company to file a bid. That company was engaged in the manufacture of steel, but it was not engaged in steel construction. Thereupon Mr. Carle furnished that company a figure and it bid \$12,480, which figure was 125 per cent. above the market price. Before the plaintiff bid on the general construction work, Mr. Stewart (without the knowledge of the defendant) opened the bids on steel and informed the plaintiff that Gunn, Carle & Co. had put in the lowest bid. When the plaintiff put in its bid, it also knew that the purported mistake had been made in the bid on the steel and that the plaintiff could get the steel for \$5,400. Furthermore, Mr. Stewart did, at about the same time, promise the plaintiff

that it could have the steel contract if it got the construction contract. None of the conniving above set forth was known to the defendant until it had made all of the payments excepting the payment which is sued for in this action. Under the facts as stated, it manifestly appears that all that Mr. Carle did was done as the agent of the plaintiff; that all that the Pacific Coast Steel Company did and all that Mr. Forbes did was done as the aids and assistants of Mr. Carle; and that at least part of the acts of Mr. Stewart were done in the interest of the plaintiff instead of in the interest of the defendant. Under these circumstances, the contract sued upon was saturated with the fraud imposed by the plaintiff on the defendant and no verdict based on the contract should have been returned.

[3] When the case stood in this form the plaintiff asked of Mr. Smith, who had formerly been the superintendent for the plaintiff:

"Do you know what the profit was on the Goldstein job? Mr. Ackerman: I object as incompetent, irrelevant, and immaterial, and in no way binding upon the defendant in this case. The Court: What is that? Mr. Perkins: I asked what the profit to the Mission Concrete Company was on this job, assuming that was to be \$41,489 the contract price. The Court: I think that is proper cross-examination. A. We made in the neighborhood of about fifty-one or fifty-two hundred dollars on that job, as near as Mr. Fassio and I could check it up from our bills payable."

The result of the ruling of the trial court was that the jury were allowed to believe that, if the plaintiff in the foregoing conniving made only a reasonable profit, then and in that event the defendant should pay accordingly. However, as the issue of reasonable value was never tendered by the pleadings the case stands thus: The plaintiff was allowed to submit its testimony regarding reasonable value and the defendant was never given an opportunity to produce witnesses on the same subject.

For the foregoing reasons we think that the judgment should be reversed, that the parties should be allowed to amend their pleadings, and that a new trial should be had on the amended pleadings. It is so ordered.

We concur: LANGDON, P. J.; NOURSE, J.

57 Cal. App. 473

PEOPLE v. HURST. (Cr. 856.)

(District Court of Appeal, Second District, Division 1, California. April 27, 1922.)

1. Criminal law — 878(1)—Conviction both of arson and burning of insured property with intent to defraud insurer proper.

Under Pen. Code, § 954, providing that an information may charge two or more different offenses connected together in their commission, a conviction for arson and the burning of insured property and contents with intent to defraud insurer was proper.

2. Arson — 37(1)—Evidence held sufficient to sustain conviction.

Evidence considered, and held sufficient to sustain conviction for arson and burning of insured property and contents with intent to defraud insurer.

3. Criminal law — 656(2)—Direction by court to answer questions evaded by accused on cross-examination not error.

Where accused as a witness repeatedly evaded questions asked by district attorney on cross-examination, it was not error for the court to direct him to answer the questions.

4. Criminal law — 419, 420(5)—Exclusion of hearsay evidence not error.

Where a witness whose testimony accused desired was ill, and he sought by another witness to prove statements made by her, it was not error to exclude such proposed testimony as hearsay.

5. Witnesses — 277(6)—Proper to question accused as to purported written confession not introduced in evidence.

Where a written confession, purported to have been made by accused, was ruled out on the ground that it was not signed, it was proper for the district attorney to question accused as to statements therein purported to have been made by him.

6. Criminal law — 448(1), 1170(1)—Evidence that business of accused, charged with arson, was profitable properly excluded as a conclusion, and any error therein was harmless.

Where, in a prosecution for arson and burning of insured property and its contents, with intent to defraud insurer, accused sought to prove that the business of accused was operating on a paying basis for the purpose of showing absence of motive, held, that the evidence was properly excluded as the conclusion of the witness, and in any event the exclusion thereof was harmless.

Appeal from Superior Court, Los Angeles County; Frank R. Willis, Judge.

Leo W. Hurst was convicted of arson in the first degree and the burning of insured property with intent to defraud the insurer, and he appeals. Affirmed.

Mart Coles and Cooper, Collings & Shreve, all of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Arthur Keetch, Deputy Atty. Gen., for the People.

SHAW, J. By the first count of an information filed by the district attorney, defendant was charged with the crime of arson. By the second count thereof he was charged with the offense defined in section 548, Penal Code, to wit, the burning of insured property, alleged to be a dwelling house and contents, consisting of furniture therein, with intent to defraud the insurer.

No objection by motion or demurrer was interposed to the information by defendant, who, upon trial, was convicted of arson in the first degree, followed by a judgment thereon of imprisonment for the term prescribed by law, which, as specified in section 455, Penal Code, is not less than two years. He was likewise convicted as charged in the second count, and adjudged to suffer imprisonment for the term prescribed by law, which, as specified in section 548, Penal Code, is not less than one year; it being provided that such last-mentioned judgment should run concurrently with the judgment pronounced upon defendant's conviction of the crime of arson.

[1] On appeal from these judgments defendant, without objection urged in the court below, insists, for some reason not appearing in his brief, that it was error to convict him upon both charges. In the absence of any reason assigned therefor, we are unable to perceive any ground upon which the objection could be based. Section 954, Penal Code, provides that—

"The * * * information may charge two or more different offenses connected together in their commission, * * * or two or more different offenses of the same class of crimes or offenses, under separate counts."

The offenses are different, and connected together in their commission; one being for arson, and the other for burning insured property, its contents, with intent to defraud. By the one act, since the property was insured, and the burning accompanied with the intent to defraud, two crimes were committed.

[2] That the evidence was clearly sufficient to show defendant's guilt admits of no doubt whatsoever. He occupied the house as a tenant of another, and at the time of the fire he held a policy of insurance upon the furniture in the sum of \$2,000 for his own benefit. With an associate, likewise charged with the commission of the crime, and who pleaded guilty to the second count, defendant participated in the burning of the house, the purpose thereof, as clearly appears from the evidence, being to obtain the insurance money, with which he and his associates were to go to Mexico. The fact that, in accordance with their agreement, the fire was ignited by King, who obtained the kerosene therefor, renders defendant none the less guilty.

[3] It is next claimed that the attitude of the court prevented defendant from having a

fair trial. This contention is based upon the fact that, when defendant upon the witness stand repeatedly evaded questions asked him by the district attorney on cross-examination, the court as often directed him to answer the questions. There was no error in the action of the court in this regard; indeed, it could not have done otherwise without loss of dignity and ceasing to function.

[4] Upon the ground that a Mrs. Hammond, whose testimony defendant desired, was ill, defendant sought by another witness to prove statements made by her to the effect that she was with defendant at about the time the fire occurred. Clearly such proposed testimony would have been hearsay.

[5] It appears that the people offered in evidence a written confession purporting to have been made by defendant, which, upon objection, was ruled out upon the ground that it was not signed by defendant. Whereupon defendant was questioned as to whether he had not made certain statements contained in the typewritten document, some of which he admitted having made, and others of which he denied. The confession was not, as claimed by appellant, introduced in evidence, and we perceive no impropriety in the court permitting the district attorney to question defendant with reference to statements made by him as to his participation in the burning of the building.

[6] A witness called by defendant was asked, "Did you have any interest in that business?" to which question the court sustained an objection upon the ground that it was immaterial. Defendant's attorney then stated, "I want to show the absence of motive;" whereupon the court asked defendant's attorney, "What do you propose to prove by this witness?" to which he replied, "I propose to prove that the business was operating on a business basis and that the business was paying;" in answer to which the court stated, "That would be a conclusion of the witness," and sustained an objection thereto. In so ruling we think the court was correct. While defendant was entitled, as he claims, to introduce evidence showing an absence of motive, which, if established, is a fact for the consideration of the jury in weighing the evidence against him, since without motive therefor it is improbable that one will commit a criminal offense, nevertheless no question was asked of the witness tending to bring out any facts from which the jury could determine whether or not the business was profitable, and, clearly, had the witness answered that it was a paying business, it would have been merely a conclusion. However this may be, and conceding the ruling to have been erroneous and that the answer to the question would have been favorable as tending to show want of motive, nevertheless, since an examination of the entire record

leaves no doubt as to defendant's act in burning the building, which was insured for his benefit in the sum of \$2,000, he could not have been prejudiced by the alleged error.

Upon the record presented there can be no possible question as to defendant's guilt, and there were no errors in the rulings of the court prejudicial to his substantial rights.

The judgment is affirmed.

We concur: CONREY, P. J.; JAMES, J.

57 Cal. App. 512

JACKSON v. LEONARDT & PECK.
(Civ. 3799.)

(District Court of Appeal, Second District, Division 1, California. April 29, 1922. Hearing Denied by Supreme Court June 26, 1922.)

1. Municipal corporations ⚡809(2)—**Contractor having permit to operate concrete mixer in street must exercise care.**

A contractor holding a regular permit from the city authorities to use a concrete mixer in the street in connection with the construction of a building was not a trespasser upon the street, but, nevertheless, owed the duty to place the machine so that it would not unnecessarily obstruct travel, or be likely to produce injury to those who, using reasonable care, might travel upon the street.

2. Municipal corporations ⚡819(1)—**Evidence held not to show negligence in leaving concrete mixer in street.**

Evidence that the concrete mixer which defendants had a permit to use in the street was standing close to the curb, 100 feet from a street intersection, having the hopper raised in which position it would cause less obstruction than if it were lowered, when plaintiff ran her automobile into it in broad daylight, held not to show any negligence by the defendant.

3. Municipal corporations ⚡809(2)—**Due care does not require barricade around concrete mixer in street.**

Due care does not require a contractor having a permit to operate a concrete mixer in the street to erect a barricade around the mixer, which would have added to the obstruction of the street and could not have served to give any better notice of the presence of the mixer than did the object itself.

Appeal from Superior Court, Los Angeles County; Albert Lee Stephens, Judge.

Action by Luella P. Jackson against Leonardt & Peck, a copartnership composed of H. Leonardt and C. L. Peck, to recover damages to an automobile. Judgment for plaintiff, and defendant appeals. Reversed.

Le Roy M. Edwards, of Los Angeles, for appellant.

Cooper, Collings & Shreve, of Los Angeles, for respondent.

JAMES, J. Plaintiff, by the judgment of the trial court, was awarded damages because of the alleged negligent act of the defendant in maintaining upon the street an obstruction with which the automobile of the plaintiff collided. Defendant has appealed.

It is the contention of appellant that the plaintiff failed to establish against it any negligent act authorizing the recovery. This contention seems to be borne out by the evidence as the record shows it. At the time in question a building was being constructed at the northwest corner of Seventh and Figueroa streets in the city of Los Angeles. On Seventh street and approximately 100 feet from the corner, in the street but close to the curb line, was a concrete mixer owned by the defendant and used in mixing the cement which entered into the construction of the building. Seventh street at that point runs in an approximately easterly and westerly direction, and its intersection with Figueroa forms nearly, if not quite, a right angle. Plaintiff driving a motor coupé, and in full daylight, drove south along Figueroa and turned west on Seventh street. Seventh street was sufficiently broad to permit of free passage of vehicles without use of the space upon which the concrete mixer was placed. The width of the mixer at its base, as it extended from the curb into the street, was about 8 feet. There was a metal hopper attached to an arm of the machine, which could be let down or raised up by a cable attachment. On the day in question (being Sunday, and the machine not being in use) the hopper was in a raised position. When raised the metal part of the hopper, at a distance of about 6½ or 7 feet from the ground, extended out about 2 feet beyond the main body of the machine and toward the center of Seventh street. When in that position the machine furnished less obstruction to traffic on the street than with the hopper lowered. As plaintiff was driving her automobile past the mixer, the right-hand front corner of the top collided with a corner of the hopper. The force of the contact partially broke the hopper loose from its attachment, and it came down and rested, when plaintiff's machine finally stopped, on the rear fender. The automobile of plaintiff was damaged considerably and several hundred dollars were expended to cover the cost of repairs.

[1, 2] Defendant was not a trespasser upon the street, as it held a regularly issued permit from the city authorities allowing it to maintain and use the mixer at that point. Its duty, of course, nevertheless, was to so place the machine that it would not unnecessarily obstruct travel, or be likely to produce injury to those who, using reasonable care, might travel upon the street. The mixer was a large contrivance standing about 8 feet high and presented its whole outline to persons

who might be approaching it. At the time of the accident, being the open day, there was no necessity for the placing of lights about it. Neither was it a thing which plaintiff, upon making the turn from Figueroa street onto Seventh, was suddenly confronted with, for in her own testimony she stated that after turning the corner of the street she traveled for a distance of about 100 feet before her automobile struck the mixer. Moreover, she testified that she did not see the mixer at all before she collided with it, which must be interpreted to mean that she did not look in the direction of it. If the machine, as was the fact, was plainly discernible in all of its projecting parts to those who traveled upon the street, and was so placed that contact with it might easily be avoided, it would follow that defendant had exercised all the care required of it in the circumstances. The negligence, if any there was, which produced the damage must be said to have been that of the driver of the automobile.

[3] Counsel for respondent argues that a barricade should have been built about the mixer. Such a barricade would merely have added to the obstruction presented by the machine and could not have served to give any better notice of the presence there of the mixer than did the object itself. The evidence does not sustain the findings made by the trial judge.

The judgment is reversed.

We concur: CONREY, P. J.; SHAW, J.

57 Cal. App. 467

RAY v. LANKERSHIM GRAIN CO.
(Civ. 3819.)

(District Court of Appeal, Second District, Division 1, California. April 27, 1922.)

1. Costs ☞205, 206—Memorandum of costs with affidavit attached prima facie right to insert amount in judgment.

The memorandum of costs, with an affidavit attached containing all the requisite statements as the same are specified in Code Civ. Proc. § 1033, establishes the prima facie right to have the total amount shown by those items inserted in the judgment, and it devolves upon the party objecting to show that the items were not properly included within the cost bill.

2. Costs ☞184(1)—Party claiming witness fees as costs need not have paid the fees.

It is not essential to the right of a party, who claims witness fees as costs, that he should first have paid the fees.

Appeal from Superior Court, Los Angeles County; T. N. Harvey, Judge.

Action by Carl Ray against the Lankershim Grain Company, a fictitious name, owned and operated by H. D. Clarke. From

an order denying motion to retax costs, defendant appeals. Affirmed.

Wetherhorn, Hoyt & Jones, of Los Angeles, for appellant.

Fred W. Morrison, of Los Angeles, for respondent.

JAMES, J. The defendant asked to have certain items, appearing in a memorandum of costs which the plaintiff filed, disallowed. The court denied the motion. Defendant has appealed from the order.

[1, 2] After notice of decision and within the time required by section 1033, Code of Civil Procedure, the plaintiff, in the court below, filed his memorandum of costs. In this memorandum, various items appeared as for fees of witnesses, who were seven in number, such fees including the per diem fixed by the statute, together with the mileage charge which is allowed to be collected. It included notary charges for taking a deposition of one Nye at Cheyenne, Wyo., amounting to \$5, and a witness fee of \$2, with a mileage charge of 10 cents for the attendance of the witness upon the taking of his deposition. The other charges were for the serving of subpoenas. Plaintiffs' attorney attached to the memorandum his affidavit, which in all respects was sufficient to establish prima facie the regularity of the charges made. This affidavit contained the statement that, to the best of his knowledge and belief, the items "in the within memorandum of costs and disbursements are true and correct and have been necessarily incurred in this cause." It was further set out in the affidavit that the witnesses actually attended at the trial and actually traveled the number of miles claimed for each, and that in the judgment of the affiant, each of the witnesses was a necessary and material one. A statement as to the correctness of the service charges was also included. In the notice of motion to have the court tax the costs, it was stated generally that the motion would be upon the ground that the charges were not correct and were not taxable against the defendant, and would be based upon an affidavit and the records and files in the case. Appellant does not claim that the witnesses were not legally required to attend upon the trial, or that they did not so attend, but makes the contention that, because they did not demand their fees when subpoenaed, they could not afterwards collect compensation. The second contention is that a party may not include in his cost bill items as for fees due witnesses, unless he has actually paid such fees. The affidavit attached to the cost bill contained all the requisite statements as the same are specified in section 1033, Code of Civil Procedure. The memorandum of costs, with such an affidavit attached, established prima facie the right of the plain-

tiff to have the total amount shown by those items inserted in the judgment. *Barnhart v. Kron*, 88 Cal. 447, 26 Pac. 210; *Miller v. Highland D. Co. et al.*, 91 Cal. 103, 27 Pac. 536. It devolved upon the moving party to show that the items were not properly included within the cost bill, and this it failed to do. There was no showing that any witness had waived his costs and presumptively, each having been duly required by subpoena to attend at the trial, each would have a legal claim against the plaintiff for the amount of his fees. Plaintiff having incurred such liability was entitled to have judgment to cover it. It is not essential to the right of a party who claims witness fees as costs that he should have first paid the fees. *Linforth v. S. F. Gas & Electric Co.*, 9 Cal. App. 434, 99 Pac. 716. No showing was made that the notary charge of \$5 for the taking of the deposition of the witness Nye in Wyoming was excessive, or that the witness fee of \$2 and mileage of 10 cents, presumably paid to the witness to secure his attendance before the notary, was not proper to be collected.

The order is affirmed.

We concur: CONREY, P. J.; SHAW, J.

57 Cal. App. 495

PEOPLE v. GROENIG. (Cr. 604.)

(District Court of Appeal, Third District, California. April 28, 1922. Hearing Denied by Supreme Court June 26, 1922.)

1. Indictment and information $\S$ 174—Indictment as principal sustains conviction for aiding and abetting.

Under Pen. Code, $\S$ 31, 971, an indictment charging defendant in the usual form as principal with the crime of grand larceny is sufficient to sustain a conviction, though the evidence shows he aided and abetted the commission of the offense.

2. Criminal law $\S$ 785(15)—Instruction as to witness testifying falsely held not to require reversal.

The giving of an instruction that, if any witness had willfully sworn falsely as to any material matter the jury should distrust his entire evidence, does not require reversal.

3. Criminal law $\S$ 792(2)—Evidence held to authorize instruction as to aiding and abetting.

An instruction in the language of Pen. Code, $\S$ 31, that all persons concerned in the commission of a crime, whether directly committing the act or aiding and abetting in the act, are principals, was proper where there was evidence on the charge of larceny of an automobile tending to show that defendant had employed others to steal the automobile and drive it into another state.

4. Larceny ☞73—Evidence held not to warrant charge on defendant's ownership of stolen automobile.

Where defendant and the owner of an automobile had a contract whereby defendant was to receive an automobile in a trade for land, and, pending consummation of the trade, the automobile was stored in a garage from which defendant had the right to take it for demonstration purposes only, and defendant had expressly refused to accept title to the automobile on the ground it would impose the risk of loss on him, the title had never passed to defendant, under Civ. Code, § 1141, so that it was not error in a prosecution of defendant for larceny of the automobile to refuse a requested instruction based on the theory that the title to the automobile had passed to the defendant before it was stolen.

5. Criminal law ☞531(3)—Evidence held to sustain finding confession was voluntary.

Where there was no evidence that any threats or promises had been made to defendant to induce him to make a confession, and it appeared that, immediately before he made the statement, the district attorney stated the charge against him, informed him he did not have to talk but that they would listen to any explanation he chose to make, the court and jury were justified in concluding that the confession was free and voluntary.

6. Criminal law ☞535(2)—Evidence aside from confession held to show corpus delicti.

Evidence that the automobile defendant was charged with having stolen was in a locked garage on a certain evening, and that next morning the garage was discovered to have been broken open and the car was gone and it was later found in another state, is proof sufficient to sustain the corpus delicti of larceny of the automobile aside from defendant's confession.

7. Criminal law ☞511(7)—Evidence held sufficient to corroborate testimony of accomplice.

In a prosecution for larceny of an automobile, where a witness for the state testified defendant had employed witness and another to steal the car, defendant's written confession and his testimony at the trial held sufficient to corroborate the testimony of the accomplice and sustain the conviction.

Appeal from Superior Court, San Joaquin County; George F. Buck, Judge.

Gus Groenig was convicted of grand larceny, and he appeals from the judgment of conviction and from the order denying his motion for a new trial. Affirmed.

R. W. Dodge and H. C. Stanley, both of Stockton, for appellant.

U. S. Webb, Atty. Gen., and J. Chas. Jones, Deputy Atty. Gen., for the People.

FINCH, P. J. This appeal is from the judgment of conviction of the crime of grand larceny and the order denying defendant's motion for a new trial. He was charged

with the theft of an automobile, alleged to belong to Henry Boehm.

The defendant and his wife agreed to sell the latter's house and lot to Boehm on the terms set out in the following contract executed by the parties on the day it bears date:

"This agreement made this 12th day of Jan., 1921, between Gus Groenig and Lydia I. Groenig, wife of Gus Groenig, first party and Henry Boehm second party. First party is agreed to sell and second party is agreed to buy property on lot 7, block 11, Lodi, Barnhart tract, for the sum of \$2,000, difference in trade on automobile (Buick 7 passenger). First party furnishes deed certif. of title insurance policy to date. Deposit \$2,000 in the Farmers' & Merchants' Bank at Lodi, Cal., payable to Lydia I. Groenig on delivery of above stated papers about 17th of Jan., 1921.

"Lydia I. Groenig.

"G. Groenig.

"Heinrich Boehm."

On the same day Boehm's check was deposited with the bank, together with a letter of instructions reading as follows:

"Inclosed herewith is my check for \$2,000 on the Farmers' & Merchants' State Bank of Lacrosse, Kansas, payable to you. You are authorized to forward said check for collection and when paid you are to deliver the said sum of \$2,000 to Lydia I. Groenig and G. Groenig, upon delivery to you by them of a deed properly executed conveying to me the following premises: Lot 7, block 11, Lodi, Barnhart tract, said deed to be accompanied by a certificate of title showing premises free and clear of any and all incumbrances. Also an insurance policy assigned to me of \$2,000, covering buildings now on premises. You are also authorized to have said deed placed on record for me. * * * Heinrich Boehm."

The defendant testified that he delivered the deed, certificate of title, and assignment of the insurance policy to the bank on the 19th day of January. The manager of the bank, Mr. Mettler, denied this statement and testified that such papers were not produced by defendant until February 2d. The defendant testified that, when he delivered these papers, he asked Mettler to give him the \$2,000 deposited, but that Mettler refused, saying that "he could not turn that over to me until Mr. Boehm got back."

J. H. Boehm testified that the automobile was placed in a garage in Lodi on the day the agreement was executed, with instructions to the proprietor thereof to keep it—

"until Mr. Groenig would have time to bring down the papers of the place and until we got our license for the car and everything in shape so we could turn the things over, and * * * that if Mr. Groenig brought anybody there to demonstrate the car * * * he would have the right to demonstrate it, but to bring it back after it was demonstrated."

About January 21st defendant and one R. L. Brown took the automobile out of the garage and later returned it. On the evening of January 23d the automobile was in the garage, which was locked for the night. The next morning it was discovered that the garage had been broken into and the automobile taken. It was finally located in El Paso, Texas. Malcolm Lee testified that, during the afternoon of January 23d, he was riding in an automobile with the defendant and Brown, they two being in the front seat and Lee in the rear, and that, in a conversation between the defendant and Brown, "I heard about \$200 to take it to El Paso but I didn't get all the words that were in there"; that between 1:30 and 3 o'clock the next morning Brown, a man named Henry Bechtold, and the witness took the automobile from in front of defendant's residence and drove it away, finally reaching El Paso with it; that the witness assumed the name Earl McDonald on the trip; that the witness wrote the defendant from some town near Phoenix, Ariz.; and that in reply he received a money order from defendant for the sum of \$80. About January 25th the defendant informed Boehm that he could not wait any longer to consummate the sale of the house and lot, as he had an opportunity to sell to another person, and the parties then agreed upon a sale to Boehm for \$3,000 in cash, in lieu of the original agreement, Boehm to keep the automobile if recovered. On February 2d the transfer of the property was made on that basis.

After his arrest the defendant made a statement to the district attorney. The statement was taken down in shorthand by the court reporter, who testified to the contents thereof at the trial. After stating the substance of the agreement with Boehm, the defendant said:

"I was to clear this house, which I did, and he was to clear this car and, being a Kansas car, we were to have 10 days in which to do this. * * * He had left the car in the garage there. * * * He gave me the privilege of using it or selling it, or anything like that. * * * I met this man Brown. I asked him if he didn't know somebody that wanted to buy a Haines. * * * I told him I had another car that I had just taken in on a trade, and I described it to him. He says right away, 'I know where we can sell that.' * * * We went over to the garage and I told the garage man, I says let him have the car. * * * So I went along with him out here to Elk Grove, somewhere by Galt, the fellow wanted to buy, but he didn't. * * * Brown seemed to be kind of pressed. * * * On the way back I gave Brown \$70 or \$75. * * * I will tell you the truth and take what comes; I will be candid with you. * * * I had given Brown this money, and I says now, 'If you don't sell the car I will be loser here.' * * * I took this car back that evening to the garage. * * * I seen him somewhere, I think it was on Main street there again that day, and we

said something about this money and so on. Well, he says, there is more than one way to get around things. * * * He said if he had a car he could go out and make big money bootlegging. * * * I opposed the proposition. * * * He said he would see that I got rid of that car if we had to steal it. And there is where the trouble started, gentlemen, and there is where I should have said something else; but, of course, I didn't say anything. Well, I don't really know just how these things went on and so on, anyway they occurred. Now then, I didn't see Brown from that day on—I believe it was Friday—until Sunday when he came to my house, he says that he had hired a man, I don't know what his name is, but he had hired a fellow, and he says we are going to do the business. He says you stay at home to-night; stay with your family so you won't get into trouble and your family will be with you. This was Sunday night and Brown asked me for some money. Well, the long and short of it, gentlemen, I gave him some money. I know I was a fool, but I did it. * * * I hadn't told Brown where to take this car. That was up to him to do with as he liked. * * * I don't know whether I asked him to destroy it or sell it, or what. I had the opinion that Brown was going to sell this car. * * * My wife didn't know anything about this. * * * On Sunday afternoon I says to him: 'Now here Brown, if something goes wrong here, you know I have a family here,' and I says, 'I don't mind giving you any money, as far as money is concerned, if you need it so bad as that,' but I says, 'I don't want to get into trouble here in any way.' I says: 'If you go to work and do this and there is any trouble, you will put me into it and I with a family will have to stand for it.' He says: 'No, I won't do no such a thing. I will go to jail first.' * * * He said he would not be caught."

The defendant stated that several days after the theft he received a letter from Phoenix, Ariz., and continued his narrative, saying:

"It said something like this: 'Dear Cousin: I am coming to see you. Everything is dried up here. I haven't any money. Send me \$80.' * * * It was signed 'McDonald.' * * * I didn't know I had a cousin by that name. * * * I didn't say anything to my wife. I wish I had, maybe things would have been different, and of course, I was scared too. * * * I got a money order for \$80.00. * * * About the time I went to get this money order I decided it was Brown that had written that letter, see, and I was afraid somebody was on my track, either to get the money or do me personal harm. * * * In order to keep my good name over there I substituted another. * * * I sent that money order from Lodi. I got it at Woodbridge."

At the trial the defendant attempted to explain away the incriminating statements made to the district attorney. His explanation is far from convincing and it was for the jury to determine which story to believe.

The defendant further testified that, after the original contract had been signed:

"John and I we drove up to my house, I believe he talked with my wife a little bit * * * and he says: 'Well, what will we do with the automobile?' 'Well,' I says, 'We will leave it right here if I had a garage to put it in but I haven't got it and it can't stay outside.' * * * I suggested that we run it over there in the Central avenue garage, * * * so we got in and drove it over there. I says to this man Olenberger (the proprietor of the garage): 'I want to leave the car here for a short period of time until we get settled up on the deal; * * * I have took this car in on a trade and we got to get papers for it.' So this man Boehm took the key and gave it to him, what he done with it I don't know, he went into the office and talked with the man."

The defendant testified that, at the time of the transfer of the house and lot on February 2d, he said to Mettler, in explanation of the change of terms:

"If you remember this deal we made, John and Henry Boehm and myself, * * * this automobile had disappeared and under the conditions these papers cannot be transferred as they are under that contract."

Relative to his right to use the automobile, the defendant testified on cross-examination:

"I didn't hear Mr. Boehm say anything to this Mr. Olenberger. I asked Olenberger what the instructions were and Olenberger told me that I could use the car for demonstrating purposes and so on as per Mr. Boehm's orders."

Mr. Mettler testified that, a few days before the car was stolen, the defendant asked him whether, if the car was delivered to him and thereafter stolen, Boehm or defendant "would be loser"; that witness replied that he thought the defendant would have to stand the loss; and that the defendant then said that he would not accept it under those circumstances. Mettler's testimony as to this conversation stands wholly uncontradicted. The foregoing lengthy statement of the evidence is deemed necessary to an intelligent understanding of the points made on this appeal.

[1] The indictment was in the usual form and charged the defendant as a principal. The evidence shows that he aided and abetted in the commission of the crime. The appellant contends that the indictment is insufficient in that it fails to allege that defendant so aided and abetted. There is no merit in the contention. Pen. Code, §§ 31 and 971; People v. Nolan, 144 Cal. 75, 77 Pac. 774.

[2] It is claimed that the court erred in giving the following instruction: "If any witness examined before you has willfully sworn falsely as to any material matter, it is your duty to distrust his entire evidence." This instruction was criticized in People v. Delucchi, 17 Cal. App. 96, 102, 118 Pac. 935, and People v. Vertrees, 169 Cal. 404, 413, 146 Pac. 890, but in neither case was the

giving thereof held prejudicial. Instructions in the identical language above quoted, or in stronger terms, have often been approved. People v. Plyler, 121 Cal. 160, 163, 53 Pac. 553; People v. Fitzgerald, 138 Cal. 39, 45, 70 Pac. 1014; White v. Disher, 67 Cal. 402, 7 Pac. 826; People v. Lon Yeck, 123 Cal. 246, 55 Pac. 984; People v. Kelly, 146 Cal. 119, 123, 79 Pac. 846; People v. Thomson, 145 Cal. 717, 722, 79 Pac. 435.

[3] The court instructed the jury in the language of section 31 of the Penal Code. It is urged that such instruction was not applicable to the charge or the evidence. The evidence quoted clearly shows that the instruction was proper.

[4] Appellant complains of the court's refusal to instruct the jury that if, prior to the 23d day of January, the defendant deposited with the bank the deed admitted in evidence, the certificate of title, and an assignment of the insurance policy on the buildings, "then the title to said automobile vested absolutely in said Gus Groenig and Lydia Groenig by such delivery of said papers, and said Henry Boehm ceased thereby to be the owner of said Buick car and defendant could not be guilty of a larceny thereof"; that, if the automobile at the time of the alleged theft was the property of the defendant, the defendant could not be guilty of stealing the same; and that if, "on or about January 23, 1921, defendant had done all that was required of him to consummate the agreement with Henry Boehm, whereby said automobile was to be turned in to defendant as part payment for a house and lot to be conveyed to said Henry Boehm, then you will find the defendant not guilty." The only instruction given by the court relative to the ownership of the automobile was, in appropriate language, that, if the defendant stole the automobile at the time alleged and the same was then the personal property of Henry Boehm, the jury should convict.

The whole testimony, even that of the defendant, shows that title to the automobile never passed to him. Section 1141, Civ. Code. There is no evidence whatever that Boehm delivered it to defendant or that the latter accepted it with the intention of passing title but, to the contrary, the evidence shows that both parties understood that title had not passed. The defendant told Mettler he would not accept delivery until the transaction was completed. When it was learned that the automobile was gone, the defendant and Boehm entered into a new agreement by the terms of which Boehm paid an additional thousand dollars for the house and lot in lieu of the delivery of the automobile and neither of them contended or suggested that title to the automobile had passed prior to the theft. Neither in his lengthy statement to the district attorney nor in his testimony,

given at the trial did the defendant once say that he even thought that the automobile belonged to him or that he had the right to take it. There was no evidence to which the refused instructions were applicable.

[5] The admission in evidence of the defendant's statement to the district attorney is assigned as error on the ground that it was not voluntary. The testimony shows that no threats or promises were made to induce the defendant to make the statement and that the statement was voluntary on his part. Immediately before the defendant made the statement, the district attorney said to him:

"Gus, you are brought back as you probably know, on a charge of grand larceny of an automobile, for taking an automobile belonging to a man by the name of Boehm, a preacher out here at Lodi; I had you brought up here. If you have anything to say about the matter we will listen to you. You don't have to talk; we are not going to attempt to make you talk. If you have an explanation to make we will be glad to listen to you."

From this testimony the court and jury were justified in concluding that the statement was free and voluntary.

[6] Appellant contends that, independent of the defendant's statement or confession, the corpus delicti was not established. The evidence shows that, on the evening of January 23d, the automobile was in a locked garage, that the next morning it was discovered that the garage had been broken open and that the car was gone, and it was later found in El Paso, Tex. Certainly, such proof is sufficient to show that the machine was stolen.

[7] It is lastly urged that the witness Lee was an accomplice in the commission of the crime and that there is not sufficient corroboration of his testimony. The defendant's testimony, given at the trial, and his statement made to the district attorney are, either of them, amply sufficient corroboration. The evidence establishes the defendant's guilt with unusual certainty.

The judgment and order are affirmed.

We concur: HART, J.; BURNETT, J.

57 Cal. App. 539

CRUM v. CRUM. (Civ. 2441.)

(District Court of Appeal, Third District, California. May 2, 1922.)

1. Divorce — 127(3)—Corroboration of plaintiff's testimony as to cruelty is required to prevent collusion.

The main purpose of Civ. Code, § 130, providing that no divorce can be granted upon the uncorroborated statement, admission, or testimony of the parties, was to prevent collusion.

2. Divorce — 127(4)—Plaintiff need not be corroborated as to every act of cruelty charged by her.

In an action for divorce on the ground of cruelty, where plaintiff alleged and testified to a large number of acts of cruelty on the part of defendant, it was not necessary that her testimony be corroborated as to every act of cruelty.

3. Divorce — 127(4)—Testimony of daughter of parties held to corroborate wife's testimony as to husband's cruelty.

In an action for divorce brought by the wife on the ground of the husband's cruelty, testimony by the daughter of the parties as to some of the acts of cruelty alleged by plaintiff held sufficient corroboration of plaintiff's testimony to entitle her to a divorce, especially where the husband vigorously resisted the divorce at the trial and on appeal, so there could be no suspicion of collusion.

4. Divorce — 27(3)—Cruelty is not limited to physical violence.

Extreme cruelty as a ground for divorce embraces not only physical violence, but also any conduct in one of the married parties which may produce mental anguish or suffering in the other, or which furnishes reasonable apprehension that the continuance of cohabitation under the circumstances may be attended with bodily harm committed by one upon the other.

5. Divorce — 184(10)—Defendant's evidence not necessarily considered on question of sufficiency of evidence to support decree for plaintiff.

Where the single question submitted on appeal from a judgment granting divorce to plaintiff is whether the decision of the trial court is sufficiently supported by the evidence, the limit of inquiry by a reviewing court is whether there is sufficient evidential support to uphold the findings, and the appellate court is not always required to consider the evidence presented by defendant.

Appeal from Superior Court, Kings County; M. L. Short, Judge.

Action for divorce by Essie B. Crum against Samuel D. Crum. Judgment for plaintiff, and defendant appeals. Affirmed.

J. C. C. Russell, of Hanford, for appellant. Clark Clement, of Lemoore, for respondent.

HART, J. The plaintiff was granted an interlocutory decree of divorce from the defendant on the ground of extreme cruelty. The decree also awarded to plaintiff the custody of the minor child of the parties, Mabel Ruth Crum, age seven years, the only issue of the marriage of said parties, and one-half of the community property, consisting principally of real estate. The personal property, of which there was a small amount, and which also belonged to the community, was awarded to the defendant.

The defendant appeals from the judgment under the alternative method upon the sole

ground that the testimony of plaintiff as to the acts of cruelty alleged to have been committed by the defendant upon her was not legally corroborated.

The parties intermarried in the state of Missouri, in the month of May, 1908, and removed to Kings county, this state, about two years later.

The complaint alleges that on numerous occasions from the year in which the parties were married until May 12, 1920, on which latter date they separated and ceased living together, the defendant "has treated plaintiff in an extremely cruel and inhuman manner," following which averment is a specification of certain acts of cruelty on plaintiff by the defendant in the years 1910, 1911, 1915, 1916 and 1919. It is alleged that on one of these occasions the defendant, in the presence of others, called plaintiff a "d—n fool," a "d—n b—ch," and cursed and threatened to inflict bodily injury upon her by saying, "God d—n you; I will bust your head," and threatened to kick plaintiff out of the house; that at another time, the defendant, becoming very angry at plaintiff, struck her a violent blow "over the head with his gun case," and that, on another occasion specifically mentioned in the complaint, the defendant, having been asked by plaintiff "a few friendly questions," became sullen and morose and refused to answer said questions; that thereupon plaintiff insisted on answers, when defendant became very angry, "grabbed her with both hands, and jammed her up against some shelves saying that he was going to kill her"; that at this time defendant, without cause, "twisted plaintiff's arm painfully, and cracked a bone in one of her fingers"; that in April, 1919, "while plaintiff and defendant were living near Lemoore, in said county, defendant, without cause, grabbed hold of plaintiff forcibly with his hands, and jammed her against the wall a number of times, and said that he was going to kill plaintiff"; that, during the four years immediately preceding the date of their separation, the defendant has practiced sexual abuse upon the plaintiff, by reason whereof she has become a nervous wreck. The complaint then charges generally numerous other acts of cruelty practiced upon plaintiff by defendant during the four years the couple resided in Lemoore, it being stated that, without cause, the defendant "constantly reviled plaintiff, and cursed her with the vilest language"; that defendant "has constantly been sullen and morose, without cause, around home; that he has constantly and habitually refused to talk to plaintiff, and has never talked to her except when compelled by necessity to do so." There are some other charges of cruelty in the complaint of a more or less specific nature, as to which no findings were made, and which, therefore, require no specific notice herein.

The complaint describes and specifies the value of the several pieces of real estate which it alleges is the community property of the parties, and asks for a division thereof between said parties. The defendant, by his answer, denies specifically each and every material allegation of the complaint, and, while not asking for a decree, alleges that the trouble between the parties has been due to the ungovernable temper of the plaintiff; that she would "fly into a rage and run all the hired men off the ranch, and would not allow any one to come on the ranch to work for defendant," and that she otherwise frequently so annoyed and harassed the defendant that he could not do the work on his farm which was required of him, etc.

The court found generally that, since the date of the marriage between the parties "the defendant has treated plaintiff in an extremely cruel and inhuman manner," and also specifically found that the several acts of cruelty particularized in the complaint, and which are therein alleged to have occurred in the years 1910, 1911, and 1915, were committed by the defendant as so alleged. It was further found that during the period of four years immediately preceding the date of the separation of the parties the defendant practiced sexual abuse upon plaintiff, "with the result that her nervous system was impaired thereby."

Reading the testimony in this case, without reference to the findings of the court, one could hardly dodge the conclusion that neither the plaintiff nor the defendant was, in the maintenance of their domestic relations, a paragon of amiability in disposition. The plaintiff herself admitted that, on one occasion, having been provoked by the insulting language with which the defendant addressed her, after she had asked him in a singularly civil way some very decent questions, emphasized her indignation thereat by hurling at him a china coffee cup with such accuracy of aim that it landed on the side of his face with sufficient force to inflict thereon a slight wound. This circumstance, however, does not mean that there is not sufficient corroboration of the plaintiff's testimony as to the general cruel treatment of her by the defendant during much of their married life. Indeed, she claimed and testified (and her testimony supporting this claim was corroborated by her adopted daughter) that she never at any time, including the occasion on which she hurled the coffee cup with such telling effect, betrayed ill-temper in controversies with her husband until she had become so overwrought through his gross and inhuman mistreatment of her that she was unable to control herself.

That the testimony of the plaintiff is sufficiently corroborated will readily appear from an examination of the evidence. There is no need for a detailed recapitulation herein of the testimony for the purpose of con-

firming this declaration. It will suffice merely to refer in a general way thereto.

The plaintiff testified that the defendant, sometimes, in the presence of persons not members of their immediate family, had, on frequent occasions, addressed to her opprobrious epithets, and cursed her, such as "God d—n you;" "you d—n b—ch," and that he had threatened to break her head, and had at different times violently struck her; that he was of a morose and sullen disposition, and very seldom would answer her with civility, sometimes not at all, when she would ask him about the business of the farm. She testified that his manner of maintaining sexual relations with her, against objection by her, was such that it resulted in the production of serious female trouble, and, consequently, in a corresponding impairment of her health.

The adopted daughter of the parties testified that she had, on two occasions, witnessed the infliction of physical violence upon the plaintiff by the defendant. One of these occasions, though, was when the plaintiff struck the defendant with the coffee cup. As to this circumstance, the little girl said that, after the cup was thrown by the plaintiff, the defendant grabbed hold of her mother and "jammed her up against the wall," and repeatedly bumped her head against the wall. She testified that the immediate cause of this particular trouble between them was that, after her mother had asked defendant some questions "in a nice way," and he had refused to answer the same, except to say to the plaintiff, "God d—n you, keep your mouth shut," the latter became very angry, and thereupon hurled the cup at defendant. The other occasion on which the witness saw the defendant use physical force on plaintiff was after the couple had retired for the night. The witness said that she heard a noise in the room occupied by the plaintiff and the defendant, and heard her mother scream, and that she (witness) then ran into the room, and saw her father in the act of choking her mother while they were in bed. The witness undertook to interfere, when the defendant ordered her from the room. The little girl further testified that "every day or so," for a long period of time prior to the date of the separation of the parties, she had heard the defendant curse the plaintiff and call her offensive names, and threaten to injure her. It is not necessary to repeat here the language which the young witness testified that she so often heard her father use towards her mother. It is sufficient to say that said language was about as vile and offensive as can well be imagined. The witness, in effect, testified that such abuses of the plaintiff by the defendant were a common occurrence.

The family physician testified that he had, in the year 1920, professionally attended the

plaintiff, and upon examination found that she was suffering from severe female trouble and a general impairment of her nervous system by reason thereof, and that the "sexual abuse" which the plaintiff stated to him that defendant had habitually practiced upon her would produce the condition which he found in the plaintiff.

It should be added that the testimony tends to show that the plaintiff was a woman of education and refinement, that for a period in her life she had taught school, and that she was to some extent accomplished along musical lines.

[1, 2] Thus the evidence has been sufficiently referred to to show that, except as to the charge that the defendant practiced sexual abuse upon the plaintiff, the latter's testimony was corroborated—that is, her testimony bearing upon the charge that the defendant otherwise cruelly treated her is corroborated. The corroboration, it may be conceded, is not of her testimony as to all the acts of cruelty charged in the complaint and to the commission of which by defendant the plaintiff testified, but the corroboration does go to the testimony of the plaintiff as to many acts and words of cruelty charged in the complaint either specifically or generally, and, since from the fact that the defendant at the trial vigorously resisted, and on this appeal likewise opposes the granting of the decree to the plaintiff, it is obvious that there was and is no collusion between them to procure a divorce, the corroboration is legally sufficient. The main purpose of section 130 of the Civil Code, providing that no divorce can be granted upon the uncorroborated statement, admission, or testimony of the parties, is, as is said in *Andrews v. Andrews*, 120 Cal. 184, 52 Pac. 298, to prevent collusion. It is further said in that case, quoting from the syllabus:

"Where a divorce is sought on the ground of extreme cruelty, consisting of successive acts of ill treatment, it is not necessary that there should be direct testimony of other witnesses to every act sworn to by the plaintiff, but it is sufficient corroboration if a considerable number of important and material facts are testified to by other witnesses, or if there is other evidence, circumstantial or direct, which strongly tends to strengthen and confirm the statements of the plaintiff."

[3] As suggested, there can be no doubt that the testimony of the adopted daughter of the parties, if believed by the trial court, as manifestly it was, strongly tended to "strengthen and confirm the statements of the plaintiff" as to many of the acts and words of cruelty practiced by the defendant upon her. The trial court was justified in finding from the testimony of the plaintiff, as corroborated by the testimony of the adopted daughter, that the defendant had carried on a systematic abuse of the plaintiff, at least by words, if not by acts, and

was further justified in finding that the cruelty thus inflicted upon the plaintiff was, when considered in view of the fact that she was a woman of education, some culture, and a corresponding degree of refinement, legally sufficient to warrant the decree.

[4] It has often been held that extreme cruelty, as specified by the law as one of the grounds upon which the married relation may be dissolved, embraces not only physical violence inflicted upon the complaining party by the other, but also any conduct in one of the married parties which may produce mental anguish or suffering in the other, or which furnishes reasonable apprehension that the continuance of the cohabitation under such circumstances might be attended with bodily harm committed by one upon the other. See *Morris v. Morris*, 14 Cal. 76, 73 Am. Dec. 615, and *Kapp v. District Court*, etc., 31 Nev. 454, 103 Pac. 235, 238. But the court in this case was also apparently justified in finding that some of the alleged acts of cruelty, consisting of the infliction of physical violence upon the plaintiff by the defendant, were sufficiently established by the proofs.

[5] We have not considered herein the testimony presented by the defendant. This we are not always required to do where the single question submitted on appeal is whether the decision of the trial court is sufficiently supported by the evidence. In such case the limit of inquiry by a reviewing court is whether there is sufficient evidentiary support to uphold the findings, and, if it be found, as we have found to be true in this case, that the decision derives such support from the evidence produced by the plaintiff, then further inquiry to that end is entirely supererogatory.

We conclude that the judgment appealed from cannot justly be disturbed, and it is therefore affirmed.

We concur: FINCH, P. J.; BURNETT, J.

57 Cal. App. 566

CITY NAT. BANK IN LONG BEACH v. LEMCO MFG. CO. et al. (Civ. 3895.)

(District Court of Appeal, Second District, Division 1. California. May 3, 1922.)

Guaranty ⚡5—Guarantor of void note not liable.

One who has guaranteed payment of a note cannot be held liable when the note itself has not been executed by its purported maker and is void for want of consideration under Civ. Code, §§ 2787, 2809.

Appeal from Superior Court, Los Angeles County; Chas. S. Crail, Judge.

Action by the City National Bank in Long Beach against the Lemco Manufacturing Com-

pany, Jess H. Clark, and others. From an adverse judgment, the last-named defendant appeals. Reversed.

H. G. Ames, of Anaheim, and Delmas & Brown, of Los Angeles, for appellant.

CONREY, P. J. There is no brief or appearance herein on behalf of respondent. The case is stated, and the point relied upon by appellant is presented as follows:

"The plaintiff sued as payee of a note purporting to be executed by the defendant Lemco Manufacturing Company, and guaranteed as regards payment by the defendant Clark. These defendants pleaded that the note had been signed in the name of the company without its authority, and that it was void for want of consideration. The court found the plea true; and thereupon rendered judgment in favor of the company, but against Clark for the full amount of the note. From that part of the ensuing judgment which runs against him Clark appeals. There is presented, then, for decision the single question: Can one who has guaranteed payment of a note be held liable, when the note itself has not been executed by its purported maker, and is void for want of consideration? This question admits, we think, of but one answer. The obligation of the guarantor being accessory to that of the principal obligor, it would seem to be as self-evident in law that if there is no principal there can be no accessory, as in physics it is self-evident that there can be no shadow where there is no substance. Brandt on Suretyship and Guaranty (3d Ed.) §§ 4, 19, 163, and notes."

The contention of appellant appears to be correct, and is supported by authority in this state. Civ. Code, §§ 2787, 2809; *Glassell v. Coleman*, 94 Cal. 260, 266, 29 Pac. 508; *Kilbride v. Moss*, 113 Cal. 432, 45 Pac. 812, 54 Am. St. Rep. 361.

The judgment against appellant is reversed.

We concur: SHAW, J.; JAMES, J.

57 Cal. App. 411

Ex parte MAZURAN. (Cr. 1055.)

(District Court of Appeal, First District, Division 2, California. April 24, 1922.)

1. Criminal law ⚡228—Jurisdiction of the police court not divested by reason of postponement.

A departure from Pen. Code, § 861, providing that a postponement of the preliminary examination cannot be for "more than six days in all," by granting postponement beyond that period does not divest the police court of jurisdiction.

2. Habeas corpus ⚡3—Remedy for improper postponement must be asserted at time of illegal confinement.

The remedy under Pen. Code, § 861, for illegal confinement by reason of erroneous postponements lies at the time of such postponements, and not by habeas corpus after hearing

and upon commitment to answer to the superior court.

Original application for writ of habeas corpus by M. J. Mazuran, on behalf of Christopher Miramontes, directed to the sheriff of the city and county of San Francisco. Writ denied.

A. J. Hennessy, of San Francisco, for petitioner Mazuran.

Matthew Brady, Dist. Atty., and Richard E. Fitzgerald, Deputy Dist. Atty., both of San Francisco, for respondent.

LANGDON, P. J. This matter comes before us on a petition for a writ of habeas corpus. Petitioner is confined in the county jail in the city and county of San Francisco by virtue of a warrant of commitment of the police court of said city and county holding said defendant to answer before the superior court on a charge of burglary.

It is contended by appellant: First, that the police court lost jurisdiction of the case by the various postponements made in violation of section 861 of the Penal Code; and, second, that the defendant was committed without reasonable or probable cause. There is no merit in either of these contentions.

[1, 2] A postponement of the preliminary examination beyond six days, whether erroneous or not, does not divest the court of jurisdiction. As was said in *People v. Van Horn*, 119 Cal. 323, 51 Pac. 538:

"If the postponement worked appellants any legal wrong, such wrong consisted in their temporary illegal confinement by the officer who had them in custody, for which, if not lawful, there would have been a remedy at the time."

Furthermore, the record shows at least one continuance was given at the request of the defendant.

After a careful examination of the record before us, we are satisfied that the evidence is amply sufficient to warrant holding defendant to answer to the charge of burglary before the superior court.

The writ is discharged, and the prisoner remanded to the custody of the sheriff.

We concur: **NOURSE, J.; STURTEVANT, J.**

57 Cal. App. 518

BLOCK v. CITIZENS' TRUST & SAVINGS BANK. (Civ. 3668.)

(District Court of Appeal, Second District, Division 2, California. April 29, 1922. Rehearing Denied May 24, 1922. Hearing Denied by Supreme Court June 26, 1922.)

1. Vendor and purchaser ⚡130(1)—**Contract to give good and sufficient deed requires conveyance of good title.**

A contract by a vendor of land to give a good and sufficient deed, when standing alone,

refers not merely to the form of the instrument, but also requires that the vendor shall transfer a marketable title which shall be free from all reasonable doubt and clear of all incumbrances or material defects.

2. Vendor and purchaser ⚡133—**Contract to give deed and certificate of title free from incumbrances by vendor does not require conveyance of clear title.**

Where the contract required the vendor to execute a good and sufficient deed conveying the land, and to deliver a certificate showing title free from all incumbrances made, done, or suffered by appellant, the clause relating to the deed to be furnished must be construed with the clause relating to the certificate of title, the purpose of which was to enable the purchaser to ascertain whether the deed conveyed what he was to receive, so that the contract requires a conveyance of title free only from incumbrances made, done, or suffered by the vendor.

3. Vendor and purchaser ⚡133—**Pendency of condemnation proceedings is an incumbrance, but not one made, done, or "suffered" by vendor.**

The pendency of proceedings to condemn a portion of the land covered by the contract of sale constitutes an incumbrance on the property, but not an incumbrance made, done, or suffered by the vendor; the word "suffered" in that connection implying responsible control, not something caused without the act of the party and beyond his power to prevent, and therefore the pendency of such proceedings does not warrant rescission of a contract to convey the property free from incumbrances made, done, or suffered by the vendor.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Suffer.]

Craig, J., dissenting.

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Action by G. F. Block against the Citizens' Trust & Savings Bank, to recover the purchase price of certain real property. Judgment for plaintiff, and defendant appeals. Reversed.

Hunsaker, Britt & Cosgrove, of Los Angeles, for appellant.

Randall, Bartlett & White and Walter J. Little, all of Los Angeles, for respondent.

FINLAYSON, P. J. This is an appeal from a judgment in favor of plaintiff in an action to recover the purchase price of a certain parcel of land that defendant had agreed to convey to plaintiff, the latter claiming the title to be defective. The true construction of defendant's contract of sale is the only question involved.

The findings disclose a situation substantially as follows: On September 11, 1913, plaintiff and defendant entered into a written contract whereby defendant agreed to sell and plaintiff agreed to buy a lot of land

in Los Angeles county for the sum of \$600, payable in certain monthly installments. The agreement contains a clause as follows:

"The first party [defendant] upon receiving payment of the full amount, * * * agrees to execute and deliver unto the party of the second part [plaintiff] a good and sufficient deed of grant conveying said land, and to deliver a good and sufficient certificate of title issued by the Title Insurance & Trust Co., showing title to said property vested in the party of the first part [defendant], free from all incumbrances, made, done, or suffered by said first party."

Plaintiff, who seems to have been put in possession immediately upon the execution of his contract to purchase, made all the payments required of him under the terms of his contract, including taxes; and on May 10, 1919, he made his final payment, which at that time was five months overdue.

On April 29, 1919, which was shortly prior to plaintiff's final payment, the Los Angeles County Flood Control District, a political subdivision of this state, commenced in the superior court for Los Angeles county an action of eminent domain to acquire by condemnation an easement in and over certain lands, including an easement in and over the westerly 60 feet of the land which defendant had agreed to convey to plaintiff. Such easement was sought by the flood control district for the purpose of providing and maintaining a fixed and definite channel for certain waters by erecting embankments and walls on the right of way sought to be condemned. The plaintiff here, the vendee, was not a party to that action. His vendor, this defendant, was, however, made a party defendant to the condemnation suit, though its time to answer therein had not expired when this action was tried. On the day when the condemnation suit was commenced, April 29, 1919, a lis pendens was recorded in the office of the county recorder, giving due notice of the pendency of that action. At the date of the trial of the present action the condemnation suit had not been set for trial. Pursuant to the power conferred by section 14 of article 1 of the Constitution, as amended on November 5, 1918, an order was made in the condemnation suit on May 14, 1919, authorizing the flood control district to take immediate possession and use of the right of way described in the eminent domain proceedings. Though the flood control district has not as yet taken actual possession of the right of way which it is seeking to obtain over the westerly 60 feet of the land in question here, it has taken constructive possession thereof.

Some time between the 19th and 25th of May, 1919, defendant tendered to plaintiff a deed, duly signed and acknowledged, and sufficient as to form, purporting to convey to plaintiff the property in question. At the same time defendant tendered to plaintiff a certificate of title, issued and executed by the Title Insurance & Trust Company of Los

Angeles on May 19, 1919, certifying that the title to the whole parcel of land is vested in defendant free from all incumbrances except "an action commenced April 29, 1919, and now pending in the superior court, entitled, Los Angeles County Flood Control District v. Stephen A. Armstrong, Citizens' Trust & Savings Bank, a Corporation, et al., brought to condemn the west 60 feet of said lot for the construction and maintenance of a channel for the flood waters of the Los Angeles, San Gabriel, and other rivers." The certificate of title further stated that "notice of the pendency of the said action was recorded April 29, 1919, in Book 76, p. 19, of notices of actions"; and also that "on May 15, 1919, an order was entered authorizing plaintiff [the flood control district] to take immediate possession and use of the right of way as described in the complaint [in the condemnation action], the money deposits required by law as security having been made pursuant to the order of the court."

Though defendant has continued ready and able to make his tender good, plaintiff refuses to accept the offered deed and certificate of title because of the pendency of the condemnation proceedings, the recording of the lis pendens, and the making of the order authorizing the flood control district to take possession of the right of way sought to be condemned.

Whether respondent, the vendee, is entitled to rescind his contract to purchase and recover the purchase money which he paid to appellant, the vendor, depends upon the construction that should be placed upon appellant's covenant "to execute and deliver unto the party of the second part [respondent] a good and sufficient deed of grant conveying said land, and to deliver a good and sufficient certificate of title * * * showing title to said property vested in the party of the first part [appellant], free from all incumbrances made, done, or suffered by said first party."

There are cases which lend color to the view that, where condemnation proceedings are commenced after the making of a contract of sale, but before the time for its completion by a conveyance, the institution of such proceedings will not affect the vendee's duty to complete the purchase. The reason given by the courts which adhere to this view is that the purchaser is regarded in equity as the owner from the time of the making of the contract, and, as such equitable owner, is entitled to the damages which may be awarded in the condemnation proceedings, and the exercise of the right of eminent domain confers upon the plaintiff in the condemnation suit an independent and not a derivative title. 27 R. C. L. p. 500; Nixon v. Marr, 190 Fed. 913, 111 C. C. A. 503, 36 L. R. A. (N. S.) 1067; Clarke v. Long Island Realty Co., 126 App. Div. 282, 110 N. Y. Supp. 697. See, also, Stevenson v. Loehr,

57 Ill. 509, 11 Am. Rep. 36. Other cases take the view that, if the vendor has agreed to convey a good title, free and clear of all incumbrances, the condemnation proceeding, if pending when the time arrives for the execution of a conveyance to the vendee, constitutes an incumbrance or defect in the vendor's title justifying the purchaser in refusing to complete the purchase and giving him the right to recover the purchase price. 27 R. C. L. p. 500; *Kares v. Covell*, 180 Mass. 206, 62 N. E. 244, 91 Am. St. Rep. 271; *Cavengaugh v. McLaughlin*, 38 Minn. 83, 35 N. W. 576; *Johnston v. Callery*, 173 Pa. 129, 33 Atl. 1036; *Miller v. Phillips & Co.*, 44 Wash. 226, 87 Pac. 264. The cases on both sides of the question are reviewed in the majority and dissenting opinions in *Nixon v. Marr*, supra. We do not find it necessary to determine which of those two conflicting views is supported by the better reasoning. We shall assume, for all the purposes of this decision, that the correct doctrine is that last stated; that is, we shall assume that, where the vendor has obligated himself to convey a good title, free and clear of all incumbrances, the pendency of condemnation proceedings at the time when the vendee becomes entitled to his deed will entitle the latter to reject the title and sue for the recovery of any purchase money that may have been paid by him to his vendor.

As we construe the language of appellant's covenant, there was no agreement to give respondent a good title, free and clear of all incumbrances. Appellant covenanted to do two things: (1) To execute "a good and sufficient deed of grant conveying said land"; and (2) to deliver a certificate of title showing title to the property vested in appellant as the vendor, free from all incumbrances "made, done, or suffered" by appellant. Though there are two parts to appellant's covenant, each part calling for the performance of a separate and distinct act, the subject-matters of the two are so correlated that the two clauses should be read together, and the intention of the parties respecting the meaning of each division of the covenant be ascertained by a consideration of the covenant as a whole, each clause throwing an illuminating light upon the other and disclosing the exact limits of the covenant and the true meaning of appellant's promise to execute "a good and sufficient deed." The whole question is one of intention, to be ascertained by a consideration of all the language used by the parties.

[1] If, instead of covenanting to execute a good and sufficient deed, and to give a certificate of title showing title in itself free and clear of all incumbrances "made, done, or suffered" by it, appellant had simply covenanted to execute "a good and sufficient deed," making no mention of any certificate of title, we would have had no trouble

in construing appellant's covenant as meaning that the parties intended that a good and sufficient title should be conveyed as well as that a deed good and sufficient in form should be executed; for the doctrine recognized by the later authorities is that, as a general rule, a covenant simply calling for a good and sufficient deed goes not merely to the form of the instrument, but also requires that the vendor shall transfer a good title, i. e., a marketable title, such as shall be free from all reasonable doubt and clear of all incumbrances or material defects. 27 R. C. L. p. 486; 11 Am. Dec. 34 et seq., note to *Porter v. Noyes*; 39 Cyc. 1446; *Haynes v. White*, 55 Cal. 38.

[2] Or if, instead of covenanting to execute "a good and sufficient deed," appellant had expressly covenanted to execute a good and sufficient deed, and to convey a good title, its express promise to convey a good title doubtless would have been construed as calling for such title, even though the covenant also contained a provision that appellant, as vendor, would furnish a certificate showing title vested in itself free only from incumbrances "made, done, or suffered" by it. But appellant did not expressly covenant to give a good title. It covenanted to execute a good and sufficient deed, and to furnish a certificate of title that was not required to show the title free of all incumbrances, but only of such incumbrances as might be "made, done, or suffered" by appellant. And, though a covenant to execute "a good and sufficient deed" is usually construed as calling for the conveyance of a good title, nevertheless the context may show a contrary intention, as we think it does in the present case. When appellant's undertaking to give a "good and sufficient deed" is read in the light of the contextual undertaking to furnish respondent with a certificate showing title in appellant free from incumbrances made, done, or suffered by the latter, it is clear that in this case the parties intended, by their use of the words "good and sufficient deed," no more than a grant conveying to respondent a title free from such incumbrances as might have been made, done, or suffered by appellant; that is, free from such incumbrances as the certificate of title was required to show. This is so because the very object of a certificate of title is to enable the vendee to pass upon the validity of the title for which he is bargaining. It is to enable him to know if he can get what he has purchased, and whether his vendor has and can convey all he has undertaken to sell. *Mead v. Fox*, 6 Cush. (Mass.) 199, 201. Though this Massachusetts Case presents the reverse of the situation that we have here, it is quite in point with respect to the construction which should be placed on appellant's covenant. It has been held in Massachusetts from an early date, as it formerly

was in this state (*Brown v. Covillaud*, 6 Cal. 566, 573, *Green v. Covillaud*, 10 Cal. 317, 322, 70 Am. Dec. 725) that a covenant for "a good and sufficient deed" relates to the form and execution of the deed, and not to the title (*Aiken v. Sanford*, 5 Mass. 494). But in *Mead v. Fox*, *supra*, it was held that, because the parties stipulated that the vendee should have "ten days to examine the title," it manifestly was their intention that the vendors should convey a good and clear title, the court saying:

"By the terms of the sale, ten days were allowed purchasers to examine the title. Purchasers could have no other object in examining the title, than to see if the plaintiffs could make a good title; and there could be no object whatever in ascertaining whether or not the plaintiffs could make a good title, unless they were bound to make such title, and the purchaser was entitled to have a good and clear title made to him, in order to bind him to the performance of his contract of purchase. The purchaser was allowed time to examine the title, to see if he could get what he had purchased, and whether the plaintiffs actually had and could convey what they had undertaken to sell."

By a parity of reasoning, it should be held that in the present case the purpose of the certificate of title was to enable the purchaser to see if he could get what he had purchased and whether his vendor had and could convey what he had agreed to sell, and that, therefore, the parties contemplated the conveyance of such title as was to be shown by the certificate of title, namely, a title free only of incumbrances made, done, or suffered by appellant.

[3] That the pendency of a condemnation action is an "incumbrance," but that it is not one which is "made, done, or suffered" by the vendor, seems obvious. If any authority be needed for the proposition that the pendency of condemnation proceedings constitutes an incumbrance, it may be found in the reasoning pursued by Circuit Judge Sanborn in his dissenting opinion in *Nixon v. Marr*, *supra*. It is not, however, an incumbrance that is "made" or "done" by the vendor; nor is it one that is "suffered" by him. An incumbrance upon property suffered by the vendor means one within his power or duty to avoid. "Suffer," in this connection, implies responsible control; and it cannot be held to apply to a thing not caused by the act of the party nor within his power to prevent. *Crist v. Fife*, 41 Cal. App. 511, 183 Pac. 197; *Smith v. Eigerman*, 5 Ind. App. 269, 31 N. E. 862, 51 Am. St. Rep. 281.

For the foregoing reasons we conclude: (1) That appellant undertook, not to execute a deed conveying the title free and clear of any and every incumbrance, but to execute a deed conveying the title free of all incumbrances "made, done, or suffered" by appellant; (2) that neither the pendency of the condemnation suit nor the order authorizing

the plaintiff therein to take possession of the easement which it was seeking to condemn was an incumbrance "made, done, or suffered" by appellant; and (3) that, as a consequence, the deed which appellant tendered to respondent would convey to the latter all the title that appellant, as vendor, had agreed to convey. It follows, therefore, that, upon the facts found by the court below, the judgment should have been in appellant's favor.

The judgment is reversed, and the lower court is instructed to enter a judgment on the findings adjudging that plaintiff take nothing by his action and that defendant recover its costs.

WORKS, J., concurs.

CRAIG, J. I dissent. As is stated in the opinion of the majority of the court, the appellant, the vendor in the contract, covenanted to do two things: First, to execute "a good and sufficient deed of grant conveying said land"; second, to "deliver a good and sufficient certificate of title * * * showing title to said property vested in the party of the first part free from all incumbrances made, done, or suffered by said first party." The dispute between the parties upon this appeal centers upon the construction of the provisions above quoted. The appellant concedes that, if he had simply agreed to deliver a good and sufficient deed without mentioning the character of the title to be conveyed, a stipulation would exist by implication that the deed must carry with it a good and sufficient title. *Haynes v. White*, 55 Cal. 38. 39 Cyc. 1446, is authority for this proposition. But it is argued that the provision, "and to deliver a good and sufficient certificate of title showing title to said property vested in the party of the first part free from all incumbrances made, done, or suffered by said first party," is a qualification of the phrase just preceding it, to wit, "agrees to execute and deliver to the party of the second part, a good and sufficient deed of grant conveying said land." However, the plain meaning of the entire provision under consideration, governed by rules of grammatical construction, is that the vendor was to do two distinct and independent acts. The purpose of the provision for a certificate of title is not merely to describe the kind of title required. Such a stipulation was unnecessary. It had been definitely defined by the agreement to execute "a good and sufficient deed of grant conveying said land." The intention of the parties concerning a requirement for a certificate of title is rather to be ascertained by a consideration of the following well-recognized legal principles.

The rule in the purchase of land is caveat emptor. In the absence of an agreement by the vendor to furnish an abstract or certifi-

cate of title it is incumbent upon the purchaser to provide the same, and to satisfy himself as to the condition of the title. *Easton v. Montgomery*, 90 Cal. 307, 27 Pac. 280, 25 Am. St. Rep. 123. The object of an abstract is to benefit the purchaser and to enable him or his counsel to pass more readily upon the sufficiency of the title. *Kane v. Rippey et al.*, 22 Or. 296, 23 Pac. 180; *Taylor v. Williams*, 2 Colo. App. 559, 31 Pac. 504. In the case last cited it was further held that a provision for the delivery by the vendor "of warranty deed conveying clear title with abstract" was not complied with by proof that the title was in fact complete and perfect. The court held that the contract was to furnish a certain abstract, and not merely good title. *Smith v. Taylor*, 82 Cal. 538, 23 Pac. 217, is another case of the same character. The contract called for an abstract of title which would show good title. The vendor furnished an abstract of title which showed defects. Upon the trial he claimed the right to show that the claims of persons appearing in the abstract which constituted the apparent defects were groundless. The court held that, under the contract there in question, proof of the actual condition of the title was inadmissible to show compliance with the stipulation that the abstract should show good title. In *Kane v. Rippey*, supra, the contract provided that the vendor should convey "in fee simple, clear of all incumbrances, by a good and sufficient warranty deed and abstract of title." The court held that by this stipulation the vendor agreed to convey a good title free from all incumbrances whatsoever, and to furnish an abstract of such title, and that the abstract which was furnished was admissible in evidence, not, however, for the purpose of proving title, but to show the condition of the abstract itself. From these cases it is apparent that the covenants for good title and for abstract of title are not interdependent.

As to whether or not any abstract of title shall be required is purely a matter of contract between the parties. Where the vendor agrees to the purchase "with abstract showing good title," this refers to record title only. However, the contract sued upon in *Moot v. Business Men's Ass'n*, 157 N. Y. 201, 52 N. E. 1, 45 L. R. A. 666, provided for a search as to the actual title and not as to the record title of the property in question. It is obvious that the nature and scope of the certificate of title is purely a matter of agreement. In the instant case the parties expressly stipulated that the vendor should not only execute and deliver to the vendee "a good and sufficient deed of grant conveying said land," but also deliver to the vendee "a good and sufficient certificate of title issued by the Ti-

tle Insurance & Trust Company showing title to said property vested in the party of the first part free from all incumbrances made, done, or suffered by said first party." The purpose of the latter requirement for a certificate of title was to relieve the vendee from the necessity of investigating the public records of the county concerning the existence of any incumbrances "made, done, or suffered by the vendor." As to all other incumbrances, however, the vendee impliedly agreed to make his own investigation, and the rule caveat emptor applies. In our endeavor to discover the intention of the parties another fact worthy of consideration, and one which can hardly be in doubt, is that the vendee would not have signed a contract to this purchase lot, being an ordinary residence lot 50 by 130 feet, with the expectation and understanding that the vendor might only convey to him a lot 50 by 70 feet. If this is true, unless the language of the contract necessarily requires such a construction, a court of equity should not interpret it in such a manner as to force the vendee to accept a piece of property which he obviously had no intention of buying. I conclude that the provision of the contract concerning the furnishing of a certificate of title does not relieve the vendor from the obligation to supply "a good and sufficient deed of grant conveying said land," which means that the vendor must have good and sufficient title, one complete and perfect for alienation; that although the provision concerning the certificate of title may have been complied with by the vendor, the stipulation to execute and deliver a good and sufficient deed of grant conveying the land required the vendor to possess and tender a good and sufficient title. *Easton v. Montgomery*, 90 Cal. 307, 27 Pac. 280, 25 Am. St. Rep. 123, and *Whittier v. Gormley*, 3 Cal. App. 489, 86 Pac. 726. The pendency of the condemnation proceeding, the lis pendens, and the order of the court giving the flood control district possession of the strip being condemned are clearly such defects of title as to violate the agreement in that respect. If authority is needed for this proposition, *Prentice v. Erskine*, 164 Cal. 446, and *Koshland v. Spring*, 116 Cal. 689, 48 Pac. 58, supply it. Appellant attempts to distinguish these cases from the one at bar upon the ground that the defects in the title existed at the time of the execution of each of the contracts. The vendor having contracted to deliver a good title, no reason is suggested, nor do we perceive any to exist, relieving the vendor from a violation of his covenant because of the fact that such violation is due to an occurrence taking place subsequent to the time that the contract was executed.

57 Cal. App. 667

Ex parte AJURIA et al. (Cr. 636.)

(District Court of Appeal, Third District, California. May 13, 1922.)

1. Municipal corporations — 636—Jurisdiction over person can be acquired by consent of defendant.

Where the court had jurisdiction over the subject-matter of a prosecution for violation of a city ordinance, it could acquire jurisdiction of the person of defendant by his consent, or by his failure to object to such jurisdiction in time.

2. Arrest — 63(3)—Officers can arrest without warrant for possession of liquors in their presence.

The unlawful possession of alcoholic liquors is a continuing public offense, so that a peace officer may arrest without a warrant a person having possession of such liquor in the immediate presence of the officer.

3. Criminal law — 394—Evidence obtained by unlawful seizure is admissible.

Even though a search of defendants' premises without a warrant was unlawful, the evidence of possession of liquors so unlawfully obtained was admissible against defendants.

4. Arrest — 63(3)—Officers may make arrest for offense in their presence, though unlawfully on the premises.

The fact that officers were unlawfully on the premises of defendant does not divest them of their statutory authority to arrest for an offense committed in their presence while they were there.

Application by Lucio Ajuria and another for writ of habeas corpus, prayed to be directed to the sheriff of Yuba county to secure their release from custody, after conviction of a violation of an ordinance of the city of Marysville prohibiting the possession of intoxicating liquors. Writ denied.

W. E. Davis, of Marysville, for petitioners.

FINCH, P. J. The petitioners were convicted of the violation of an ordinance of the city of Marysville and sentenced to pay fines and to be imprisoned in the county jail. They herein seek their discharge upon a writ of habeas corpus. The petition does not set out the terms of the ordinance or state the offense of which the petitioners were convicted, other than that it was a misdemeanor. It may be inferred from the facts alleged, however, that they were found guilty of having wine in their possession contrary to the terms of the ordinance.

[1] It is alleged that the police officers unlawfully and without a search warrant entered in the nighttime and searched the defendants' premises, and discovered there a barrel containing several gallons of wine;

that thereupon, without a warrant and without a complaint having been filed charging the defendants with the commission of any offense, the officers arrested them and took them to the police station; that three days later a complaint was filed charging the defendants with the misdemeanor of which they were later convicted; that no warrant of arrest was ever issued out of the police court or served upon the defendants, and that by reason of the failure to so issue and serve a warrant the police court did not acquire jurisdiction of the persons of defendants; and that thereafter the defendants were tried and convicted. In his points and authorities, counsel for petitioners states that on their arrest they were released on bail; but the petition does not so allege. It does not appear that petitioners made any objection to the jurisdiction of the police court at any stage of the proceedings. There can be no contention that the court did not have jurisdiction of the offense charged. Jurisdiction of the offense cannot be acquired by consent, but "everywhere jurisdiction of the person of the defendant may be acquired by consent of the accused or by waiver of objections. If he fail to make his objection in time, he will be deemed to have waived it. He cannot, for instance, raise such a question for the first time in the appellate court." 8 R. C. L. 96; 16 C. J. 174.

[2, 3] It is contended that the officers were not authorized to make the arrest without a warrant. A peace officer may make an arrest without a warrant for a public offense committed in his presence. The unlawful possession of alcoholic liquors is a continuing offense. The defendants were in possession of the wine in the immediate presence of the officers. It is not perceived why the officers were not as fully authorized to make the arrest without a warrant as they would have been had they seen the defendants on a street corner with the wine in their possession. *Jenkins v. State*, 4 Ga. App. 859, 62 S. E. 574. The search of the premises without a warrant was unlawful, but the evidence so unlawfully obtained was admissible against the defendants. *People v. Mayen* (Cal. Sup.) 205 Pac. 435.

[4] For like reasons had the officers may have been unlawfully on the premises could not divest them of their statutory authority to arrest for an offense committed in their presence while there. Petitioners rely on *People v. Howard*, 13 Misc. Rep. 763, 35 N. Y. Supp. 233, and *People v. James*, 11 App. Div. 609, 43 N. Y. Supp. 315, in support of their contention that a conviction cannot be upheld where the arrest was made, without a warrant, for a misdemeanor not committed in the presence of the arresting officer. In the first case, decided by the

Court of Special Sessions of Albany county, the objection to the court's jurisdiction was made and sustained on the arraignment of the defendant. In the other case, no information was filed and no warrant of arrest issued. In the case of *People v. Park* (Erie County Court) 92 Misc. Rep. 369, 156 N. Y. Supp. 816, where the defendant was arrested, without a warrant, for a misdemeanor not committed in the presence of the arresting officer, the court reviewed the cases cited by petitioners and many others and affirmed the judgment, holding that the court acquired jurisdiction of the defendant when she was brought before it charged with the offense, regardless of the illegality of the arrest. It may be further stated that in that case objection to the court's jurisdiction was made at the time of the trial. See, also, *People v. Pratt*, 78 Cal. 345, 20 Pac. 731, and *Ex parte Clark*, 85 Cal. 203, 24 Pac. 726.

The petition for the writ is denied.

We concur: BURNETT, J.; HART, J.

189 Cal. 799

Ex parte AJURIA et al. (Cr. 2472.)

(Supreme Court of California. May 22, 1922.)

1. Habeas corpus ☞85(1)—Complaint charging offense not brought before Supreme Court is presumed to have been sufficient.

Where the complaint on which applicants for writ of habeas corpus were tried and convicted is not presented to the court to which application is made, it is presumed that it sufficiently charged the offense.

2. Intoxicating liquors ☞17—City ordinance making unlawful possession of intoxicating liquors is valid.

A city ordinance declaring it unlawful for any person to have in his possession any intoxicating liquors is valid.

3. Criminal law ☞562—Conviction for possession of liquors is not void because liquors were seized without warrant.

A conviction of possession of intoxicating liquors contrary to a city ordinance is not void, because the liquor was found on defendant's premises without a warrant to search such premises having previously been obtained.

Application by Lucio Ajuria and another for a writ of habeas corpus, prayed to be directed to the sheriff of Yuba county to secure the release of petitioners from custody, after conviction of violation of an ordinance of the city of Marysville prohibiting the possession of intoxicating liquor. Writ denied. See, also, 207 Pac. 515.

W. E. Davies, of Marysville, for petitioners.

PER CURIAM. The petitioners are imprisoned after conviction upon a charge of violating an ordinance of the city of Marysville declaring it unlawful for any person to have in his possession any intoxicating liquors.

[1, 2] The complaint on which they were convicted is not presented to us, and we must therefore presume that it sufficiently charges the offense. We have heretofore had similar attacks made upon local ordinances of this character, and our decisions therein are against the petitioners on all the points presented in this case with relation to the validity of this ordinance. See *In re Polizzotto* (Cal. Sup.) 205 Pac. 676; *People v. Collins* (Cal. App.) 202 Pac. 344; *People v. Capelli* (Cal. App.) 203 Pac. 837; *Ex parte Kinney* (Cal. App.) 200 Pac. 967, and *Ex parte Volpi* (Cal. App.) 199 Pac. 1090.

[3] The claim that the judgment is void because the intoxicating liquor was found on the premises without previously having obtained a search warrant for the discovery thereof is answered by the decision in *People v. Mayen* (Cal. Sup.) 205 Pac. 435. On the authority of these cases the petition is denied.

SHAW, C. J., and WILBUR, SHURTLIFF, LAWLOR, SLOANE, and LENNON, JJ., concur.

189 Cal. 100

RAMSAY v. RODGERS et al. (S. F. 10220.)

(Supreme Court of California. June 8, 1922.)

1. Appeal and error ☞631—Motion to dismiss appeal denied, where clerk's typewritten copy of judgment roll had been filed.

Where appellant had filed the clerk's typewritten copy of the judgment roll, a motion to dismiss the appeal was denied, since, under Code Civ. Proc. §§ 950, 953, a clerk's certificate is ordinarily a sufficient authentication, and, as printing of the record is not necessary under section 953c, where prepared under section 953a, as amended in 1915, and the latter section, in providing that a transcript of the proceedings made by the official reporter and authenticated by the trial judge becomes a portion of the judgment roll, requires only the proceeding at the trial to be so authenticated and prepared.

2. Appeal and error ☞672 — Judgment roll held sufficient record for review.

The judgment roll alone is a sufficient record for the review of all rulings which appear thereon and of the sufficiency of the pleadings and findings to support the judgment.

In Bank.

Appeal from Superior Court, City and County of San Francisco; E. P. Shortall, Judge.

Action by T. H. Ramsay against Elizabeth A. Rodgers and others. Judgment for plaintiff, and defendants appeal. On motion to dismiss appeal. Motion denied.

John E. Bennett, of San Francisco, for appellants.

Creed, Jones & Dall, of San Francisco, for respondent.

SHAW, C. J. The respondent moves to dismiss the appeal on the ground that no transcript, prepared and authenticated as required by law, has been filed within the time allowed by the rules of this court.

[1] Prior to the filing of the notice of motion to dismiss the appeal, the appellants had procured from the clerk of the superior court and had filed in this court a transcript of the papers included in the judgment roll, duly certified by the clerk of said superior court. We are of the opinion that, under the rules of court and the law as they now exist, this is a sufficient compliance with the law and with our rules. Section 950 of the Code of Civil Procedure provides that, on appeal from a final judgment, the appellant must furnish the court with a copy of the notice of appeal, the judgment roll, and any bill of exceptions upon which he relies. Section 953 provides that the copies provided for in section 950 must be certified to be correct by the clerk or the attorneys. A certificate of the clerk is therefore a sufficient authentication. Our rules require the printing of the judgment roll, except when it is prepared under section 953a. Section 953a, as amended in 1915, provides that any person desiring to appeal from any judgment may, in lieu of a bill of exceptions "or for the purpose of presenting a record on appeal from any appealable judgment or order, or for the purpose of having reviewed any matter or order reviewable on appeal from final judgment," procure a transcript of the proceedings had at the trial, to be made up by the official reporter, and to be settled and authenticated by the judge of the superior court, and that, when so settled and allowed, such transcript shall "become a portion of the judgment roll." The portions of the section first quoted authorizes a record under the provisions of section 953a for the purpose of presenting an appeal from the judgment.

[2] The judgment roll alone is a sufficient record for the review of all rulings which appear thereon and of the sufficiency of the pleadings and findings to support the judgment. Section 953c provides that, on appeals from judgments, if the appellant avails himself of the provisions of section 953a, the clerk, within 10 days after the preparation

of the record, must transmit it to the court to which the appeal is taken, and that no transcript thereof need be printed. It will be observed that section 953a does not require the judge of the superior court to settle and certify the judgment roll, nor does it require the official reporter to make a typewritten record thereof, in pursuance of the notice to be given thereunder. His transcript includes only the testimony offered or taken, evidence offered or received, and the rulings and other proceedings on the trial, but does not include the pleadings, finding, or judgment. The preparation and certification of those documents are not provided for, but are to be prepared in accordance with section 950 and certified in accordance with section 953. Section 953c, however, provides that, on appeals from judgments and other appealable orders, when the record is prepared under section 953a, it must be filed and need not be printed.

In the present case the appellants proceeded under section 953a, but failed to procure a reporter's transcript, and succeeded only in getting the clerk's transcript of the judgment roll. Formerly, under section 953a before it was amended so as to include the passage first above quoted, it had been decided that a judgment roll alone could not, under our rule, be presented in typewriting. *Harpold v. Slocum*, 168 Cal. 364, 143 Pac. 609; *Lapique v. Plummer*, 33 Cal. App. 317, 165 Pac. 56. We think that, by fair intendment, the Code as it now stands allows the filing of a typewritten transcript of the judgment in cases where an attempt has been made to proceed under section 953a and the appellant has failed to procure the reporter's transcript of the proceedings and evidence at the trial, and that the former decisions do not apply to the present rules and statute. Such has been the consistent practice ever since the amendment of section 953a in 1915. The point was expressly so decided by this court in denying a petition for rehearing after the decision of the District Court of Appeal in *McKinnell v. Hansen*, 34 Cal. App. 76, 81, 167 Pac. 887, where we held that, under rule VII, subdivision 2, an appeal on the judgment roll, prepared under section 953a, may be presented on a typewritten transcript. See, also, *Beckett v. Stuart*, 35 Cal. App. 797, 171 Pac. 107.

The filing of the typewritten record in the present case, prior to the giving of the notice to dismiss the appeal, removes the ground upon which the notice to dismiss is founded.

The motion to dismiss the appeal is denied.

We concur: LAWLOR, J.; LENNON, J.; SLOANE, J.; SHURTLEFF, J.; WILBUR, J.; WASTE, J.

189 Cal. 31

PEOPLE v. SMITH. (Cr. 2404.)

(Supreme Court of California. May 26, 1922.)

1. Witnesses  405(2)—Denial by defendant he had been employed as card dealer held collateral in prosecution for causing delinquency.

In a prosecution for causing delinquency of a minor by dealing cards to him in a gambling game, the question, asked defendant on cross-examination, whether he had previously been employed as a card dealer by the same club, while it was at a different location, related to a matter which the prosecution could not prove as original evidence, so that it was error to permit the prosecution to contradict defendant's denial.

2. Criminal law  1186(4)—Immaterial evidence admitted to impeach defendant held not prejudicial; "miscarriage of justice."

Where defendant admitted he had followed gambling for livelihood, and had dealt black jack in another state, but denied dealing to a minor, error in permitting the state to contradict his denial that he had been employed as a black jack dealer by the same club at a different location was not so prejudicial that an affirmation of the conviction would result in a miscarriage of justice, within Pen. Code, §§ 960, 1258, 1404, and Const. art. 6, § 4½.

3. Criminal law  1172(6)—Witnesses  248(2)—Instruction on alibi held not required by evidence, so that error therein was harmless; answer held not responsive to question.

Where the only evidence to support an alibi was defendant's statement, in answer to a question whether he dealt black jack to the prosecuting witness on the date in question, that he never dealt black jack in the house, which was not responsive to the question, there was no evidence to show alibi, so that error in an instruction cautioning the jury against a fabricated defense of alibi was not prejudicial.

4. Criminal law  1186(4)—Mistake in commitment as to name of minor, whose delinquency was caused is merely clerical.

Where defendant was charged with contributing to the delinquency of James E. Edmonds, the fact that the order of commitment or preliminary examination gave the name of the minor as James E. Edwards, was purely a clerical error, insufficient to justify a reversal on the ground that the information did not charge the offense set out in the order of commitment, as required by Pen. Code, §§ 809, 872.

5. Criminal law  1170(2)—Exclusion of testimony witness had been mistaken in identification of another as associated with defendant held not prejudicial.

In a prosecution for contributing to juvenile delinquency, where the minor had identified defendant as one who dealt cards to him in gambling game, the exclusion of evidence, offered by defendant, that the minor had identified as a participant in the game another who was not in the city at the time was not prejudicial to accused, where the minor was asked at the trial of accused whether he had seen that

other at the place in question, and had replied that he did not suppose so, because the other had been acquitted of ever having been there.

6. Criminal law  692—Erroneous admission of conclusion of witness held waived by failure to cross-examine thereon.

Error in permitting a witness for the prosecution to state his conclusion that detectives who shadowed him were employed by defendant, over defendant's objection, was waived, where the court, in admitting the evidence, suggested that defendant could cross-examine the witness as to the basis for the conclusion, and defendant failed to act on the court's suggestion.

7. Criminal law  1169(2)—Admission of evidence that place in which defendant was employed was gambling house held not prejudicial.

The admission of evidence that the club in which defendant was employed had the reputation of being a gambling house, if erroneous, was not prejudicial to accused, where the prosecuting witness testified he was directed to that club by a taxi driver, from whom he inquired where he could find a game, and was admitted without identification and without a membership card, and defendant admitted he had formerly been employed by and was a frequenter of the club, so that he must have had knowledge of its character.

8. Infants  20—Evidence in prosecution for contributing to delinquency held admissible to show knowledge of character of club wherein minor was allowed to gamble.

In a prosecution for contributing to juvenile delinquency by dealing cards to a minor in a gambling game, evidence that the club by which defendant was employed had been raided by the police as a gambling house, while it was maintained at another location, was competent to show defendant's knowledge of the character of the club, which was the same organization, notwithstanding the change of location.

9. Infants  20—Evidence held to sustain verdict finding defendant contributed to delinquency of minor.

In a prosecution for contribution to the delinquency of a minor, evidence that defendant dealt cards and sold chips to the minor in a gambling game, and talked with him during the game, though he did not ask the minor to play or gamble, is sufficient to sustain a conviction, notwithstanding an instruction to find defendant not guilty if the minor went on the premises without inducement or persuasion by defendant and engaged in gambling there.

10. Criminal law  361(3)—Evidence of defendant's preparations to entrap prosecuting witness in attempting to bribe held inadmissible.

Where prosecuting witness had visited the defendant on several occasions before the trial, and claimed defendant was attempting to bribe him to leave the jurisdiction, while defendant claimed the witness was attempting to extort blackmail, evidence that on one occasion, when the witness was expected at defendant's home, defendant had photographers present to take

pictures showing the witness entering the house and leaving it, and also had a detective and stenographer to report the conversation, though it would have shown defendant's suspicion of the witness' purpose, had no bearing on the witness' frame of mind, and was properly excluded.

11. Infants — 12—Provision of Juvenile Court Law, making it a misdemeanor to contribute to delinquency, is constitutional.

The provision of Juvenile Court Law, § 21, making it a misdemeanor to commit any act which causes or tends to cause a minor to become such a person as is described in section 1, subd. 11, of the act, is constitutional.

In Bank.

Appeal from Superior Court, City and County of San Francisco; Harold Louderback, Judge.

Samuel Smith was convicted of causing a minor to perform an act or follow a course of conduct which would tend to cause him to become a delinquent, and he appeals. Affirmed.

Frank J. Murphy, of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and John H. Rioridan, Deputy Atty. Gen., for the People.

LAWLOR, J. The defendant, Samuel Smith, appeals from a judgment of conviction of a misdemeanor triable in the superior court, in having violated section 21 of the Juvenile Court Law (Stats. 1915, p. 1225), to the effect that any one who shall commit any act which causes or tends to cause any minor under the age of 21 years, among other things, to become such a person as is described in subdivision 11 of section 1 of said act, or any person who by any act, threat, command, or persuasion induces or endeavors to induce any such minor to perform any act, to follow any course of conduct, or to so live as would cause or tend to cause him to become or remain a person coming within the provisions, among others, of said subdivision 11, shall be guilty of such a misdemeanor.

Appellant was charged by information with the violation of this statute, in that he induced, persuaded, and encouraged James E. Edmonds, then of the age of 16 years, to frequent a public gambling house, to wit, the Thirty-Third Assembly District Club, at 32 Turk street, in the city and county of San Francisco, and there engage in the playing of cards and other games of chance for money. It was alleged these acts of appellant tended to and did encourage Edmonds to become such a person as is described in subdivision 11 of section 1 of the Juvenile Court Law, to wit, a person under the age of 21 years, who is leading, or is in danger of leading, an idle, dissolute, and immoral life.

It appears that Edmonds, whose home was in New Orleans, left that city and came to San Francisco, unaccompanied by and without the consent of his parents. His first visit to the Thirty-Third Assembly District Club was on the night of October 28, 1920; he having been directed there by a taxicab driver. He was admitted to the club after he told the doorkeeper he was 22 years old. Edmonds testified that on the occasion of his first visit appellant, who was a member of the club, was present, but that no conversation passed between them. The two succeeding nights Edmonds again visited the club, and, according to his testimony, appellant was dealing black jack there on both those nights, in which games Edmonds played, and during which he talked to appellant. Edmonds also returned to the club on the nights of October 30 and November 1, but did not remember seeing appellant on those visits. He testified that he played cards on each of the five nights, and that he lost in all something over \$700. Appellant denied he was employed by the Thirty-Third Assembly District Club at the times Edmonds visited it, and that he ever dealt black jack at 32 Turk street.

1. We shall first consider appellant's contention that the court erred in allowing him, after he had testified in his own behalf, to be impeached by another witness concerning asserted collateral matter brought out on cross-examination. We quote from appellant's testimony on his direct examination:

"Q. Have you ever been employed in a place where they played cards for money? A. I have. Q. Where? A. In Nevada—different states. Q. Have you ever been employed in San Francisco? A. In clubrooms here; yes, sir. Q. Where? A. 225 Ellis street [the former location of the Thirty-Third Assembly District Club]."

On cross-examination he testified:

"Q. Isn't it a fact that you dealt black jack in the Thirty-Third Assembly District Club when it was located at 325 Ellis street? A. 225 Ellis? Q. When it was on Ellis street? A. No, sir. * * * Q. And you now say under oath, Mr. Smith, that while you were working for the Thirty-Third Assembly District Club, when it was located on Ellis street, that you did not deal black jack? A. No sir. * * * Q. How long previous to July of 1920 [when it moved to 32 Turk street] had it been that you were employed by this Thirty-Third Assembly District Club? A. Possibly two years."

None of this testimony was objected to. The following testimony was given in rebuttal by John C. Miles, a police officer:

"Where did you first see him [appellant]? A. 225 Ellis street. Q. When? A. Oh, various times, and often between 1917 and 1918. * * * Q. Do you know what his occupation was there? A. Why that of a card dealer.

* * * Q. What kind of a game was he dealing?

"Mr. Murphy: I will object to that upon the ground it is calling for impeaching testimony upon a collateral matter.

"The Court: I will allow the question. A. I have seen him dealing California stud poker and black jack; that is all."

The court had previously stated in regard to the admission of the impeaching testimony:

"I am willing to have this go in, provided, first, that it is on the matter of occupation, and that the witness knows that it is on the matter of occupation."

In *People v. Chin Mook Sow*, 51 Cal. 597, 600, it was said:

"It is a well-settled rule that a witness cannot be cross-examined as to any fact which is collateral and irrelevant to the issue, merely for the purpose of contradicting him by other evidence, if he should deny it, thereby to discredit his testimony. And if a question is put to a witness on cross-examination which is collateral or irrelevant to the issue, his answer cannot be contradicted by the party who asked him the question; but it is conclusive against him. But when the question asked on cross-examination calls for a response in respect to a matter which the party asking the question would have a right to prove as an independent fact, the rule does not apply."

See, also, *People v. Dye*, 75 Cal. 108, 16 Pac. 537.

[1] It was held in *People v. Niles*, 44 Mich. 606, 7 N. W. 192, that, unexplained, testimony concerning the occupations of a defendant in a criminal case was irrelevant. In *State v. Blassengame*, 132 La. 250, 61 South. 219, the court held that the circumstances of a case might make such evidence relevant. It is true that counsel for appellant, in the case at bar, brought up the subject of appellant's occupations, evidently to present him in the most favorable light before the jury. In his opening statement he had said he would show appellant had been engaged in many occupations—"all ordinarily referred to as legitimate hard work, and that he has also engaged in playing cards, following an injury, after which he has spent much of his time as a card player," and that "he was not employed at any time in the Thirty-Third Assembly District Club." Since appellant brought up the subject of his occupations, and testified on direct examination that he had been employed at 225 Ellis street, it was proper on cross-examination to question him as to the nature of such employment. In fact, this was not objected to. But it does not follow that such evidence was relevant, and not collateral. It has not been made to appear that the testimony as to his past occupations was relevant to the main issue, or was such a matter as the prosecution might have proved as an independent

fact as a part of its case in chief. In our opinion, evidence that appellant, two years before the commission of the crime in question, was employed as a black jack dealer, even by the same employer, was but proof of a prior wrongful act, unconnected with the crime charged. Such evidence would ordinarily not be relevant (Jones on Evidence, vol. 1, § 143), nor a proper subject of impeachment (*Steen v. Santa Clara Valley, etc., Co.*, 134 Cal. 355, 66 Pac. 321), and it has not been shown to be relevant to any issue in this case. The ruling was therefore erroneous.

[2] It remains for us to consider whether an affirmation of the judgment, in view of this error, would result in a miscarriage of justice. An examination of the record satisfies us that the verdict was not affected by this ruling. It is plain from the evidence that the jury believed Edmonds told the truth when he testified as to appellant's connection with two of the games in which he participated, and also that such conduct on the part of appellant constituted a violation of the statute. Appellant admitted that he had followed gambling for a livelihood, that he had dealt black jack, denying, however, that he had done so in this state. It must be assumed, from the evidence as a whole and the adverse verdict, that the jury did not accept this qualification, but believed from all the circumstances that he dealt black jack for the Thirty-Third Assembly District Club, and that he did so on the occasions testified to by Edmonds. Appellant's testimony was in direct conflict with that of Edmonds, and when it is considered that the latter's testimony was vigorously attacked from every angle, and that no effort was spared to impeach it, it cannot reasonably be concluded that the item of impeaching testimony prejudicially affected the jury on the point whether appellant dealt black jack at 32 Turk street when Edmonds was present. Pen. Code, §§ 960, 1258, 1404; Const. § 4½, art. 6.

[3] 2. Appellant's next claim is that the court erred in giving the following instruction on the subject of alibi:

"The defendant could not have been in two places at the same time, and in this contradiction of witnesses the jury have to determine for themselves where lies the truth. In so judging they will take into consideration the appearance and apparent candor and fairness of the respective witnesses, the probability of their statements, its coincidence with other facts or features of the case which they may deem established, and, generally, those rules of ordinary experience and general observation by which intelligent men decide as to controverted propositions of fact. The effect of an alibi, when established, is like that of any other conclusive fact presented in a case, showing, as it does, that the party asserting it could not have been present at the time of the commission of the

crime alleged in the indictment, and therefore did not participate in it—is, when credited, a defense of the most conclusive and satisfactory character.

"The fact, however, which experience has shown, that an alibi as a defense is capable of being, and has been occasionally, successfully fabricated; that, even when wholly false, its detection may be a matter of very great difficulty; and that the temptation to resort to this as a spurious defense may be very great, especially in cases of importance—these are considerations attendant upon this defense which call for some special suggestions upon the part of the court.

"These are that, while you are not to hesitate at giving this as a defense full weight—that conclusive effect to which, when established, it is justly entitled, either as entirely satisfying you of the innocence of the defendant, or as creating a reasonable doubt, which entitles the defendant to an acquittal—still you are to scrutinize the testimony offered in the support of an alibi with care, that you may be satisfied that a fabricated defense is not being imposed upon you."

This instruction, although the same as that approved in *People v. Lee Gam*, 69 Cal. 552, 11 Pac. 183, was disapproved in *People v. Levine*, 85 Cal. 39, 22 Pac. 969, 24 Pac. 631, and *People v. Lattimore*, 86 Cal. 403, 24 Pac. 1091, and in *People v. Roberts*, 122 Cal. 377, 55 Pac. 137, a similar instruction was held to be reversible error, upon the grounds that it constituted a charge upon the weight of the evidence, and that it cast the burden of proof upon the defendant. However, we are of the opinion that the state of the evidence in the case at bar renders the error harmless. Appellant correctly states that—

"It must be remembered that the appellant was the only witness who testified as to the alibi in this case."

An examination of the transcript shows that, although he did state he had never seen Edmonds prior to his arrest, his only testimony approaching the subject of alibi was as follows:

"Q. From the 20th day of October to the 2d day of November, were you employed at the Thirty-Third Assembly District Club? A. I was not. Q. Were you there, on any of those days above mentioned, inclusive, dealing black jack? A. I never dealt black jack in the house."

The answer given is not responsive to the question, and does not tend to show whether appellant was or was not present at the time and place of the alleged commission of the crime. The instruction was therefore not applicable, and hence appellant was not prejudiced thereby. *People v. Walsh*, 43 Cal. 447.

[4] 3. Appellant assigns error to the refusal of the trial court to set aside the information on the ground that it did not charge the offense set out in the order of commitment. Pen. Code, §§ 809, 872; *People v. Lee Look*, 137 Cal.

590, 70 Pac. 660; *People v. Nogiri*, 142 Cal. 596, 76 Pac. 490; *People v. Parker*, 91 Cal. 91, 27 Pac. 537. The complaint was filed and the preliminary examination conducted in the juvenile department of the superior court, and charged an offense of contributing to the delinquency of James E. Edmonds. The order of commitment gave the name of the minor as James E. Edwards, and the information as James E. Edmonds. At the arraignment, on December 12, 1920, appellant moved to set aside the information, and the hearing was continued until December 21; the court directing the district attorney to procure an amendment of the order of commitment. On December 20, the committing magistrate, by a minute order, amended the order of commitment to conform to the information as to the name of the minor, reciting that the discrepancy was due to a clerical error. The amended order was presented to and filed in the trial court, which, on December 21, 1920, denied appellant's motion to dismiss the information. It is not necessary to determine whether this mode of correcting a purely clerical error is regular or not. The mistake was one of those defects or errors in pleading which are declared to be insufficient to justify a reversal or a new trial by the sections of the Constitution and the Penal Code already referred to.

[5] 4. The next contention of appellant is that the court erred in refusing to permit the defense to introduce evidence tending to prove that Edmonds was mistaken in his identification of one James Young, who gave the name of James Thomas, at the preliminary examination of Young for the same offense as that charged against appellant. Young was one of the persons Edmonds stated to have been present at the time he visited the Thirty-Third Assembly District Club. Upon cross-examination Edmonds was asked the following question, to which an objection was sustained:

"Q. Is it not a fact that upon the preliminary examination in the case of *People v. Thomas* you identified Thomas as one of the participants in the game in which you claim Smith was dealing, * * * that you also identified him as the man that you pointed out to Mr. Floyd on the night of November 6, 1920, and is it a fact now that you were mistaken as to your identification of Mr. Thomas, both as to being a participant in the game and as having identified him to Mr. Floyd on the night of November 6, 1920?"

James Young, testifying in behalf of appellant, was asked on direct examination:

"Well, did James E. Edmonds identify you as a person who was present at the Thirty-Third District Club between October 28 and November 1, 1920?"

An objection to this question was also sustained. The district attorney objected, upon the grounds that it was incompetent,

immaterial, irrelevant, and not proper cross-examination, and that the inquiry was going too far afield; that, if the testimony were allowed, the prosecution would be entitled to bring in a number of witnesses to testify that Edmonds had identified all the persons involved in the several charges. Counsel for appellant offered to prove that—

"This witness [Edmonds], in a hearing before Judge Murasky, in the case of *People v. Thomas*, charged with contributing to the delinquency of a minor, positively, and without equivocation, identified the defendant in that case, Thomas, as having participated in the very games in which this defendant is charged with having played, and we will then undertake to prove, and do now undertake to prove that this witness was absolutely wrong, and that Thomas, the man whom he then positively identified, was in San Diego at the time the alleged game took place."

Assuming that the inquiry should have been allowed, it cannot be held the rulings were prejudicial. The following testimony of Edmonds shows that he did not insist upon this trial that Young was one of the persons he saw at the Thirty-Third Assembly District Club:

"Q. Now, I will ask you if you know a man known as James Thomas? A. I do. Q. And where did you first meet him? A. I first saw him in the preliminary hearing at which he was tried. Q. Did you ever see him in the Thirty-Third District Club? A. I don't suppose so; he was acquitted of ever being there."

Moreover, Edmonds was subjected to a searching examination as to the correctness of his identification of appellant. The excluded testimony would therefore have been but additional to the same point.

[6] 5. It is insisted the court erred in permitting Edmonds to testify on redirect examination, over the objection that the evidence was incompetent, irrelevant, and not binding on appellant, that he knew that while he was in New Orleans, and while he was on his way to San Francisco to attend the trial, he was being shadowed by detectives in the employ of appellant, on the ground that—

"There was no evidence in the case to show that such alleged detectives were employed by the defendant, or that the defendant had any knowledge of such employment. Testimony of this character has always been held to be inadmissible"—citing *People v. Dixon*, 94 Cal. 256, 29 Pac. 504; *People v. Choy Ah Sing*, 84 Cal. 276, 24 Pac. 379.

It was developed on the cross-examination of Edmonds that, after returning from New Orleans, he went to see appellant's counsel, and also that he had telephoned to and called on appellant, and the latter claimed these communications were had for purposes of blackmail. The testimony in question was offered as tending to explain Edmonds' mo-

tive in having these communications; it being asserted by counsel for the people that—

"He was induced to go and see them by this very defendant himself, for the purpose of inducing or bribing him to leave the jurisdiction of this court after he arrived."

It may be conceded that, if the witness had any knowledge he was being shadowed by appellant's agents, he should have been asked to state the facts upon which he based his knowledge, rather than the conclusion itself. But the court, in admitting the testimony, said:

"It is open to re-cross-examination as to what the basis of his knowledge was, as to whether it was such knowledge as to justify his answer."

As the defense did not choose to act upon the suggestion of the court, we cannot hold, in the face of the judgment of conviction, that the witness did not have primary knowledge of the fact. Inasmuch as the defense did not inquire into the matter, the objection will be deemed to have been waived.

[7] 6. Appellant's next contention is that, on the ground it was hearsay, the court erred in admitting evidence to the effect that, at the times Edmonds visited the Thirty-Third Assembly District Club, the place had the reputation of being a gambling house. Even conceding this ruling to have been erroneous, appellant could not have been prejudiced by it. That the Thirty-Third Assembly District Club was a public gambling place might also have been inferred from Edmonds' testimony that he was first directed to the place by a taxicab driver, when he asked if the latter could "show me where there was a little game," and that he was admitted to the club without being known and without a membership card. In any event, no prejudice could have resulted from the admission of the testimony in question, for the purpose of showing appellant's knowledge of the character of the premises, for according to his own testimony he had formerly been employed by and was a frequenter of the club.

[8] 7. It is next claimed the court erred in receiving evidence that the police raided the premises at 225 Ellis street, the former location of the Thirty-Third Assembly District Club. This testimony is asserted to be erroneous on the grounds that it was incompetent, irrelevant, immaterial, not proper cross-examination, called for the opinion and conclusion of the witness, impeached and disgraced appellant in the eyes of the jury, and that the jury might have concluded that, inasmuch as appellant had once been an employee in a gambling club, it was probable he was engaged in a like employment at the time of the alleged commission of the crime for which he is now being prosecuted. Before the questions objected to were propounded, appellant had testified, without objec-

tion, that the Thirty-Third Assembly District Club was the same one that had been located at 225 Ellis street, and that he had worked in the club at that location. It also appears from his testimony that the character of the club had not materially changed since the time it occupied 225 Ellis street. Then he testified:

"Q. Don't you know, as a matter of fact, in 1918, while you worked there, and while you were in the place, the police raided it as a gambling institution, and carted everybody off to the city prison? * * *

"Mr. U'Ren: I just want to go into this man's knowledge as to the reputation of the place; isn't that the fact? A. I was there twice, on two different occasions, when the place was raided."

An objection to further evidence along the same line was sustained; the court announcing that the point was sufficiently covered by the testimony under review.

There was no error in the admission of this evidence. Although housed in a different location, the club was the same one in which Edmonds testified he had played cards for money. Appellant's knowledge of the character of the club was relevant, and testimony that he knew of its character while at one location tended to prove that he knew of it while at another.

[9] 8. It is insisted that the verdict is against law. The jury were instructed in effect that if they found that Edmonds frequently and without any inducement, persuasion, or encouragement upon appellant's part, went to the premises described in the information, and engaged in gambling, they must find appellant not guilty, and also that, if they found "no acts proven on the part of defendant which would induce" Edmonds to become or remain addicted to the habit of gambling, they must find appellant not guilty. It is argued that, as Edmonds testified that appellant never asked him to play or gamble, it was the duty of the jury under the above instructions to return a verdict of not guilty. However, from the record as a whole, and particularly from Edmonds' testimony that when he played black jack he bought chips from appellant to bet on the cards, that he talked to appellant during the game, and that appellant dealt for him occasionally, we cannot say there was not evidence upon which the verdict might have been predicated under the instructions.

[10] 9. Error is also assigned to the refusal of the court to permit evidence for appellant that he invited Edmonds to his apartment for the purpose of entrapment. The evidence shows that Edmonds visited the apartment, but while he claimed it was to get his money back and for the purpose of following up a suggestion of a bribe which he asserted was to be offered to persuade

him to leave the jurisdiction, appellant insisted it was for purposes of blackmail.

As tending to prove the latter contention, appellant offered to show that upon one occasion he had stationed a photographer outside the apartment house to get a picture of Edmonds entering and leaving it, and that a stenographer and a detective were stationed inside to report the conversation between Edmonds and appellant. However, upon that occasion Edmonds did not appear at all. It is contended by the Attorney General that such testimony would be irrelevant, immaterial, and self-serving. Conceding that the suggested preparations by appellant for Edmonds' visit might tend to prove his distrust of Edmonds, we do not see how they could tend to prove Edmonds' state of mind in going there. The ruling was proper.

[11] 10. The last contention is that—

"Section 21 of the Juvenile Court Law, as qualified and supplemented by subdivision 11 of section 1 of the same law, is unconstitutional and void."

In *People v. De Leon*, 35 Cal. App. 467, 170 Pac. 163, the constitutionality of the Juvenile Court Law was upheld, and a petition for a hearing of the cause in this court was denied. An examination of the petition for a hearing in this court shows that the question of the constitutionality of the act was raised therein and the subject fully presented. Appellant's contention is therefore without merit.

The judgment is affirmed.

We concur: SHAW, C. J.; LENNON, J.; WILBUR, J.; SLOANE, J.; SHURTLEFF, J.

189 Cal. 44

WEAKLEY v. MELTON. (S. F. 9693.)

(Supreme Court of California. May 29, 1922.)

1. Gifts — 49(1)—Evidence held sufficient to establish unconditional gift.

Testimony of a mother that the turning over to her by her son of a part of an inheritance from an uncle was without condition, and with the understanding that she would return what was left to him because she wanted him to inherit the balance, held to establish an unconditional gift.

2. Trusts — 49—Declaration of trust held to have been procured by "undue influence."

Where a son procured from his mother a declaration of trust for a sum which he had turned over to her, by representing that he desired the trust to prevent the sister from making trouble or from getting it after his mother was through with it, and the mother testified that she was greatly disturbed mentally at the time and did not hear distinctly when the declaration was read to her, and

that she did not want to sign it, *held*, that the declaration of trust was procured by undue influence as defined by Civ. Code, § 1575.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Undue Influence.]

3. Trusts ⚡49—Procurement of deed of trust after unconditional gift not justified as exercise of legal right.

Where a son made an unconditional gift to his mother of a sum of money, the subsequent obtaining by him of a deed of trust thereto could not be justified as the exercise of a legal right.

4. Compromise and settlement ⚡5(1)—Unsigned agreement attempting settlement of trust no defense to suit to vacate trust alleged procured by undue influence.

In a suit to vacate a trust, alleged procured by undue influence, a proposed, unsigned agreement undertaking to make final settlement, was not binding on any of the parties, and was at most an accord without satisfaction, and did not constitute a defense to the action.

In Bank.

Appeal from Superior Court, Santa Cruz County; Benj. K. Knight, Judge.

Action by Jennie E. Weakley against George L. Melton. From a judgment of the superior court, in an action to set aside trust to quiet title and recover on a promissory note, defendant appeals. Affirmed.

Lucas F. Smith, Lucas F. Smith, Jr., and Stanford G. Smith, all of Santa Cruz, for appellant.

A. W. Hare and Netherton & Johnston, all of Santa Cruz, for respondent.

LAWLOR, J. Plaintiff, Jennie E. Weakley, brought this action to have declared null and void a declaration of trust of real property, located in the city of Santa Cruz in favor of defendant, George L. Melton, and to have the record thereof canceled; to have her title to said property quieted as against defendant, and to recover \$2,900 alleged to be due to plaintiff on a promissory note, executed in her favor by defendant, together with costs. Judgment was entered in favor of plaintiff, granting all the relief prayed, and from that judgment defendant takes this appeal.

Respondent, a woman of advanced years, and appellant are mother and son. Respondent's first husband, appellant's father, died when the latter was about 3 years old. Thereafter respondent remarried, and a daughter, now Mrs. A. L. Munger, was born of the second marriage. Respondent worked and supported appellant until he was about 15 years of age. At that time he inherited between \$20,000 and \$30,000 from the estate of a paternal uncle. Respondent was ap-

pointed guardian of appellant's person and estate, in which capacity she acted until he came of age in 1892. After appellant attained his majority, he transferred to respondent the sum of \$9,000, she claiming that it was a gift and he asserting it was given in trust during her lifetime. This money she dealt with in her own name, but she always kept it separate from her second husband's property. On one occasion in 1896, appellant said to her:

"Dr. Workman told me I ought to have some writing to show I get this money after you are done with it. But I am not going to ask it of you."

In 1910 appellant wrote to respondent, explaining that he intended her to have the use of the money only during her life, and that upon her death, the money, or the property in which it had been invested, should revert to him. On September 5, 1911, appellant visited respondent at her home in Santa Cruz, which home consisted of a house and lot which respondent had purchased out of the \$9,000 she received from appellant. At that time respondent executed the following declaration of trust in appellant's favor, of the property constituting her home:

"Whereas, my son, George L. Melton, on or about the 6th day of April, 1892, did convey to me the sum of nine thousand dollars (\$9,000) to be held by me during the term of my natural life in trust for him, his heirs or assigns, this is to certify that said money is now invested as follows: [Her home described by street number, and a loan of \$3,800 to A. L. Munger]. Witnesseth: That said real estate with all and singular the rents, tenements, and hereditaments thereunto appertaining and said loan, together with accretions and interest due thereon and property or properties derived from said real estate or loan shall at the expiration of said trust be immediately placed in possession of said George L. Melton."

This declaration of trust appellant caused to be recorded, and is the one respondent seeks to have declared null and void by this action, on the ground it was obtained by undue influence. Appellant told respondent he desired the declaration of trust because he feared respondent's daughter, Mrs. A. L. Munger, would eventually receive part of the property covered by it.

According to the evidence, respondent became so nervous and distressed over having given appellant the declaration of trust that she began to break down physically. As a result, her son-in-law, A. L. Munger, endeavored to secure the release of the declaration of trust. At that time Munger owed respondent \$2,900 of the \$3,800 he had borrowed from her. He and appellant, who was at that time short of money, agreed that the \$2,900 should be paid to appellant through a bank in Fresno—he to assume the debt to

respondent—and, according to Munger, that a cancellation of the declaration of trust should be delivered through the same bank upon the making of the payment. The money was accordingly paid and the following document deposited with the bank:

"At the request of Jennie E. Weakley and for the sole purpose of enabling her to better enjoy the life interest in the property transferred to her as a life estate, I hereby surrender and authorize the cancellation on record of the acknowledgment of trust executed by Jennie E. Weakley on September 6, 1911, and recorded on that day in vol. 6 of Miscellaneous, page 247, Santa Cruz (California) County Records."

Appellant, on November 14, 1913, gave respondent his note for the \$2,900 loaned to him, upon which one cause of action in this suit is based. He regularly paid the interest on this note until November 14, 1916. Respondent was dissatisfied with the purported cancellation of the declaration of trust, so a proposed agreement, dated June 1, 1919, was drawn up between appellant, respondent, A. L. Munger and his wife, looking to the settlement of the entire matter. By its terms respondent was to convey to appellant the property covered by the declaration of trust, and surrender as paid the note of November 14, 1913. Appellant was to pay respondent the interest due on the note, and an allowance for her support of \$25 a month. The Mungers were to make her a like allowance. This attempt to adjust the matter failed, and respondent refused to enter into the proposed agreement.

Respondent then began this action to secure the cancellation of the declaration of trust, alleging in effect that appellant acted fraudulently in giving to respondent the authorization to cancel of record instead of surrendering the declaration of trust. The note was set out in *hæc verba*. Appellant in his answer alleged that the \$9,000 was given to respondent as a life estate only, the residue to revert to him on her death; denied that the declaration of trust was given under undue influence or that he acted fraudulently or deceived her in giving the authorization to cancel of record. Appellant further alleged that the \$2,900 was a part of the \$9,000 life estate; that he was only to pay interest at the rate of 8 per cent. per annum and not the principal, and that, on respondent's death, the note was to be surrendered to him. The court found:

That "after defendant arrived at the age of majority and after the accounts of the guardian had been settled, he made a gift to his mother of \$9,000. This gift was made by defendant to plaintiff as an outright gift and without reservation, exception, or limitation, and was accepted by plaintiff as such"; that "defendant secured the execution of said document [the declaration of trust] by said plaintiff while said plaintiff was in an extremely agitated and nervous condition, and through the exercise by

defendant of undue influence upon said plaintiff"; that "prior to the said delivery to the said Munger, as agent for plaintiff, of said purported cancellation of declaration of trust, it was understood and agreed between plaintiff and defendant that said instrument of trust should be thereby wholly canceled and that the cancellation received by her was intended to accomplish that end."

Appellant contends the evidence is insufficient to support these findings. It was also found that no part of the principal or interest of the note was paid; that the matters in dispute were never settled or compromised; and that the purported agreement of settlement was never signed by any one but appellant.

1. Appellant first asserts that—

"plaintiff's testimony, fairly and reasonably considered, goes only to the extent that the gift of this property and money to her by the defendant was for her support and maintenance, with the right to consume the principal if that should be necessary, and that, whatever remained over upon her death, should belong to defendant."

We are of the opinion this position cannot be maintained. Respondent, on direct examination testified as follows:

"Q. Then when, Mrs. Weakley, did you receive the money from the defendant which you have since claimed as your own? A. Well, I received it after he was of age, but we had talked it over, and he had promised to give it to me even before that, but I didn't ask it of him until he was of age. * * * But I told him if his father had lived until Uncle Amon had passed away I would have been entitled to half of it and he to half, and I said, 'If you will give me a third, because there is enough for both of us' * * * and he willingly said he was willing for me to have half, but I didn't ask it and didn't accept it. * * *

"Q. Now what was the substance of the conversation as near as you can recollect that occurred when this \$9,000 was turned over to you, delivered to you? In other words, what were the conditions imposed, if there were any conditions? A. * * * We never to my knowledge had one minute of controversy over this property, and he was willing and saw the justice of my having a share of it. We didn't call it a gift, and I didn't demand it, but I did ask it of him as a moral right. * * *

"Q. As I understand it, there was a conversation between yourself and your son in reference to the amount of money he had received from the different sources, and, as I understand, you related to him at that time in reference to your care of him and what you thought you should have, and then the \$9,000 was delivered to you. Now were there any specific conditions imposed upon the gift of the \$9,000? A. No, not any, but after—I remember after I had it I told him I would be careful of it and I would return what was left, what I didn't use, and I always kept it separate from Mr. Weakley's property, because I wanted George to inherit what was left of the \$9,000.

"Q. You say that was after you received it?
A. That was after I received it."

[1] This testimony is clearly sufficient to support the finding that at the time it was turned over to her, the \$9,000 was given absolutely to respondent, free from any condition, limitation, or trust. Respondent stated there were no conditions attached to the gift, but that, after it was made, she said she would return what was left, because she always wanted appellant to "inherit" what was left. It is not claimed that this promise to give appellant what was left created any trust in his favor. While in certain letters he had written he maintained that the money was held by respondent in trust for him, and he testified it was "to be used by her, as we expressed it, during her lifetime, and to be returned to me undiminished at the time of her death," respondent stated "it is not true, not one word of it. It is awful to sit here and deny my son's word, but he has not stated the facts correctly." The evidence on this issue is involved in sharp conflict, and, since respondent's testimony alone is sufficient, we are bound by the findings that the money was given to her unconditionally.

2. It is next claimed the evidence is insufficient to sustain the finding that the declaration of trust was executed while respondent was in an extremely agitated and nervous condition and through the exercise of undue influence by appellant. It is provided, in section 1575 of the Civil Code that—

"Undue influence consists: (1) In the use, by one in whom a confidence is reposed by another, or who holds a real or apparent authority over him, of such confidence or authority for the purpose of obtaining an unfair advantage over him; (2) in taking an unfair advantage of another's weakness of mind; or, (3) in taking a grossly oppressive and unfair advantage of another's necessities or distress."

[2] In *Soberanes v. Soberanes*, 97 Cal. 140, 31 Pac. 910, a mother made a gift of certain real property to her son. In discussing the claim that he obtained the property through undue influence, the court said:

"Some of the cases hold that undue influence is not to be inferred from the relation of parent and child * * * (*Millican v. Millican*, 24 Tex. 446); but where the parent is of great age, or is enfeebled by disease, and conveys his entire estate to one child, to the exclusion of other children dependent upon his bounty, the burden is unquestionably upon the donee to show that the gift was made freely and voluntarily, and with full knowledge of all the facts, and with perfect understanding of the effect of the transfer (*Todd v. Grove*, 33 Md. 194; *Highberger v. Stiffler*, 21 Md. 352, 83 Am. Dec. 593)."

Respondent testified that appellant came to her home on the evening of September 5, 1911, and that he brought up the subject of the declaration of trust at that time. On direct examination she stated that—

"he commenced and told me how much he had always done for me, and how he considered it was his, and I just sat there and didn't make any reply, but his plea was he wanted to keep my daughter from getting a share of it, and my argument was they didn't want it and didn't expect it."

She further testified:

That she was so wrought up and nervous over the incident that she did not sleep that night; that the next morning she asked appellant, "Who has put you up to this?" that he said, "Not anybody;" that she was worried and cried; that she understood they were to draw up an agreement; but that, while they were waiting for the car, appellant took an agreement, already drawn up, from his pocket. That agreement was the declaration of trust which respondent later signed. She stated that he read the agreement over to her, but that, as she was hard of hearing, she did not hear half that he said, and that, as she did not have her glasses, she could not read it; that "I kept asking him not to ask me to sign it, and I asked him that at home in the kitchen, I said, 'Don't ask me to sign this, George, it is going to ruin my life, I will never care for the home if there is a cloud on the title,' and he said I would have all the privileges I ever had, 'The money is yours while I live,' * * * and I went and signed it, but I didn't know what I was signing."

On cross-examination she said:

"I don't remember anything that happened going down town, but I remember I was awfully excited and nervous. * * * I remember of George—I drew back a little bit, and I don't know that I told him I didn't want to sign it, but I drew back, and he patted me on the shoulder and he says, 'It is all right, mother, it is just to keep Pearl from making any trouble or getting it after you are through with it.'"

[3] In view of the authorities cited and this evidence, we cannot hold that the finding of undue influence was not warranted. Appellant cites *Van Valkenburgh v. Oldham*, 12 Cal. App. 572, 577, 108 Pac. 42, 44, to the proposition that—

"Persuasion is not coercion; insistence upon one's legal rights is not undue influence and pertinacious zeal to secure the payment of a just debt is not fraudulent."

But we have shown appellant had no claim to the property—that it was given to respondent free from any condition—and his obtaining of the deed of trust cannot therefore be justified as the exercise of a legal right.

3. Appellant makes the further contention that the evidence is insufficient to support the finding that he—

"fraudulently procured said sum of \$2,900 from said plaintiff and gave said plaintiff his promissory note therefor * * * and induced plaintiff to believe she was to receive a complete cancellation in consideration thereof."

He insists he "consistently refused to renounce his claim to the remainder over of the fund after plaintiff's death, but he yielded to the importunities of plaintiff and agreed to clear the record title of the Santa Cruz residence and for this purpose executed the informal release" of October 7, 1913. It is unnecessary to consider this contention, for respondent's claim to a cancellation of the declaration of trust is based upon the claim of undue influence exerted to induce her to sign it. Inasmuch as the findings support the judgment, and respondent's right to cancellation dates back to the execution of the declaration of trust, the finding as to the fraudulent securing of the loan is immaterial, and the point is without merit. Aside from the claim that all of the property is held in trust for him, he does not dispute the finding that the \$2,900 is owing to respondent.

[4] 4. Appellant contends the court erred in not admitting in evidence the proposed agreement of June 1, 1919, by which the controversy was to be settled, and which, it is asserted, would constitute a complete defense to this action. It is claimed this agreement went into effect, notwithstanding it was not signed by respondent, because it had been assented to by her attorney. But, as we have shown, the court found against the execution of the agreement, and this finding is not attacked. This being the case, it was not binding on any of the parties, and was at most an accord without satisfaction. As such, it would not constitute a defense to the action. *Silvers v. Grossman*, 183 Cal. 696, 192 Pac. 534. There was no error in excluding the evidence.

The judgment is affirmed.

We concur: SHAW, C. J.; WILBUR, J.; SLOANE, J.; LENNON, J.; SHURTLEFF, J.; RICHARDS, Justice pro tem,

(189 Cal. 7)

O'CONNOR v. WEST SACRAMENTO CO.
et al. (Sac. 2966.)

(Supreme Court of California. May 26, 1922.
Rehearing Denied June 22, 1922.)

1. Landlord and tenant ⇨93—In provision for tenant's reimbursement on landlord's termination of lease the term "per acre per year" held to refer to unexpired term.

In a lease providing that the landlord might at any time or times after a fixed date terminate the lease in whole or in part, the terms "per acre per year" used in a provision for reimbursement of the lessee on termination of lease construed to refer to unexpired term, and not to the whole term.

[Ed. Note.—For other definitions, see Words and Phrases, Second Series, Per Acre.]

2. Landlord and tenant ⇨93—Phrase "credit on rent" in a reimbursement clause in case of landlord's termination of lease held to mean a credit on the rent for the entire term.

Where a lease reserved a lump sum rental payable in installments and provided that, after a named date, landlord could terminate the lease, and provided for reimbursement in such case, at different prices per acre, such to be "a credit on the rent," held to mean a credit on the whole amount of rent due.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Credit.]

3. Landlord and tenant ⇨93—Lease construed as holding tenant for rental for entire term, although lease was sooner terminated by landlord in estimating the stipulated amount to be paid by the landlord.

Where a lease provided that lessor could terminate it after a fixed date by making certain payments "per acre per year," to be allowed as credits on the rent, held that the lump sum rental for the whole term, which was to be paid in installments, was considered an obligation of the tenant in estimating the amount to be paid by the lessor upon his termination of lease, whether such termination was in whole or in part.

4. Landlord and tenant ⇨93—Contract as to reimbursement of tenant on termination construed.

In a tenant's action against landlord for reimbursement under the terms of a lease providing that the landlord might terminate it upon making certain payments "per acre per year," which were to be credited against the rent, which was fixed at a lump sum payable in installments, held, that the court cannot read into the contract the words "due and unpaid," and thus hold the landlord for the full amount "per acre per year," without charging against it the amount of unpaid rent for the whole term.

5. Contracts ⇨176(2)—Construction is always for the court, no matter how ambiguous or uncertain its terms.

The construction of a contract is always a matter of law for the court, no matter how ambiguous or uncertain or difficult its terms, and the jury can only assist the court in determining disputed fact questions.

6. Trial ⇨199—Submitting to jury the question of parties' intention to be derived from contract's language and extrinsic evidence was error.

It was error to submit to the jury the question of the intention of the parties, to be derived in part from the language of the contract and in part from extrinsic evidence.

7. Trial ⇨191(3)—Instruction assuming that construction of contract must be reasonable and just held error.

In a case involving the construction of the terms of a lease, an instruction which assumes, as does the entire presentation of facts by the plaintiff, that the parties drew a contract whose construction must be reasonable

and just under all circumstances, whereas the real question for determination is the meaning of the written contract, is erroneous.

8. Landlord and tenant ☞37—Court cannot, under guise of interpreting lease, make new contract.

The court cannot under the guise of interpreting a lease make a new contract for the parties.

9. Landlord and tenant ☞93—Right to claim breach of contract held waived by stipulation.

In a tenant's action against landlord to recover under reimbursement clause in a lease on its termination by the latter, plaintiff's failure to surrender the premises as constituting a breach of contract and defense to the action was waived by stipulation submitting the amount of compensation for determination.

10. Election of remedies ☞7(1)—Plaintiff held not estopped by selection of remedies inconsistent with right to compensation on termination of lease by landlord in view of stipulation.

It cannot be claimed that plaintiff tenant was estopped by selection of a remedy inconsistent with the right to compensation under lease provisions requiring reimbursement of rent on termination of lease by landlord in view of a stipulation by which they mutually converted the proceeding into one for compensation.

11. Landlord and tenant ☞18(3)—Verdict against fraud by tenant in procuring lease held supported by the evidence.

In tenant's action for money due under lease provisions upon landlord's terminating tenancy, where defendant claimed that the lease was procured by plaintiff's fraudulent representation that he was the lessee, when in fact he was acting for a corporation composed of himself and his brothers, where the lease was made to plaintiff individually, and the corporation was formed thereafter, there was no merit in the claim that there was no evidence to support the verdict against fraud.

Sloane, J., dissenting.

In Bank.

Appeal from Superior Court, Yolo County; W. A. Anderson, Judge.

Action by Thomas O'Connor, as executor of the estate of J. Harbinson, deceased, against the West Sacramento Company and others for an injunction to restrain the termination of a lease. Verdict and judgment for plaintiff, and the defendants appeal. Trial court directed to modify its judgment by reducing the amount of damages assessed.

Arthur C. Huston and Harry L. Huston, both of Woodland, and Charles W. Slack, Chauncey S. Goodrich, and John T. Pigott, all of San Francisco, for appellants.

John S. Partridge, of San Francisco, and Elmer W. Armfield and Arthur B. Eddy, both of Woodland, for respondent.

WILBUR, J. In its final form this action is one to recover from the defendant landlord an amount claimed to be due the plaintiff tenant under the terms of the lease upon the termination on November 2, 1917, of the lease wherein the landlord let to the tenant 403.4 acres of land for three years from November 1, 1916, to and including October 31, 1919, at a gross rental of \$16,740.75, to be used for the planting and raising of alfalfa. The landlord admits an indebtedness of \$2,955.52 and tendered that amount. The tenant claims \$20,451.75 as the proper amount. The jury returned a verdict for \$13,625, and the defendant appeals from the judgment rendered thereon. The provision of the lease involved is as follows:

"15. The lessee further covenants and agrees that the lessor shall have the right, at any time or times after the 1st day of June, 1917, to terminate this lease, and the estate hereby granted, as to the whole or any portion of the said premises, by notice in writing to the lessee, given either personally to the lessee, at least thirty (30) days prior to such termination, as follows:

"Mr. J. Harbinson, 915 Second Street, Sacramento, Cal.

"In the event of such termination of this lease, for a portion only of the said premises, this lease shall continue in full force and effect as to the remainder of the said premises, subject to the continuing right of the lessor to terminate this lease, in the manner hereinafter provided, as to the whole or any portion of the remainder of the said premises. The lessor further covenants and agrees to compensate the lessee for any portion of the said premises as to which this lease shall be so terminated as follows:

"If said lease shall be terminated as to any portion of the said premises designated by green lines on the map or plat attached hereto, the lessor will compensate the lessee for each and every acre of the said premises, as to which this lease shall be so terminated, at the rate of eight and no/100 (\$8.00) dollars per acre per year if such termination shall occur on or before the 1st day of November, 1917; at the rate of ten and no/100 (\$10.00) dollars per acre per year if such termination shall occur on or before the 1st day of November, 1918; and at the rate of twelve and no/100 (\$12.00) dollars per acre per year if such termination shall occur on or before the 1st day of November, 1919.

"If said lease shall be terminated as to any portion of the said premises designated by red lines on the map or plat attached hereto, the lessor will compensate the lessee for such portion of the said premises as to which this lease shall be so terminated as follows: The lessor will compensate the lessee for each and every acre of the said premises as to which this lease shall be so terminated, at the rate of twenty and no/100 (\$20.00) dollars per acre per year if such termination shall occur during the period from June 1, 1917, to July 15, 1917; at the rate of seventeen and 50/100 (\$17.50) dollars per acre per year if such termination shall

occur during the period from July 15, 1917, to August 15, 1917; at the rate of sixteen and no/100 (\$16.00) dollars per acre per year if such termination shall occur during the period from August 15, 1917, to October 1, 1917; at the rate of fifteen and no/100 (\$15.00) dollars per acre per year if such termination shall occur during the period from October 1, 1917, to October 31, 1917; at the rate of seventeen and 50/100 (\$17.50) dollars per acre per year if such termination shall occur during the period from October 31, 1917, to October 31, 1919. Provided, however, such cash reimbursements shall be made by allowing the lessee a credit on the rent."

The lease contains almost the same provisions with regard to the "reimbursement of" and "compensation to" the tenant in case the landlord constructs "levees, canals, ditches, and other works, for the purpose of reclamation, drainage, or irrigation, or any thereof." The lease in that regard provides as follows:

"The lessor further covenants and agrees to reimburse the lessee for any portion of the said premises over which such levees, canals, ditches, or other works shall be so constructed, as follows: If such works shall be constructed on any portion of the said premises designated by green lines on the map or plat attached hereto, the lessor will compensate the lessee for each and every acre of the said premises, which shall be covered by such works, at the rate of eight and no/100 (\$8.00) dollars per acre per year if such works shall be constructed on or before the first day of November, 1917," etc.

The balance of the clause is identical with the above-quoted clause applicable to the termination of all or any part of the lease as to times and amounts within the green and red line areas, except that the phrase "if such works shall be constructed" is used instead of the phrase "if such termination occur." This clause ends like the other with the proviso:

"Provided, however, such cash reimbursements shall be made by allowing the lessee a credit on the rent."

These two clauses, practically identical, with reference to the use of a part of the premises for irrigation works, etc., and the termination of the lease, are obviously used in the same sense, and, if we can ascertain the meaning of one, it will point to the correct interpretation of the other similar clause.

[1] The tenant's contention is that the clause contains two ambiguities, one the phrase "a credit on the rent," and the other "per acre per year." With reference to the first clause it is said that it is doubtful whether or not the credit "per acre per year" is for the whole term (three years) or for the unexpired term, which in the present instance, as the lease was terminated at the expiration of the first year (November 2, 1917), is two years. Or, to express the doubt

in terms of money, the question is whether a credit of \$35 or of \$52.50 per acre should be allowed in the red boundary area and \$20 or \$30 in the green. These areas, it may be said, are 371.1 acres in the red and 32.2 acres in the green. There does not seem much room for doubt as to the meaning of the phrase "per acre per year" when it is remembered that the purpose of the "reimbursement" or the compensation is to make compensation to the tenant for his loss, which is represented by loss of the use of the land occupied by levees, etc., or as to which the lease is terminated for the balance of the term.

[2] The other phrase, "a credit on the rent," seems plain enough when it is remembered that the lease reserves a lump sum as rental (\$16,740.75) and makes no provision for an annual or monthly rental, or for the payment of the rent in equal installments at yearly, semiannual, or monthly periods, from which it might be inferred that the rent was adjusted with reference to such periods. The only rent mentioned in the lease is in the following phrase:

"* * * Yielding and paying unto the lessor, as rental of the said premises, the sum of sixteen thousand seven hundred forty and 75/100 (\$16,740.75) dollars, payable by the lessee to the lessor * * * in installments as follows."

These installments are: Two items, \$1,323.14 (evidenced by a note executed contemporaneously with the lease) and \$1,323.13, total \$2,646.27, on June 25, 1917; \$3,286.30 on November 1, 1917; \$1,963.17 June 25, 1918; \$4,257.11 November 1, 1918; \$2,293.95 June 25, 1919; \$2,293.95 before October 31, 1919. This would make \$5,933.57 payable during the first year, \$6,220.20 during the second, and \$4,597.90 during the third year. The average yearly rental would thus be \$5,580.25, or an average annual rental of \$13.34 per acre. It seems clear enough that the phrase should be read "allowing the lessee a credit on the rent (reserved in the lease)." In the case of the larger tract (371.1 acres) the amount agreed to be allowed as a "credit on the rent" is in each instance greater (\$20, \$17.50, \$16, \$15, \$17.50) than the average rental (\$13.34) per acre, and, if we assume that the rental value of the two pieces is in proportion to the allowances made in the respective areas, it is evident that the allowance is in each instance greater than the average rental per acre so apportioned. This is the interpretation of the lease adopted by the lessor when he tendered the sum of \$2,955.52 at the termination of the lease.

[3] We will now consider the claims made by the respondent tenant. First, it is claimed that the proviso should be construed as though it read "a credit upon the rent due and unpaid at the time of the termination of

the lease." And in this connection it is also urged that the termination of the lease ipso facto terminated the obligation to pay rent. It could not be applied to rent due and paid, because money so paid becomes the property of the landlord. It is no longer "rent," nor could the stipulated set-off well be applied to moneys already paid, nor could it well be applied to future rents; for according to the contention of the tenant there would be no future rents. Hence the construction contended for that the proviso applies to rents due and unpaid. But it is presumed that the tenant will pay his rent when due, and, if he does, there will be no period of time except the day when the rent is due when there will be any rent upon which the amounts specified may be "credited."

As it appears that this theory is the one adopted by the jury, we will give it further consideration. The jury were instructed as follows:

"(2) If you find that the intention of the parties was that Mr. Harbinson should receive compensation for the balance of the term at the rate of \$10 per acre for the 32 acres, and \$17.50 per acre for the 371 acres, then your verdict must be for the plaintiff for the sum of \$13,625.10."

The jury returned a general verdict for that amount, thus adopting this view. The tenant paid the rental due November 1, 1917 (\$3,286.30), and hence the tenant was allowed the reimbursement without "crediting on the rent," for on this theory there was no rent on which to credit it. The fundamental assumption on which this verdict is based is that all rental ceased upon the termination of the lease. This would ordinarily be true and is true here in a sense, for, if the allowance to the tenant on termination of the lease in every case is equal to or greater than the rent reserved for the balance of the term, as is the case here, then there will be no further rent paid. Indeed, it is conceded that the landlord must make a payment to the tenant at the termination of the lease, and that the tenant makes no further payment to the landlord. The lease as a contract is not terminated. It is still in effect between the parties, and the plaintiff is seeking to recover under its terms. What the parties dealt with in the clauses under consideration was the termination of the tenant's estate in the land, or, in the case of irrigation works, etc., of the beneficial use of the land by the tenant. In the absence of any contract with relation to the matter, no doubt the tenant's obligation to pay all future installments of rent would cease. In this case the lease does not fix the rental value of the land for any period less than three years, and it was as appropriate to make provision for the rights of the parties upon its termination during

that period as it would have been if all the rent was to be paid in one installment at the termination of the lease.

The particular form of the agreement evidently resulted from the fact that the clauses in question contemplated the termination or use by the irrigation works of a part only of the premises rather than a termination of the entire leasehold, although provision was also specifically made for the latter event. In the case of irrigation works, etc., the tenant's right to the possession of the acreage devoted to this use continued. The lease still remained in full force and effect as to the entire 403.4 acres. The allowance made as a credit on the rent is because the tenant has lost the beneficial use of that portion as an alfalfa farm. Hence he is credited with the value of the use thereof on the rental. He is thus "reimbursed" or "compensated," to use the language of the lease.

The significance of this clause concerning the construction of irrigation works, etc., lies in the fact that there is no occasion or opportunity to consider the legal effect of a surrender or termination of the lease, and no chance to argue that the right to rental ceased, in whole or in part, with the whole or partial termination of the lease, for the lease is still in full force and effect; the tenant's beneficial use thereof has merely been impaired by the works in question. It would follow that a similar construction should be placed upon the termination clause, couched, as it is, in the same language. The only occasion for considering the clause with reference to the construction of irrigation works, etc., is the fact that this clause demonstrates that the continuance of a legal estate in the part as to which the lease is terminated or used is a false quantity in the case; the amount to be credited under the lease is the same in each event. Another consideration leads to the same conclusion. The termination clause deals with whole or partial termination. If partial, it is clear that the obligation still remains to pay the entire rent reserved in the lease, less the credit for which provision is therein made. If this is a correct conclusion, there is no adequate reason for adopting a totally different construction where the whole estate is terminated. It is not reasonable to assume that the parties intended that the retention of a single acre, or part of an acre, for instance, should result in the tenant being required to pay all future installments of rent, amounting in this case to \$10,818.18, and should pay no part of it if the last acre was also included in the notice of termination. The parties have a perfect right to fix any terms they can agree upon as the basis of adjustment upon the termination of the tenancy, and there is no reason to believe that they contemplated a wholly different adjustment of their rights

in case of a partial and of a total termination. They might have done so, but there is nothing in the language of the lease under consideration which points to such a conclusion. It is apparent that the form of agreement resulted from the fact that the lease reserved a lump sum rental. For that reason it would have been difficult to frame a provision for reimbursement for partial loss which was not in the form of a credit upon the whole rental reserved where there was no apportionment of the rental to either time or acreage.

It is clear then, we think, that the allowance to the tenant is the same per year per acre, whether the allowance is for 100 acres or for 403 acres or for the whole 403.4 acres, and that the lump sum rental was considered an obligation of the tenant in estimating the amount to be paid by the landlord upon the termination of the lease, whether whole or partial.

[4] The appellant's claim is untenable that the above-quoted proviso should have read into it the words "due and unpaid" as to the rent upon which the allowance was to be credited. To add these words to the lease is beyond the power of the court or jury. Such a construction would defeat the claim of the plaintiff, for he here seeks to recover \$20,000, not as a credit upon rent "due and unpaid," for there was no such rent, but by a judgment requiring the defendant to pay to him that amount. The amounts to be allowed to the tenant upon termination bear no relation to the time or amount of the payment of the installment of rents. Apparently the amount to be paid the tenant the first year was fixed wholly with reference to the maturity of the crop on the land, and without reference to the payment or nonpayment of rent or of other considerations which will be presently mentioned. The tenant claims that, if the notice terminating the lease had been effective October 31, 1917, instead of November 2, 1917, he would have wholly escaped the payment due November 1, 1917, of \$3,286.30, because such rental would not have been due on October 31, 1917, and for that reason he complains somewhat that the landlord selected November 2d as the date of termination.

The payment or nonpayment of the rent must be an immaterial factor in the problem. It is not reasonable to believe that the parties intended that the selection of a date of termination with relation to a date of payment of an installment of rent should have any such result, thus making a difference of over \$10 per acre per year (\$4,257.11) between a termination of the lease October 31, 1918, and November 2, 1918. Such a construction is wholly inconsistent with the care with which the exact allowance per acre per year is regulated during the sum-

mer and autumn of 1917. If the lease is terminated in June or the first two weeks in July the rate is \$20 per acre; from July 15th to August 15, 1917, it is \$17.50 per acre, although a payment of \$6.56 per acre (\$2,646.27) is made July 25, 1917. The rate from October 1st to October 31st is \$15 per acre, and changes on that date to \$17.50, and remains the same for the balance of the term, although a payment of \$8.15 per acre (\$3,286.30) is due the next day (November, 1917) and remains the same, although three payments, amounting to about \$5 per acre, and one of over \$10 per acre, are made during this period. It is clear from the foregoing that the allowances to the tenant were made without reference to the dates or amounts of rent installments, which leads to the conclusion that the allowances were to be made against the whole rental reserved, which amount, except in the case of a termination of the whole lease, or nearly the whole lease, would be larger than the allowance.

[5, 6] While we have no doubt that this is the correct construction of the lease, and this conclusion determines the case, we will nevertheless deal with some of the points of the parties, particularly as the appellant claims that the reimbursement clause is too uncertain to be enforced, and the respondent claims that it is so ambiguous as to permit and require extraneous evidence for its interpretation. The appellant contends, and the respondent admits, that the construction of the lease is a question of law.

"Of course," says respondent, "it is elementary that the construction of a contract is always a legal question or a question of law for the court. However, where parol evidence is required to clear up the meaning of ambiguous language, such evidence should be submitted to a jury, which must determine the meaning of such ambiguous language. With the meaning of such language made clear by the jury, the court determines the legal effect of the writing. * * * All that was submitted to the jury's consideration was the meaning of the language 'per acre per year' and 'credit on the rent.'"

In this connection it should be observed that no such question was submitted to the jury. They were nowhere asked to construe the meaning of either of these terms or phrases. The instruction on which they returned a verdict is quoted above. The jury were thereby instructed to bring in a verdict for the plaintiff for \$13,625.10, "if you find that the intention of the parties was that Mr. Harbinson should receive compensation for the balance of the term at the rate of," etc. The object of all construction is to arrive at the intention of the parties, so that the instruction submitted to the jury a question of law just as truly as if the court had used the equivalent phrase, "if you construe the contract to provide that Mr. Harbinson

should receive," etc. This instruction and similar instructions were erroneous.

The respondent cites as justifying the instruction section 66, *Blashfield on Instructions*; *Coquillard v. Hovey*, 23 Neb. 622, 627, 37 N. W. 479, 8 Am. St. Rep. 114; *Taylor v. McNutt*, 58 Tex. 71; *Chambers v. Ringstaff*, 69 Ala. 140, 146; *State v. Patterson*, 68 Me. 473, 475; *Cunningham v. Washburn*, 119 Mass. 224, 226; *T. E. Foley v. McKinley*, 114 Minn. 271, 131 N. W. 316, 318; *Rapp v. H. Linebarger & Son*, 149 Iowa, 429, 128 N. W. 555; *Durand v. Heney*, 33 Wash. 38, 73 Pac. 775; *Vilas v. Bundy*, 106 Wis. 168, 81 N. W. 812; *Alworth v. Gordon*, 81 Minn. 445, 84 N. W. 454; *Hope v. Maccabees*, 91 N. J. Law, 148, 102 Atl. 689, 691, 1 A. L. R. 455; *Paepcke-Leicht Lumber Co. v. Talley*, 106 Ark. 400, 153 S. W. 833, 836; *Yost v. Silvers*, 138 Mo. App. 524, 119 S. W. 971, 973; *Haskell v. Read*, 68 Neb. 107, 93 N. W. 997, 998, 96 N. W. 1007; *Vulcan Iron Works v. Electro Magnetic Mining Co.*, 54 Ind. App. 28, 99 N. E. 429, 431, 100 N. E. 307; *Jones v. De Coursey*, 12 App. Div. 164, 42 N. Y. Supp. 578; *Arlington Heights Realty Co. v. Citizens' Railway & Light Co.* (Tex. Civ. App.) 160 S. W. 1109.

We will not undertake to analyze these cases for the reason that the fundamental principle involved is elementary, and is recognized in these decisions, namely, that the construction of a contract is always a matter of law for the court, no matter how ambiguous or uncertain or difficult its terms, and that the jury can only assist the court by determining disputed questions of fact. If the facts and circumstances to be considered in the interpretation of the contract are undisputed, there is nothing to submit to the jury, and the court must direct a verdict in accordance with the construction placed on the contract by the court in the light of the admitted circumstances. On the other hand, if such circumstances are in dispute, and the meaning of the contract is to be determined one way according to one view of the facts and another way in accordance with the other view of the facts, then the determination of the disputed fact must be left to the jury, but in no case can the proper construction of the contract be left to a jury. *California W. D. Co. v. Cal. M. O. Co.*, 178 Cal. 337, 341, 177 Pac. 849. Any instruction that leaves more than this to a jury is erroneous. The dispute may be concerning the accepted meaning of trade or technical or colloquial terms in such cases, and in such cases only does the jury determine the meaning of the terms or language used in a contract. No such condition exists here. The terms of the contract are couched in ordinary language to be determined according to accepted usage, unless the circumstances of the parties and the entire contract show that the language used in the contract must receive a different or unusual construction.

In note to 12 L. R. A. 376, it is said:

"The meaning of terms of art or business is for the jury.

"This is the rule where testimony is necessary to determine the meaning of the term; but when the meaning is determined, the construction of the contract with the meaning so determined is for the court"—citing *Barnard v. Kellogg*, 77 U. S. (10 Wall.) 383, 19 L. Ed. 987, and other cases.

"The construction of a written contract is for the court alone, as soon as the true meaning of the words used and the surrounding circumstances, if any, have been ascertained as facts, and it is the duty of the jury to take the construction from the court"—citing *Levy v. Gadsby*, 7 U. S. (3 Cranch) 180, 2 L. Ed. 404, and other cases.

"So where the meaning of words is affected by a custom or usage of trade, it is for the jury to say in what sense they were used by the parties." 1 *Blashfield's Instructions to Juries*, § 66, p. 133.

And this would be true where the contracts between the parties and the ordinary course of business contemplated by them in connection with the contract gave to the terms therein used a peculiar meaning, such, for instance, as in the case of *First National Bank v. Bowers*, 141 Cal. 253, 74 Pac. 856, where the words "with B-L attached" were to be construed. It was admitted by the parties that the letters "B-L" meant a bill of lading, but the question in issue was what sort of a bill of lading was contemplated by the parties. It was contended, on the one hand, that the bill of lading intended was one which vested title to the oranges therein described in the bank, and, on the other hand, that according to the course of business of the parties it meant any bill of lading accompanying a draft for oranges even where the consignee was an agent of the consignor and regardless of whether or not the bank secured a lien upon the oranges by the bill of lading. The trial court having instructed the jury to bring in a verdict for the defendant, it was held that the instruction was erroneous for the reason that the court thereby determined that the defendant was only liable as guarantor for such drafts as had attached thereto bills of lading which conveyed title, whereas it was shown that according to the ordinary course of business as conducted for the two years covered by the guaranty it had been the custom of the Haight Fruit Company, whose drafts were guaranteed by the defendant, to use the form of draft by which the shipper retained control over the consigned fruit until delivered. Under these circumstances it was held that the jury should determine the sense in which the parties used the term "bill of lading attached." The main question considered by this court was whether or not the construction of the contract of guaranty by the trial court was correct, and the court does not in-

dicating the form of instructions by which the questions should be submitted to the jury. Upon the second appeal in that case, 153 Cal. 95, 94 Pac. 422, it is said:

"Upon appeal [the previous appeal] this court held that the wording of the guaranty was not so plain, unambiguous, and certain as to have justified the court in refusing evidence explanatory of it."

The decision of the court in *First National Bank v. Bowers*, supra, goes no further than to hold that, where a technical phrase like "bill of lading" is used, it can be properly left to a jury to determine the form and terms of the bill of lading intended by the parties as ascertained by their conduct and dealings with reference to bills of lading. This case is not authority for submitting to the jury the general question as to the intention of the parties to be ascertained by construing a contract, and expressions in the opinion which would so indicate cannot be considered as authority because juries are triers of the facts and not of the law, and because of subsequent decisions in which the functions of the jury in matters of interpretation are determined. *Estate of Donnellan*, 164 Cal. 14, 19, 127 Pac. 166, 168; *Estate of Thomson*, 165 Cal. 290, 131 Pac. 1045; *Cal. W. D. Co. v. Cal. M. O. Co.*, supra. In *Estate of Donnellan*, supra, wherein the construction of a will was involved, it was said:

"It is a fundamental and indisputable proposition that, wherever doubt arises as to the meaning of a will, such doubt is resolved by construction, and that construction is one of law; it is an application of legal rules governing construction either to the will alone or to properly admitted facts to explain what the testator meant by the doubtful language. In those cases where extrinsic evidence is permissible there may be a conflict in the extrinsic evidence itself, in which case the determination of that conflict results in a finding of pure fact. But, when the facts are thus found, those facts do not solve the difficulty. They still are to be applied to the written directions of the will for the latter's construction, and that construction still remains a construction at law. In such cases, where the evidence of the facts is in conflict, it is permissible for the court or for the jury to find the facts and those findings, under firmly established principles, will not here be disturbed. But the application to the will itself of the facts found, admitted, or established presents a question of legal construction, which is as purely a question of law as is a construction of the will without resort to extrinsic evidence. Therefore, if the facts have been found by the court upon conflicting evidence, this court, accepting the findings, will still review the construction of the court in probate and determine whether or no a wrong construction at law has been reached. If the facts are admitted, or established without conflict, the justness of the application which the court made of those facts in its construction will equally, as a legal proposition, be the subject of review. Again, it is fundamental that in all cases where extrinsic evidence is admis-

sible to aid in expounding the will the evidence is limited to this single purpose. It is considered for the purpose of explaining and interpreting the language of the will, and is never permitted to show a different intent or a different object from that disclosed (though perhaps obscurely) by the language of the will itself."

The same rules apply to interpretation of contracts. In *Estate of Thomson*, supra, at page 296 of 165 Cal., at page 1048 of 131 Pac., it is said:

"Appellant contends that this [the question of construction] is really a conclusion of law, and that the determination of the scope and meaning of a contract is always a question of law. *Estate of Donnellan*, 164 Cal. 14, 127 Pac. 166. It is perfectly true that the construction of a contract, whether that construction is to be arrived at from a mere reading of the contract itself, or from such reading aided by extrinsic evidence of circumstances and the like, is always a construction of law. But, upon the other hand, it is equally true that whether or not there is a sufficient consideration to support a contract is always a question of fact."

In *Cal. W. D. Co. v. Cal. M. O. Co.*, supra, it is said:

"The construction of the contract in the light of the real facts is a matter of law."

In that case it was held improper to submit to the jury the question as to the intention of the parties in using the phrase "into the oil sand" contained in an oil drilling contract unless that phrase had some "special local meaning, or customary construction, with reference to which the parties contracted."

It was error in this case to submit to the jury the question of the intention of the parties to be derived in part from the language of the contract and in part from extrinsic evidence.

[7, 8] Let us next consider the character of the extrinsic evidence relied upon to ascertain the proper construction of the contract. The situation, as stated by the respondent, is as follows:

"To aid the court and jury in construing this language, the witness Harbinson was permitted to testify to many extrinsic circumstances and matters which establish, and from which, as we have pointed out, the jury concluded, the intent of the parties was that the company was to compensate Harbinson for the *unexpired* term of the lease, deducting therefrom, however, such rent as might be *due*. * * * From the testimony of the witnesses Harbinson, Glide, and Klingsmith a conflict arose. There was testimony from which the court or jury could infer or conclude that Harbinson *was to be compensated so much per acre per year for the unexpired term*, and while the appellant has made no assertions as to what the testimony of Glide and Klingsmith established, if we are correct in our presumption there was also testimony from which the court or jury might infer or conclude that Harbinson *was to be compensated*

only so much per acre, regardless of the length of the unexpired term." (Italics ours.)

The evidence upon which this statement is based may be summarized as follows: Harbinson testified that he had seeded the land to alfalfa, and that in January, 1917, frost destroyed the young alfalfa, and that therefore he was compelled to reseed the land; that the reasonable expense of mowing, raking, plowing, discing, harrowing, clod-mashing, and seeding would be \$4,826 and of reseeded \$1,976, total \$6,802, and that therefore his total expenditures for the first year were \$12,734; that the anticipated return for alfalfa for the first year would be one ton, or \$10 net per acre, while the second and third years the return would be six tons per acre, making a net return to the tenant of \$48,360 for the last two years and a loss of \$8,704 for the first year.

The appellant presented a witness who testified to a conversation between the plaintiff and the defendant's agent at the time the lease was being drawn to the effect that the amounts of \$20, \$17.50, \$16, \$15, and \$17.50 were fixed with reference to the time of cutting the alfalfa and a crop of volunteer barley on the place during the year 1917. Nothing was said in that conversation about the installments of rent falling due under the contract, or about the payments "per acre per year."

The reason advanced by respondent for the reception of the evidence offered on his behalf is thus stated by respondent's counsel:

"But, further than that, one of the circumstances that the court or the jury are entitled to in getting at the meaning of this lease is what would be a fair compensation to Joe Harbinson when it was terminated."

Assuming that such evidence was admissible, where was the conflicting testimony to be submitted to the jury? There was no dispute about the cost of improving the land or about the conversation. If either of these factors were applicable to the interpretation of the contract, it was the duty of the court to make the application. Instead, the jury were instructed as follows:

"Gentlemen of the jury, you are instructed that you are entitled to take into consideration all the circumstances and facts as shown by the evidence and bearing upon the subject-matter of this lease. The subject-matter of the lease is the land, and in determining what compensation the plaintiff is entitled to, if any, for the termination of the lease, you are entitled to take into consideration the condition of the land at the time the lease was made, what would be necessary to do to the land to get it into a condition to get a stand of alfalfa, and also what would be necessary to produce on it a good stand of alfalfa. You are also instructed that you are entitled to take into consideration the amount of expense which the parties had in mind in so cultivating the land and getting a good stand of alfalfa. You are likewise entitled to take into consideration the amount of rent

paid and to be paid, and also what would have been the value of the leasehold interest in the land to Mr. Harbinson with a good stand of alfalfa on it; and in determining what should be the amount of your verdict, if any, for the plaintiff, you are entitled to determine whether or not the parties entering into the lease took into consideration the expense of getting a stand of alfalfa, the amount of rent to be paid, and the value of the land in alfalfa for the portion of the time left after the lease should be terminated; and if, in the light of these circumstances you believe that the intention of the parties was that if the lease should be terminated Mr. Harbinson should receive \$17.50 per acre per year for the three years, then you must find your verdict accordingly, and estimate and determine the amount. If, however, you determine that the intention of the parties was, in light of all the circumstances, that the amount of compensation should be \$17.50 per acre for the remainder of the time from November 1, 1917, to November, 1919, then you must render your verdict accordingly. In other words, you are instructed [here follow hypothetical instructions, including that upon which the verdict was based]."

By this instruction the jury were directed in effect to place themselves in the position of the parties and to construe the contract, while this was exclusively the duty of the court. If the expense of planting the land to alfalfa was a legitimate matter to be considered, the evidence was before the court for that purpose. The fact is that the instructions virtually left the jury to determine whether \$20,451.75 or \$2,955.52 or \$9,643.57, or nothing was a fair compensation to the plaintiff under the circumstances, for the court expressed no opinion whatever on the subject of the proper interpretation of the contract. The fact is that the only difficulty in the case arises out of the extrinsic evidence, and the apparent hardship thus shown to result to the tenant from the termination of the lease on November 2, 1917. The instruction to the jury assumes, as does the entire presentation of the facts by the respondent, that the parties drew a contract, whose construction must be reasonable and just under all the circumstances, whereas the real question for determination is the meaning of the written agreement. The parties may not have anticipated and evidently did not anticipate every possible condition arising from a termination of the lease at different periods during the term of the lease. It is, of course, true that the lease should be given an interpretation which would work no obvious injustice to either party if the language used is susceptible of such an interpretation, but, if not, it must be construed according to its plain import. As we have said, the terms of the lease are plain and unambiguous. The effort of the jury to give to the lease an interpretation that would be just, based upon a speculation as to what the parties intended, in effect requires the landlord not only to remit the rental for the last

two years of the term, but in addition to pay the tenant a larger amount for the land for that part of the term (\$13,625) than the tenant had agreed to pay for that period. In other words, the landlord is required to pay the tenant \$6,812.50 per year for two years for its land instead of receiving from the tenant \$5,580.25 per year (if we assume that \$5,932.57 it received is a fair rental for the first year), while, if respondent's claim had been adopted, the amount paid by the landlord for the last two years (\$20,451.75) would exceed the entire rental reserved for the whole term. On the other hand, the interpretation we have placed on the lease means a loss to the tenant of \$5,748.48. If we subtract from that loss the amount due to the unforeseen frost, it follows that the lease was so drawn that a loss of \$3,772 was likely to result to the tenant by the termination of the lease on November 2, 1917. It is therefore not a reasonable agreement as applied to the particular date of termination, but it can be made reasonable only by making a new contract for the parties, which cannot properly be done, and should not be attempted under the guise of interpreting the lease. The extrinsic evidence introduced in this case did not aid in its interpretation or justify the conclusion of the court and jury.

[9] This action was begun by the plaintiff on November 1, 1917, to restrain the defendant from taking possession of the land in pursuance of its notice of September 12, 1917, terminating the lease on November 2d. The basis of the action was the alleged insolvency of the defendant and the fact that the amounts due to the plaintiff under the lease were unpaid. The defendant answered and tendered \$2,955.52, the amount it admitted to be due to the plaintiff. Thereafter on November 6, 1917, it was stipulated that the plaintiff should immediately surrender possession of the premises to the defendant, that defendant would pay \$10,000 to the clerk of the court to secure to plaintiff any amount found due to him by the defendant, and that it be determined in the action what amount of money was due the plaintiff by reason of the termination of the lease. Thereafter the plaintiff filed an amended and supplemental complaint, January 8, 1919, and an amendment thereto January 14, 1919, the answer to which was filed during the trial. The defendant now claims that the failure of the plaintiff to surrender possession on November 2, 1917, was a breach of the contract, which prevents any recovery by the plaintiff. In view of the stipulation surrendering possession on November 6, 1917, and in the express agreement to submit the amount of compensation to determination in this case, it is clear that the breach, if any, was waived by the stipulation.

[10] It is claimed that the plaintiff was estopped by the selection of a remedy incon-

sistent with a right to compensation. but, in view of the stipulation, that question cannot arise, for this action was by mutual agreement converted into one for compensation.

The same thing is true in regard to the alleged failure of the plaintiff to prove performance of the terms of the lease which was alleged in the general terms permitted by the Code. The claim is that plaintiff's refusal to surrender the possession of the premises on November 2, 1917, was a breach, but, as we have said, this was waived by the stipulation.

[11] Defendant claims that the lease was procured by fraud, and that the verdict in that regard was against the uncontradicted evidence. The fraud is alleged to consist in representation by the plaintiff to the defendant that he was the lessee, when, in truth and in fact, he was acting for a corporation composed of himself and his brothers. The lease was made to him individually and the corporation was not formed until after the lease was executed, so there is no merit in the claim that there was no evidence to support the verdict against fraud.

What has been said disposes of other points raised by the appellant. The respondent is entitled to the sum tendered by the appellant, and should have interest thereon and costs because the appellant virtually withdrew its tender when it advanced the claim that the plaintiff should recover nothing.

The trial court is directed to modify its judgment by reducing the same to the amount of \$2,955.52, with interest from November 2, 1917, at the rate of 7 per cent. per annum, plus the plaintiff's costs of the first trial; appellant to have his costs on appeal deducted from the judgment.

We concur: SHAW, C. J.; LENNON, J.; WASTE, J.; LAWLOR, J.; SHURTLEFF, J.

SLOANE, J. I dissent. In my judgment the proviso for paying lessee compensation for terminating his lease two years before the expiration of the term "by credit on the rent" is ambiguous as to what rents were referred to in the use of that expression. It was an ambiguity which could only be resolved by a consideration of all the conditions and circumstances surrounding the transaction in order to determine in what sense the word "rent" was used, whether as referring to rents "due and unpaid" for the expired part of the term as found by the verdict of the jury or rent "reserved in the lease" as determined by the majority opinion on this appeal.

The facts developed in evidence tending to throw light upon the interpretation which should be given to the use of the word "rent" in this connection, while established by unconflicting testimony, give rise to conflicting inferences; that is, some of the conditions and

transactions suggest that the words "credit on the rent" were used in one sense, and some that they were used in the other. Under these circumstances the question was clearly one of fact for the jury.

The authorities cited in the opinion of Mr. Justice WILBUR to the point that the construction of a contract is always a question of law for the court, no matter how ambiguous its language, if the extraneous evidence explaining the ambiguity is not conflicting, are unquestioned. It is equally as well settled, however, by these authorities and others, that where the evidence is conflicting, it becomes a question of fact for the jury, not to construe the contract, but to determine what meaning the parties themselves attached to the ambiguous terms, and it is also recognized that such conflict may arise from different inferences which may be drawn from undisputed facts, as well as from a dispute as to the facts themselves. *T. E. Foley Co. v. McKinley*, 114 Minn. 271, 131 N. W. 316; *Rapp v. Linebarger & Son*, 149 Iowa, 429, 128 N. W. 555; *Durand v. Heney*, 33 Wash. 38, 73 Pac. 775.

First National Bank v. Bowers, 141 Cal. 253, 74 Pac. 856, is a case in point, and closely parallel to the one before us. There the ambiguity arose in the use of the term "bill of lading attached." As the main opinion states, in reviewing the decision:

"The question in issue was what sort of a bill of lading was contemplated by the parties."

It was contended, on the one hand, that the bill of lading intended was one which vested title in certain oranges, and, on the other hand, that it meant any bill of lading accompanying a draft for oranges regardless of whether the consignee secured a lien by the bill. The matter was to be determined by evidence as to the custom existing in similar transactions. The court says, quoting *Thompson v. McKay*, 41 Cal. 228:

"The rule is well established that, in construing doubtful instruments, they must be interpreted in the light of the surrounding circumstances. After ascertaining the relation of the contracting parties to each other, and the subject-matter of the contract, the court will, if possible, so construe the instrument, however inartificially drawn, as to give effect to the intention of the parties, provided it can be done without disregarding the language of the instrument, when all its parts are considered."

* * * The purpose to be subserved by this rule is to place the court or jury in the position of the parties at the time the contract was made, and enable it to intelligently interpret the language used by them. * * * Under these principles the plaintiff had a right to have submitted to the jury the question of what was intended, understood, and meant by the parties in the use of the term 'bill of lading attached.'"

In the instant case the opposing parties contend, on the one hand, that in using the

term "credit on the rent" the parties had in mind such rents as might be due and unpaid when the lease was terminated; on the other, that the rent referred to was the term "rent" stipulated in the lease, which remained unpaid covering the remaining two years of the term for which the lease had been canceled.

It may be conceded that it is possible from certain expressions of the lease contract to give the interpretation to the disputed clause contended for by appellant, without recourse to extraneous evidence. But, on the other hand, there are other declarations that are inconsistent with such interpretation.

The lessor contracts to compensate the lessee for the loss of the remainder of the term, in case of an exercise of the option to terminate the lease, and the stipulated damages for the two years of the unexpired term in this instance was \$13,625.

When the lessor exercised his option to terminate the lease as to the entire premises, the obligation of the lessee to pay future rentals was also terminated. It is conceded that all accrued rents had been paid. If the contract for damages had stopped at the unqualified agreement to compensate the lessee in the sum of \$13,625, for the loss of the unexpired term, there would have been no question of the latter's right to recover that amount, without deducting therefrom over \$10,000 of rent that he did not owe. Is it a reasonable interpretation of the provision that this payment should be made by a "credit on the rent" that the parties thereby intended to bind the lessee to account for rents which, under the terms of the contract, were not due or owing?

Under this construction of the contract it will be seen by a little computation that, had the lease been terminated six months earlier or six months later, the stipulated compensation would have been entirely canceled by the unexpired term rental, and all the lessee would have received from the agreement to compensate him would have been a release from obligation to pay rent on the terminated leasehold, which release he already had by virtue of the voluntary cancellation of the lease by his landlord.

The conditions of the termination of the lease as it occurred here left a balance due the lessee over the unpaid term lease of \$2,955.52, which, under the ruling of the majority opinion, is all the compensation he will receive for the unexpired two years of his valuable leasehold.

When we consider, under the extraneous evidence, together with other significant facts, that the parties to the lease in framing this contract had under consideration the amount of remuneration which would compensate the lessee for the loss of the last two years of a three-year lease upon 400 acres of land which was to be planted to alfalfa

the first year, at a probable net loss for that season, and contemplated matured crops for the last two years which were expected to net to the lessee many thousands of dollars the second and third years, it is a violent interpretation which accepts the one of two meanings of the term used, which would leave the tenant with only a nominal compensation for his loss.

It is argued that, if the unpaid term rent was not the thing referred to in this proviso, the reference to rent could have no application, as all accrued rents were presumed to be and had actually been paid before the termination of the lease. The option, however, reserved by the lessor to so cancel the lease extended to all or any part of the acreage, and it may well have been within the contemplation of the parties that such option would only be exercised as to part of the land, leaving accruing rents on the remainder to be applied on the stipulated damages.

I think the interpretation adopted by the jury was consistent with the conditions shown in evidence and supports the verdict for \$13,625.

When the lessor agreed to "compensate" the lessee at a fixed rate per acre per year for the loss of the canceled two years of his leasehold, it agreed to give him something of value for surrendering the remainder of his term. There is no compensation in merely granting to the lessee the privilege of paying himself by applying to his claim rentals which he no longer owes, on lands which he no longer possesses.

The verdict of the jury is based upon a rational, common sense interpretation of the intent of the parties, and supports the only construction of the contract consistent with justice and fair dealing.

In the language of Justice Shaw in *Stein v. Archibald*, 151 Cal. 223, 90 Pac. 537:

"It is a well-settled principle applicable to the construction of contracts that, where one construction would make the contract unreasonable, unfair, or unusual and extraordinary, and another construction, equally consistent with the language, would make it reasonable, fair, and just, that the latter construction is the one which must be adopted."

It is true that the question of fact as to the interpretation of the ambiguous language of this lease was not submitted to the jury under an appropriate instruction, and instructions were given which, it is claimed, left with the jury the construction of the contract. But, even so, this error would only call for a reversal and new trial, and should not be followed by a judgment of this court taking the interpretation of the controverted language from the consideration of a jury.

Ex parte FUJII. (Cr. 2420.)

(Supreme Court of California. June 1, 1922.)

1. Constitutional law 240(1)—Evidence 18—Weights and measures 2—Prohibiting sale of strawberries in half-pint containers a reasonable classification.

The provision of Fruit and Vegetable Standardization Act, § 7, that the standard basket for strawberries shall be the dry pint, though the same section permits half-pint baskets for other berries, is not unreasonable or discriminatory, since it is a matter of common knowledge that strawberries are larger and of more irregular shape than other berries, so that the sale in small containers would be detrimental to the purchaser, and since the pint and half-pint containers had the same surface area, the difference being in their depth, which is not observable when the baskets are packed, as they usually are, in six-basket trays.

2. Weights and measures 2—Acts to limit deception in marketing should be liberally construed.

Acts providing standard containers for fruits and vegetables, having for their purpose the protection of the purchasing public by the elimination of deceptive methods in the marketing of products, are beneficial in a high degree, and are to be liberally construed.

In Bank.

Application of Frank Fujii for a writ of habeas corpus, prayed to be directed to the Sheriff of the City and County of San Francisco, to secure the release of petitioner from custody on a charge of violating the California Fruit and Vegetable Standardization Act. Writ denied.

Eugene F. Conlin, of San Francisco, for petitioner.

U. S. Webb, Atty. Gen., and R. W. Harrison, Deputy Atty. Gen., for respondent.

PER CURIAM. Application for a writ of habeas corpus. The applicant was arrested upon the charge of a violation of the provisions of an act of the Legislature known as "The California Fruit and Vegetable Standardization Act" (Stats. 1921, c. 719), committed by the applicant on or about the 29th day of October, 1921, in the city and county of San Francisco, as follows:

That the said Frank Fujii "then and there unlawfully, feloniously, maliciously and willfully did sell, offer for sale and expose for sale certain strawberries in containers holding less than one dry pint, to wit, one-half dry pint, contrary to the force and effect of the statute," etc.

The applicant now seeks this writ, basing his application upon the ground that the particular provision of said act with the violation of which he is charged is unconstitutional, for the reason that the same is not uniform in its operation, but is discrimina-

tory, in that it imposes an arbitrary and unreasonable limitation and restriction upon the property rights of the applicant in the ownership and sale of his strawberries. The particular provision of said act which the application thus assails reads, in part, as follows:

"Sec. 7. Standard packages are hereby established as follows: * * *

"(2) Standard berry baskets, dry pint containing an interior capacity of approximately thirty-three and six-tenths cubic inches and dry one-half pint containing interior capacity of approximately sixteen and eight-tenths cubic inches; *provided, that the standard basket for strawberries shall be the dry pint.*"

[1] Section 14 of the act makes it unlawful for any person, firm, company, organization or corporation "to pack or cause to be packed for sale, or shipment, import, sale, offer for sale or deliver for shipment, any of the fresh fruits, nuts or vegetables specified in this act that do not conform to the standards herein provided. It shall also be unlawful to prepare, sell or offer for sale, a deceptive pack of fresh fruits, fresh vegetables," etc., "or to mislabel any package of such fruits, nuts or vegetables." The particular discrimination upon which the applicant herein relies is that created by the foregoing provisions in section 7 of said act as between the growers and sellers of strawberries and the growers and sellers of other berries, such as blackberries, loganberries, raspberries, huckleberries, currants, and the like, which latter berries may be packed, shipped, and sold in dry one-half pint containers, while strawberries may only be packed, shipped, and sold in dry pint containers. This, the applicant contends, creates a discrimination for which no proper basis in the way of legitimate classification exists. The applicant offers no evidence in support of this contention, but relies upon the face of the statute itself, and, in a measure, upon common knowledge as to the comparative sizes and properties of these respective species of berry product as furnishing the necessary support of his claim. The respondent to the petition herein, on the other hand, presents, as a part of his showing in support of the lawfulness of the petitioner's detention, the actual containers used in the packing, shipment, and sale of these respective berry products in conformity with the standards fixed by the statute, both in the form of the individual basket in both the pint and half-pint sizes and of the larger container known as the berry box or tray, which holds six baskets of either the pint or half-pint size. In this meager state of the record we are asked by the applicant to hold this act, as to the particular provision above quoted, unconstitutional, as showing upon its face an unjustified discrimination against the growers, shippers, and sellers of strawberries.

We are unable to so hold even with the aid of that common knowledge of the similarities

and differences in the several species of berries which the applicant seeks to invoke in aid of his contention. It is a matter of common observation and knowledge that strawberries are, as a rule, much larger than the other varieties of berries referred to, and that, as a rule, they are less uniform as to size and also as to form, especially in the larger varieties. It is also a matter of common observation and knowledge that strawberries cannot be placed as compactly in containers as other varieties of berries can without rendering them liable to crushing, with the consequence of their speedy degeneration and decay. These facts of themselves would seem to furnish some basis for a classification having to do with size of containers, but when there is added to these matters of common observation and knowledge the showing made by the respondents as to the particular forms and sizes of berry containers in common use, both as to the individual basket and as to the larger box or tray, holding in each case six baskets, the reason for the classification made by the act in question becomes obvious. The half-pint basket in common use for berries is shown to have the same area as to its upper surface as the pint basket, the difference in content being due to the fact that it is much shallower in depth and of much less area as to its bottom. It is reasonably plain that this reduction in area would work to the disadvantage of the larger, more rigid and less uniform strawberry, or, in other words, that the ratio in quantity and weight would not remain constant with the reduction in size of the container. But the chief difficulty does not lie here, but rather in the divergences in ratio and opportunities for deception furnished by the customary use of the larger box or tray in the packing, shipment, and sale of the berries. These larger boxes or trays are of uniform size, whether containing the pint or half-pint basket. In each case six baskets fill the tray. When these baskets are filled with berries and placed in these trays the upper and visible area is the same in the tray containing half-pint baskets as it is in the tray containing pint baskets. The interior or lower area of each size of basket, is concealed, and thus the purchaser has no ready means of detecting the difference in content of the two trays, although the one has but half the content of the other. This opportunity for deception would not be so serious if the two sets of trays and baskets were exhibited side by side for comparison or other test as to their content, but this condition would rarely be presented if the purpose of the seller was that of deception. The act in question evidently had this precise matter in view in its provision, above quoted, making it unlawful "to prepare, sell or offer for sale a deceptive pack," etc. It may be argued that this opportunity for deception is as great in the other species of berries as in the case of strawber-

ries, but the answer is that the same inconsistent proportion in content which was seen to exist in case of the individual baskets would also appertain in a larger degree to a cluster of baskets in the trays of uniform area. We think, therefore, that there is a sufficient basis for the classification made use of in this act to justify the discrimination as to the size of containers for strawberries.

[2] With the policy of the law we have not to deal, but it may be said that acts of this character, having for their purpose the protection of the purchasing public by the elimination of deceptive methods in the marketing of products, are beneficial in a high degree, and that such acts are to be liberally construed so as to give effect to their salutary regulations.

The writ is denied, and the petitioner remanded.

RICHARDS, Justice pro tem., and LAW-
LOR, WILBUR, SHURTLEFF, and WASTE,
JJ., concur.

(189 Cal. 59)

GEARY ST., P. & O. R. CO. v. ROLPH et al.
(S. F. 9350.)

(Supreme Court of California. June 2, 1922.
Rehearing Denied June 29, 1922.)

1. Corporations ⚡243(3)—Principal is liable for calls on stock held in agent's name as trustee.

Where stock of corporation stood on the company's books in the name of a trustee, who was agent for the real stockholder and holding the stock for his principal within the scope of the authority of the agent, the principal is liable to the corporation for calls for a portion of the unpaid balance of the subscription price of the stock.

2. Principal and agent ⚡132(1)—Principal is liable for agent's contracts within scope of authority, though made in agent's name.

A principal is responsible to third persons for the ordinary contracts of his agent made with third persons in the course of the business of the agency and within the scope of the agent's powers, though such contracts were made in the name of the agent, and did not purport to be other than the agent's personal obligations.

3. Principal and agent ⚡145(4)—Third person cannot hold undisclosed principal after electing to hold agent.

The rule that a third person can hold an undisclosed principal on contracts made by his agent in the agent's name is subject to exception when the third person knows he is dealing with an agent and knows who is the principal, and thereafter elects to hold the agent, and not the principal.

4. Corporations ⚡228—Liability of stockholder for unpaid portion of subscription is not in writing.

The liability of a stockholder to an insolvent corporation for the unpaid portion of the par value of the stock is not evidenced by a written agreement, but arises from his relation to the company as a stockholder.

5. Principal and agent ⚡132(1)—Fact that principal was known to third person does not relieve his liability on contracts in agent's name.

The mere fact that the principal is known to a third person at the time the latter makes a contract with the principal's agent in the name of the agent instead of the principal does not alone prevent the third person from holding the principal liable on the contract, in view of Civ. Code, § 2330, stating that an agent represents his principal for all purposes, and that liabilities which would accrue to the agent if they had been entered on his account accrue to the principal.

6. Corporations ⚡89(1)—Insolvency of corporation is not necessary to entitle it to enforce stockholder's liability for unpaid par value.

It is not necessary that a corporation be insolvent to entitle it to enforce the liability of its stockholders for the unpaid balance of the par value of stock subscribed for by them.

7. Corporations ⚡228—Insolvent corporation owes duty to call for unpaid subscriptions for stock.

It is the duty of an insolvent corporation to resort to the liability of its stockholders for unpaid portions of the par value of its stock to enable the corporation to discharge its debts, and, if it fails to perform its duty in that respect, the creditors can enforce such liability.

8. Corporations ⚡243(3)—Statute requiring transfer on corporate books does not prevent holding undisclosed principal liable for stock in agent's name.

Civ. Code, § 324, providing that a transfer of corporate stock is not valid except as to the parties thereto until it is entered on the books of the corporation, does not prevent a corporation from enforcing a call for the unpaid balance on its stock against a stockholder whose stock stood on the books of the corporation in the name of an agent as trustee.

9. Corporations ⚡89(1)—Calls by corporation on unpaid subscriptions must be equal on stockholders.

The call by a corporation upon its stockholders for portions of the unpaid price of the stock, to be enforceable in statutory proceedings, must be equal on all stockholders, so that, when all have paid the call, each will have paid the same amount on each share of stock subject to the call.

10. Corporations ⚡228—Creditors can hold any stockholder for entire amount due on subscription.

Creditors of a corporation can require any stockholder to pay the entire amount due on his stock subscription for the satisfaction of

their claims, leaving it to the stockholder to bring suit against the other holders to equalize the burden.

11. Railroads ☞15—Evidence held not to sustain finding that greater amount had been paid on some stock subscriptions.

In an action to enforce a uniform call on the holders of all the stock of a railroad corporation, evidence that, when a corporate franchise was procured, 1 per cent. of the stock was subscribed and 10 per cent. of the par value of that stock paid, as required by Civ. Code, §§ 293, 294, but that thereafter calls were made and apparently paid in equal amounts by the stockholders, does not sustain a finding that a portion of the stock, erroneously stated by the trial court to be 10 per cent., had been subject to payments larger than the rest of the stock, so as to render an equal call against all shares of stock invalid, but rather supports the inference that the amount paid in to secure the franchise had been returned to those who advanced it or had been credited on subsequent calls.

12. Corporations ☞90(6)—Evidence held not to sustain finding stock was full paid as between corporation and stockholders.

Evidence that one by-law of a corporation declared that certificates should be issued only for full paid stock, which was contradicted by another by-law providing for the issuance of stock when 20 per cent. had been paid thereon, with evidence that the stock in controversy did not recite that it was full paid when issued, which was not required by Civ. Code, § 323, prior to its amendment by St. 1905, p. 397, held not to show that the stock issued to defendant had been issued as full paid as between the corporation and the stockholders, so that the corporation could not levy a call thereon exceeding 10 per cent. under Civ. Code, § 332.

In Bank.

Appeal from Superior Court, City and County of San Francisco; George A. Sturtevant, Judge.

Action by the Geary Street, Park & Ocean Railroad Company against James Rolph, trustee, and Robert F. Morrow, in which William Grant Morrow and another, as executors, were substituted as defendants after the death of Robert F. Morrow. Judgment for defendants, and plaintiff appeals. Reversed.

Pillsbury, Madison & Sutro and Alfred Sutro, all of San Francisco (Eugene M. Prince, of Berkeley, of counsel), for appellant.

William M. Abbott, Wm. M. Cannon, K. W. Cannon, and E. J. Foulds, all of San Francisco, for respondents.

SHAW, C. J. This is an action by the plaintiff to recover of defendants the amount due from them upon an assessment or call for a portion of the unpaid subscription price of its corporate stock, amounting to \$54,876 upon 1,614 shares of the stock. The action

was begun in 1916, in the lifetime of Robert F. Morrow, against James Rolph, as trustee, and said Robert F. Morrow. On June 3, 1918, Morrow died. Thereupon his executors were substituted as defendants in his stead, and a claim for that amount was duly presented to them for allowance and was by them rejected. Whereupon the action proceeded to trial and judgment for the defendants. The plaintiff appeals.

The complaint alleges the number and value of the shares of the plaintiff's capital stock; that its par value is \$100 per share; that only \$37.50 had been paid thereon; that a call had been regularly made on the stockholders for the payment of an additional sum of \$34 per share thereon for the purpose of raising money wherewith to pay its debts; that it has no assets with which to do so other than the liability of the stockholders for the unpaid balance of the stock value; and that it had duly elected to collect the amount called for by action instead of by sales of the stock. It then alleged that Robert F. Morrow was, at the date of the call, and had been ever since July 17, 1902, the owner of 1,614 shares of said stock, which shares at all times mentioned had stood and still stood in the name of James Rolph, trustee, on the books of said corporation, and for which, prior to July 17, 1902, certificates had been issued in the name of James Rolph, trustee, by plaintiff at the request of said Morrow, which certificates were by plaintiff delivered to Morrow and which he accepted and which he at all times thereafter owned; that said Rolph never had any interest in or title to the stock; and that Morrow, as such owner, had demanded and received from the plaintiff all the dividends declared by the plaintiff on said stock. The answer admitted that the said shares stood in the name of Rolph, as trustee, and that certificates had been issued to him in his name by the plaintiff, but denied the ownership thereof by Morrow, the receipt of any dividends thereon by him, the delivery of the certificates to Morrow, and the acceptance thereof by him.

The court made findings showing that the plaintiff had issued the amount of stock aforesaid; that only \$37.50 had been paid on the par value of 90 per cent. thereof; that \$47.50 had been paid on the remaining 10 per cent.; and that the call had been regularly made, as alleged, for \$34 on each share of the entire stock. The findings also state that the 1,614 shares of stock in controversy were issued to James Rolph, trustee, and at all times stood on plaintiff's books in that name. No findings in response to the allegations of ownership by Morrow were made. The findings merely state that the shares were not issued in the name of James Rolph, trustee, at the request of Morrow, and that they were not delivered by plaintiff

to Morrow or accepted by him. The failure of the court below to find upon the allegation of ownership was evidently based on the theory that Morrow could not be the owner of stock, so as to become liable to the corporation or its creditors for calls thereon for unpaid subscriptions, unless it stood on the corporate books in his name, or unless the corporation had in some manner and with his consent recognized him as the holder thereof, and that the facts that he was the beneficial owner, and the record holder his agent or trustee to hold the stock in that manner for his use and benefit, were immaterial.

It was further found that it is not true "that said Robert F. Morrow, otherwise than as the agent or representative of said James Rolph, trustee, demanded or received from plaintiff any dividend or dividends on said stock or any thereof." Technically the finding that the dividends were not received "from plaintiff," except as to one or two of them, is correct. But, if it was intended as a finding that Morrow had never received for his own use and benefit any of the dividends declared and paid by plaintiff on the stock, it is directly contrary to the undisputed evidence. The evidence shows that 116 dividends were declared and paid after May 26, 1885, the date when the first 400 of the 1,614 shares were issued to Rolph, trustee. The dividends were uniformly paid by means of checks payable to James Rolph, trustee. Rolph testified that he had regularly received these checks; that the same were usually delivered to him by Morrow, or by some one for him; that he always indorsed these checks to the order of Morrow at once and redelivered the same to him; and that he had never received or kept any of said checks for his own personal use. This evidence was not contradicted or in any manner impeached.

The plaintiff assigns as error the failure to find the facts in regard to the allegations of ownership. An examination of the record shows that there was abundant evidence to justify a finding that Morrow was at all times after its issuance the real and actual owner of this stock, and that in taking and holding it in his own name Rolph was acting solely as agent for Morrow and for the exclusive use and benefit of Morrow. In addition to the testimony of Rolph, as aforesaid, the testimony of Morrow himself, although evasive in the extreme, was sufficient to warrant the conclusion, beyond doubt, that he was the real owner. It follows that, if such ownership and agency are material to the right of the plaintiff to recover, or if the facts show such relations between Morrow and the corporation as to make him liable for calls for unpaid subscriptions, the failure to find such facts was error which requires a reversal of the judgment. Two questions are thus presented: (1) Whether or not a call for unpaid subscriptions of stock, made for

the purpose of obtaining money necessary to pay the debts of an insolvent corporation, can be recovered by the corporation from one who is the real owner of stock which stands on the books of the corporation in the name of another as trustee or agent, the trust or agency being for the sole purpose of holding the stock for the use and benefit of the real owner; (2) whether or not the conduct of Morrow with respect to this stock and the corporation put him in such relation or privacy with the corporation as to make him directly liable to it for such calls.

It will not be necessary to consider the second question. We are of the opinion that under the facts of this case Morrow became liable to the corporation for the call in question.

[1] Rolph held the legal title to this stock. It was registered on the corporate books in his name as trustee. Morrow's ownership was not disclosed by the registry. But Rolph held it solely for the use of Morrow and as Morrow's agent for that purpose. As such holder Rolph assumed the obligation to the corporation to pay the balance remaining unpaid upon the subscription price, which, in the absence of any contrary showing, is presumed to have been the par value. He assumed this obligation in carrying out his agency, and it came within the scope of his powers as such agent.

[2] It is a settled rule of the law of agency that a principal is responsible to third persons for the ordinary contracts and obligations of his agent with third persons made in the course of the business of the agency and within the scope of the agent's powers as such, although made in the name of the agent and not purporting to be other than his own personal obligation or contract.

"It is thoroughly well settled in the law of agency that, when a simple contract, oral or in writing, other than a negotiable instrument, is in fact entered into by one of the parties as the authorized agent of another, but in his own name, and without disclosing to the other party the name of the principal, or even the fact that he is contracting as agent at all, the other party to the contract, while he has a right to sue the agent on the contract, may, at his option, maintain an action against the undisclosed principal, when discovered." 1 Clark & Skyles on Agency, § 457, p. 1006.

See, also Story on Agency, § 446; 2 Mecham on Agency, § 1710. The following cases in this state enforce or announce this rule: *Ellis v. Crawford*, 39 Cal. 526; *Thomas v. Moody*, 57 Cal. 219; *Goss v. Helbing*, 77 Cal. 190, 19 Pac. 277; *Puget S. L. Co. v. Krug*, 89 Cal. 244, 26 Pac. 902; *Ferguson v. McBean*, 91 Cal. 72, 27 Pac. 518, 14 L. R. A. 65; *Bergtholdt v. Porter B. Co.*, 114 Cal. 689, 46 Pac. 738; *Schader v. White*, 173 Cal. 445, 160 Pac. 557; *McKee v. Cunningham*, 2 Cal. App. 688, 84 Pac. 260; *Walton v. Davis*, 22 Cal. App.

459, 134 Pac. 795; *Eldridge v. Mowry*, 24 Cal. App. 186, 140 Pac. 978.

It has been said in some cases that this rule does not prevail when, at the time the contract is entered into, the principal is known. In *Ferguson v. McBean*, supra, the court, in the course of its discussion, said:

"It is undoubtedly true that when the principal is undisclosed he may sue or be sued, but not when he is known, and especially not when he is present at the making of the contract."

But the court was there considering the question whether or not one Bills was interested in or bound by a written contract executed by McBean alone, upon negotiations conducted by plaintiff with both McBean and Bills in which the interest of Bills, if any, was fully disclosed. The decision was based on the conclusion that the plaintiff deliberately chose to take the contract of McBean alone instead of a contract by both, and that under the peculiar circumstances of the case parol evidence could not be received to show an intent to deal with both so as to make Bills liable as an interested party, because it would violate the rule that parol evidence is inadmissible to vary the terms of a writing. The above-quoted statement was not necessary to the decision, nor was the decision based on it.

[3] The rule is subject to the well-recognized exception that the principal cannot be held liable when the third person knows that he is dealing with an agent and knows who is the principal, and elects to hold the agent rather than the principal. 1 *Clark & Skyles, Agency*, §§ 459, 461, 462. It was to this proposition that the above statement was leading.

[4] In this case the exception stated in some cases that the rule cannot be applied when the contract is in writing is of no importance, for the liability of Rolph for the unpaid subscription is not evidenced by a written agreement to that effect, but arises from his relation with the company as a stockholder. *Rhode v. Dock Hop Co.*, 184 Cal. 376, 194 Pac. 11, 12 A. L. R. 437. It does not appear that the corporation was informed, at the time Rolph became the holder of this stock, that he was holding it for Morrow, as agent or otherwise, nor that it has ever endeavored to enforce the obligation against Rolph, instead of Morrow, or otherwise elected to hold Rolph liable therefor in place of Morrow.

[5] We are also of the opinion that the better reason, as well as the weight of authority, is against the proposition that the mere fact that the principal is known to the third person at the time he contracts with the agent prevents such third person from holding the principal liable on the contract made in the name of the agent. We treat this point because upon a new trial it may appear that the agency was fully known to plaintiff.

That the principal is not liable in such a case if the circumstances, or the terms of the contract, or the two combined, show an intent by the other party to take the agent as his debtor or obligor, in preference to the principal, is, as we have said, well established, and it is manifestly in accordance with reason and justice. In such a case the election takes place at the time of the making of the contract. But, where no such election or intent appears and there is nothing more than a contract made in the name of the agent, knowing him to be such and with knowledge of the identity of his principal, the case is, and should be, governed by the well-known principle that he who acts by another acts by himself; that the contract of the agent, within the scope of his authority, is in legal effect the contract of the principal. The Civil Code states that—

"An agent represents his principal for all purposes within the scope of his actual or ostensible authority, and all the rights and liabilities which would accrue to the agent * * * within such limit, if they had been entered on his own account, accrue to the principal." (Section 2330.)

Here Rolph was engaged by Morrow to register Morrow's stock in his, Rolph's, own name, and hold it for the use of Morrow. It was a necessary incident of such agency that Rolph should assume in his own name the obligation to pay up, on call, the balance of the stock subscription. He was therefore authorized by Morrow to assume such obligation. If Rolph had entered into this relation on his own account the liability for the calls would, of course, have "accrued" to Rolph. Consequently, under the rule of section 2330, the liability to respond to such calls "accrued to the principal," Morrow.

The authorities fully support this conclusion. Mr. Story says:

"The liability of the principal to third persons upon contracts made by his agent, within the scope of his authority, is not varied by the mere fact, that the agent contracts in his own name, whether he discloses his agency or not, provided the circumstances of the case do not show that an exclusive credit is given to the agent."

And he extends this doctrine to written contracts. Sections 446, 446a. And as to the exceptions he says:

"The exceptions to this liability of the principal may easily be gathered from what has been already stated. If the principal and agent are both known, and exclusive credit is given to the latter, the principal will not be liable, although the agent should subsequently fail; for it is competent to the parties to agree to charge one, exonerating the other; and an election, when once made, is conclusive and irrevocable." Section 447.

"Sometimes a subscription for stock is made by one person in his own name, but really he is acting as the agent of another, and the stock is entered on the corporate books in the name

of the agent. In such a case it is the rule that corporate creditors may hold either the principal or the agent responsible on the stock."

1 Cook on Cor. § 249.

"In America the relation of the real owner to the 'dummy' is held to be that of principal and agent, and the principal is held liable, on the ground that an undisclosed principal is liable on the contracts of his agent." 1 Cook on Cor. § 253.

In Clark & Skyles on Agency it is said that the doctrine stated might seem to be—

"opposed to the general principle of the law of contracts that a contract cannot impose a liability upon a person who is not a party to it, but this principle is held inapplicable because of the doctrine of the identity of principal and agent. The principal, although not named in the contract or disclosed at all, is regarded as having become a party thereto through the agent. The minds of the parties meet because, as was said in substance in a New York case, the agent's mind is his undisclosed principal's mind."

The reference is to Kayton v. Barnett, 116 N. Y. 627, 23 N. E. 24.

An examination of the decisions of the subject show that the idea that the principal cannot be held liable in cases where the third person, at the time of contracting, knew the principal and his relation to the transaction, arises from the unfounded assumption that, since the decisions holding the principal liable when the contract does not disclose his name or interest, refer to him as the "undisclosed principal," the doctrine does not prevail when he is known. But this language is used because the principal was insisting, not that he is not liable when he is known, but that he is not liable when the contract does not on its face purport to bind him, or to be for his behoof or benefit. It is this circumstance that is referred to by the word "undisclosed." The principal would have no standing in court to say he is not liable when his authorized agent makes a contract purporting to be for him and the party taking it had full knowledge of the fact that it was for him. The liability when he is undisclosed does not arise from his not being known, although sometimes fraud from that fact is also involved, but from the fact that the contract of his authorized agent, though not in his name, is really for his benefit and in his business. Thus Mr. Mechem says:

"The principal is also liable on all informal contracts entered into on his account and by his authority and not expressly made on the agent's responsibility rather than the principal's. * * * Where a person is known to be acting as the agent of a disclosed principal, the presumption is that the principal, and not the agent, is to be bound." 2 Mechem on Agency, § 1710; see, also section 1717.

[6, 7] It is not necessary to the enforcement of this liability that the insolvency of the plaintiff corporation or its inability to

pay its debts should appear, for the liability exists under the general principles of law. In this case, however, the insolvency does appear, and these liabilities for calls are not only part of the corporate assets, but they constitute the whole thereof. It is the duty of the corporation to resort to them for the payment of its debts, and, if it fails in that respect, its creditors may do so. Sanger v. Upton, 91 U. S. 60, 23 L. Ed. 220; Baines v. Babcock, 95 Cal. 581, 27 Pac. 674, 30 Pac. 776, 29 Am. St. Rep. 158; Rhode v. Dock Hop Co., 184 Cal. 378, 379, 194 Pac. 11, 12 A. L. R. 437. There are many cases holding that, where the corporation is insolvent, the creditors have the benefit of the liability of the real owner of stock held on the books of the corporation in the name of an agent, disclosed or undisclosed, but really for the benefit of the real owner. Among them are the following: Brown v. Artman (C. C.) 166 Fed. 485; Brown v. Huey (C. C.) 166 Fed. 483; Kurtz v. Brown, 152 Fed. 374, 81 C. C. A. 498, 11 Ann. Cas. 576; American, etc., Co. v. Kurtz (C. C.) 134 Fed. 665; White v. Marquardt, 105 Iowa, 147, 74 N. W. 930; Fell v. Securities Co., 11 Del. Ch. 234, 100 Atl. 788; Gordon v. Cummings, 78 Wash. 519, 139 Pac. 493; State ex rel. v. Superior Court, 44 Wash. 108, 87 Pac. 40; Cole v. Satsop, 9 Wash. 487, 37 Pac. 700, 43 Am. St. Rep. 858; Ohio V. N. Bank v. Hulitt, 204 U. S. 162, 27 Sup. Ct. 179, 51 L. Ed. 423.

[8] In opposition to this conclusion, the defendants rely on section 324 of the Civil Code and on the decision of this court in People's Home Savings Bank v. Stadtmuller, 150 Cal. 106, 88 Pac. 280, Geary Street, etc., Co. v. Bradbury, 179 Cal. 46, 175 Pac. 457, and Visalia, etc., Co. v. Hyde, 110 Cal. 632, 43 Pac. 10, 52 Am. St. Rep. 136, which, they claim, prevent the application of such rule in this state.

The provisions of section 324 relating to the question are as follows:

"Whenever the capital stock of any corporation is divided into shares, and certificates therefor are issued, such shares of stock * * * are personal property, and may be transferred by indorsement, by signature of the proprietor * * * and the delivery of the certificate; but such transfer is not valid, except as to the parties thereto, until the same is so entered upon the books of the corporation as to show the names of the parties by whom and to whom transferred, the number of the certificate, the number or designation of the shares, and the date of the transfer."

It is claimed by the defendants that this provision forbids and prevents the existence of any liability for calls upon unpaid stock in favor of the corporation against any one except the registered owner. It will be seen from the language of the section that it does not purport to declare anything concerning the liability of a stockholder for the unpaid part of the subscription price. It relates ex-

clusively to transfers of shares of stock and to the things necessary to make such transfers valid as to other persons than the transferor and the transferee. We are not here concerned with the validity of the transfer of the stock to James Rolph, trustee, as between him and the person who transferred it to him. The record does not show how or from whom Rolph received the stock. The theory upon which the plaintiff here is allowed to choose to resort to the liability of the principal for the obligations of his agent is not based upon the proposition that the transfer of this stock to Rolph as trustee for Morrow was invalid. On the contrary, it assumes the validity thereof, and places the liability of Morrow upon the doctrine already stated that the principal is liable to such third person on any valid obligation incurred by the agent to such person in carrying out the business of the agency. There is nothing in the provisions of section 324, or in any other provision of the Code, that in any manner relates to or affects the right which the corporation would have, under the general principles of law, to enforce against the principal the obligation incurred by the agent. Such right depends on the relation of principal and agent existing between Morrow and Rolph with respect to the stock. That relation is perfectly lawful, and its lawfulness is not affected by the fact that Morrow could not maintain any right as a stockholder to participate in the management of the corporate affairs at stockholders' meetings, or to inspect its books, except through the medium of Rolph as his agent and trustee. The right of the corporation to pursue Morrow for Rolph's liability is not at all inconsistent with the absence of any right in Morrow to personally act in or control the corporate business. The provisions of section 324, therefore, do not constitute a defense to this action.

We find nothing in the decisions cited by the defendants which gives to section 324 the effect claimed for it, or which impairs or destroys the plaintiff's right to pursue Morrow for the amount of the call formally and technically made upon Rolph as holder of this stock.

People's Home Savings Bank v. Stadtmuller, supra, is the leading case in this state on the subject. In that case the plaintiff attempted to enforce an unpaid call by action against Anna Stadtmuller. The stock had been subscribed for and had been issued to F. D. Stadtmuller, her husband, in his lifetime, and he died the owner thereof. Upon the settlement of his estate the certificates and title thereto were distributed to said widow. She accepted the certificates and retained the same, but never caused the transfer thereof to her to be entered on the books of the corporation, nor otherwise assumed the relation of a stockholder with the

plaintiff. The corporation about that time became insolvent, and shortly afterward duly made a call for the unpaid portion of the subscription price of the stock. The court said that, where stock had been transferred from the record holder to another who does not cause the transfer to be registered, "or in some way equivalent in the eye of the law establishes the relationship of stockholder between himself and the company, and is thus accepted by the company as a substituted stockholder for the original holder," the corporation "has no right of action against the transferee, because, as between him and the corporation, the contractual relation of stockholder has not been created." It will be seen that there had been no agency of the husband to hold the stock for his wife; the corporation did not attempt to enforce the original subscription of the husband as her agent or in his own behalf, but was proceeding solely to enforce the obligation which it claimed had been created by implication of law against the wife upon the acceptance by her of the stock distributed to her. There was no suggestion or claim that she was liable as principal for the obligation of her agent incurred for her in the course of his business as such agent. That question did not arise, and the decision does not affect it in any manner.

In *Visalia R. R. Co. v. Hyde*, supra, the stock was entered on the corporate books in the name of Hyde, but before the making of the call thereon he had sold it to another person and had indorsed and delivered the certificate to that person. That transfer, however, had not been entered on the corporate books. It was held that the defendant was liable for the call, notwithstanding the previous sale and the fact that he was not the owner thereof when the call was made. The mere statement of the facts shows that the right of the corporation to sue the principal for an obligation assumed in his behalf by his authorized agent was not involved in the case. In *Geary Street, etc., Co. v. Bradbury*, supra, it is said incidentally in the course of the argument that a purchaser of stock not fully paid up does not become liable to the corporation for calls thereon until in some manner he comes into privity with it as a stockholder. But the defendant in that case was the registered owner of the stock at the time the call was made, which, it may be remarked, was the same call as is here involved, and no question of the character here involved and urged was presented or could be presented. These cases, therefore, do not conflict with our conclusion that Morrow became liable as principal.

Upon the foregoing principles we are of the opinion that Morrow became liable to the plaintiff for calls regularly made on the subscription price of this stock, that his ownership of the stock and Rolph's agency were

facts material to the plaintiff's case as alleged, and that the court below erred in failing to find such facts.

The respondent contends that the assessment is invalid because it is unequal in operation. The point is based on the findings that in 1915, when the assessment was made, there were outstanding 10,000 shares of stock of the par value of \$100 each, upon 90 per cent. of which \$37.50 a share was paid up, and upon the other 10 per cent. \$47.50 a share was paid up. This would mean that 9,000 shares were paid up to \$37.50 a share and 1,000 shares up to \$47.50 a share.

[9] The prevailing rule with regard to calls made by the corporation itself on unpaid subscriptions for additions to its working capital is that they must be equal, so that, when all have paid the call, all the stockholders included in the call will have paid the same amount on each share of their stock subjected to the call. 4 Thompson, Corp. § 3713; 1 Cook on Corp. § 114; 1 Clark & M. on Corp. § 499f; O'Dea v. Hollywood, 154 Cal. 70, 97 Pac. 1.

[10] Where creditors proceed by bill in equity to apply the unpaid stock subscription to the payment of corporate debts, this rule does not prevail; each is liable for the full amount unpaid on his subscription, and any inequality resulting from the proceeding is adjustable only by suits for contribution between the respective stockholders. Kaye v. Metz (Cal. Sup.) 198 Pac. 1049; 1 Cook on Corp. § 211; Pentz v. Hawley, 1 Barb. Ch. 123. While this call and the action to enforce it is really for the benefit of creditors, it is nevertheless a statutory proceeding, and, so far as we are advised, it is uniformly held that such a call by the corporation pursuant to statutory authority is void unless it is made in such manner as to produce no inequality between stockholders. To apply this rule to the present case, for illustration, a call for \$34 a share could not be lawfully made on all the shares, if some of them are only \$37.50 paid up and others are \$47.50 paid up. Hence, under this rule, if the facts are as stated, the call would be invalid.

[11] The only basis for the finding that 1,000 shares were paid up to the amount of \$47.50 a share is the statement in the plaintiff's articles of incorporation, dated November 5, 1878, that the amount of the capital stock is \$1,000,000, divided into 10,000 shares of \$100 each; that the amount thereof actually subscribed was 100 shares; that this was more than \$1,000 per mile of the length of the road; and that 10 per cent. thereof had been paid in to the treasurer. One hundred shares, it is to be noted, was only 1 per cent. of the total capital stock, not 10 per cent., and the remainder thereof was 99 per cent., not 90 per cent. The sum paid in was not \$10,000; it was only \$1,000. Therefore

the finding that \$47.50 was paid up on 1,000 of the shares is not sustained by the evidence.

The effect on the validity of the assessment might perhaps be the same, the inequality would still be manifest, if \$38.50 instead of \$47.50 per share had been paid on part of the stock assessed, and only \$37.50 on the remainder. There is evidence, however, showing that the inequality did not exist. The books and records of the corporation were partly destroyed by the great fire of April, 1906. There was uncontradicted evidence, partly secondary and partly derived from books not destroyed, to the effect that the books showed that on May 30, 1879, an assessment was made for \$5 a share on the whole 10,000 shares of capital stock, and that it was on that day paid to the treasurer and credited thereon to the respective stockholders, amounting to \$50,000, and that the next credit entry on the book was "June 4, 1879, Franchise (S. C. Bigelow) \$1,000." Bigelow was the treasurer. It was also shown by like evidence that thereafter on the same books follow credits to the respective holders of all the stock for payments of seven other assessments, made at monthly intervals thereafter, six for \$5 a share and one for \$2.50 a share, the whole amounting to \$375,000, or \$37.50 on each of the 10,000 shares; that neither the \$1,000 nor any part thereof was credited to the original subscribers, or to any stockholder as a payment on his stock, nor credited as a payment on account of capital stock at all, but only as "Franchise." This evidently refers to the franchise obtained by filing the articles of incorporation, for the recital in the articles was obviously made to show compliance with the provisions of the Civil Code requiring that before such articles are filed by any railroad corporation stock must be subscribed to the amount of \$1,000 for each mile of road (section 293), and that "there must be paid for the benefit of the corporation, to a treasurer elected by the subscribers, ten per cent. of the amount subscribed" (section 294). The articles do not expressly say that the 10 per cent. paid in to the treasurer was paid by the 10 persons named therein as subscribers, or either of them, or in their behalf. The inference from all this is very strong either that the \$1,000 was paid by some person on behalf of all the persons who then and afterwards took up all the stock, and was afterward refunded to him, or that before any assessment was made it was in some way equalized so that all were liable to calls in equal amounts per share. The fact that each of them, or their successors in interest, within 15 months after the filing of the articles, voluntarily paid eight separate calls of the same amount upon each share, amounting in all to \$375,000 without raising any objection on account of inequali-

ty, coupled with the fact that said evidence also shows that for 35 years following, up to the year 1915, when the present call was made, the books of the corporation continuously carried charges amounting to precisely \$625,000 against said stockholders, as balances unpaid on the subscription price of their capital stock, and credits amounting to exactly \$375,000 to said stockholders for payments made by them thereon, instead of \$376,000, as it would have been if the \$1,000 had not been in some way refunded, is very persuasive, if not conclusive, proof that this "Franchise" payment was either repaid out of the general funds of the corporation to the person or persons who paid it, credited in the collection of the subsequent calls, or otherwise adjusted, so as to equalize the matter between all the stockholders. The record shows that the court below, in its consideration of the evidence, assumed that \$10,000 was paid in on the 1,000 shares subscribed before the filing of the articles. This, in effect, was considering a fact which was not true and which was not in evidence. It constitutes error in character the same as the receiving of incompetent evidence, or as an erroneous interpretation of the effect of a writing on a material matter. With this erroneous idea as to the amount paid in, the court would not give the same weight to the above-mentioned strong circumstantial evidence of a subsequent return or distribution of the comparatively small sum of \$1,000 actually paid and of the consequent equalization of the amount paid per share by the several stockholders. The entry of "Franchise \$1,000" would be wholly without significance, and there would be nothing to explain the absence of any account of the \$10,000. In so far as the possible inequality of \$1 per share on 1,000 shares might be sufficient to support the judgment, if that fact had been found, or in so far as the finding of a larger inequality could be regarded as immaterial in view of the actual existence of the smaller one, it would be a judgment based on a fact which the court did not find, and which it is extremely doubtful that it would have found but for the erroneous interpretation of the effect of the evidence as aforesaid. Consequently the judgment should be reversed in order that the trial court may give the due effect to all the circumstances bearing on the point. It may be remarked in this connection that the opinion of the learned judge of the court below is printed in respondent's brief, and that it does not discuss or mention this point, but places the decision for the defendant altogether on the two propositions that Morrow could not be held liable unless he was the registered holder of the stock, and that there was no estoppel to prevent him from denying such ownership.

[12] There is also a finding that ever since

its issuance the whole of the capital stock of the corporation plaintiff has been and "is now fully paid up as between plaintiff corporation and its stockholders." Upon this finding the defendant contends that, under section 332 of the Civil Code, no assessment thereon could exceed 10 per cent., and therefore that the assessment of 34 per cent., or \$34 a share, is invalid. The finding by its terms implies that the stock is not paid up as between the corporation and its creditors, for whose benefit this assessment was levied, and hence it may be doubtful if it affects that assessment. But we do not think it is sustained by the evidence. The only support for it is an inference drawn from the by-laws adopted in 1878. These by-laws are contradictory on the subject so far as they relate to it all. Section 29 declares that "certificates of stock shall be issued only for fully paid stock." This, it is said, implies that no certificates were afterward issued except for stock that was fully paid up. Section 31 declares that stock shall be transferrable on the company books, on proper assignment and delivery to the assignee of "the receipts for the installments paid on such stock, or the certificates of stock when fully paid," but not "until all previous calls or installments thereon shall have been fully paid in," nor "unless at least twenty per cent. has been paid thereon and receipts issued thereon." This clearly indicates that the stock was not paid up at that time. The subsequent proceedings and transactions and the books of the company repel and destroy all inferences that the stock was issued as paid-up stock, or was, in fact, fully paid. On April 25, 1899, the order for the first assessment of \$5 a share was made. It was all paid in full on May 30, 1879. The entry made at the time on the books shows that the entire capital stock had been subscribed for, the names of the subscribers, the number of shares held by each, and the payment by each of them of the \$5 assessment on each share held by him. If the stock had been fully paid for previously, as now contended, there would have been a credit in the cash account for \$1,000,000 in money paid for the capital stock. But no such credit appears, or ever did appear, and no one has ever claimed that any such payment was ever made. There is no record of the expenditure of such money by the corporation, or of its possession thereof. If that amount of money had been paid to the corporation at that time, there would have been no reason or necessity for any assessment on the stock, or for any issue of bonds. Yet the record shows, as above stated, that calls or assessments on the stock were made and paid monthly from April, 1879, to January, 1880, amounting to \$375,000. It also shows that in 1890 the corporation issued bonds to the amount of \$484,000, secured by a mortgage

**PAYNE, Director General of Railroads v.
RICHARDSON, State Treasurer.**
(S. F. 9763.)

(Supreme Court of California. June 8, 1922.)

covering all of its properties, and that the present assessment was made to raise the money necessary to pay a deficiency judgment entered against the corporation on a foreclosure sale under said mortgage; also, as already stated, that the stock account carried a charge of \$1,000,000 against the stockholders for the aggregate amount owing upon the several stock subscriptions; that this was reduced by the credits for payments on the eight calls made and paid thereon, amounting to \$375,000; and that the balance owing from stockholders was thereafter carried on the books at \$625,000. It also appears that each of the eight orders or resolutions for the aforesaid calls began with the words, "It is hereby ordered that an assessment upon the subscribed capital stock" be levied. If there had been assessments upon paid-up stock, the word "subscribed" would not have been appropriate, and its use shows that the assessment was understood to be upon subscriptions owing, and not as or for a demand for an additional contribution to the corporate assets. The record indicates that the entire investment of the company did not reach the sum of \$1,000,000, which, it is now claimed, was paid in by the stockholders at the beginning of its operations. There is no evidence whatever that the stock was ever sold or offered for sale by the corporation at a price less than its par value, or that the certificates originally issued therefor declared that the stock represented thereby was fully paid for. All the certificates to Rolph were issued prior to July 17, 1902. Up to that time, and afterwards until 1905, when section 323 of the Civil Code was amended (Stats. 1905, p. 397), stock certificates were not required to show the amount paid thereon, or that anything had been paid thereon. The findings recite that thereafter, in 1907, in transferring certificates for 356 shares to new holders, the corporation made and issued certificates to the new owner showing on their face that the stock was fully paid. This was not the stock held by Morrow. We are not referred to any part of the record which supports this finding or relates to it. But the evidence we have already mentioned shows that, if such statements were made in those certificates, they were not true. This finding was of an evidentiary fact only, and it is not a finding that such stock was fully paid up at that time, nor that any of the certificates held by Morrow in Rolph's name were fully paid up.

For the foregoing reasons we conclude that the judgment of the court below was not in accordance with the law and the facts, and that it cannot stand.

The judgment is reversed.

We concur: WILBUR, J.; LENNON, J.; SLOANE, J.; LAWLOR, J.; SHURTLEFF, J.; WASTE, J.

1. Taxation ⚡393—Carrier's transportation of its own freight should not be considered in arriving at gross receipts.

In arriving at the gross receipts of a railroad for the purpose of taxation, the railroad's own transportation should not be considered.

2. Taxation ⚡390(1)—Taxes to be paid on railroads by Director General are to be ascertained in same manner had railroad remained in private control.

Under the Federal Control Act, § 15 (U. S. Comp. St. 1918, U. S. Comp. St. Ann. Supp. 1919, § 3115¼o), providing that nothing in the act shall be construed to affect the existing laws or powers of the states in relation to taxation, the taxes to be paid by the Director General of Railroads to various states or municipal bodies are to be ascertained in the same manner that they would have been levied and assessed had the railroad remained in private control.

3. Taxation ⚡393—Receipts of railroad under federal control include amount due from government for transportation.

Under the Federal Control Act, § 15 (U. S. Comp. St. 1918, U. S. Comp. St. Ann. Supp. 1919, § 3115¼o), providing that nothing in the act shall affect existing laws or powers of the states in relation to taxation, where a state tax on railroad property was based on a percentage of gross receipts, as a basis of valuation of the property, the amount of transportation furnished the government for which a railroad company had not been paid should be included in the gross receipts for the purpose of taxation.

In Bank.

Appeal from Superior Court, City and County of San Francisco; George A. Sturtevant, Judge.

Action by John Barton Payne, as Director General of Railroads, United States Railroad Administration, against Friend W. Richardson, as State Treasurer of the state of California. From judgment for defendant, plaintiff appeals. Affirmed.

Henley C. Booth, of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and Frank L. Guarena, Deputy Atty. Gen., for respondent.

WILBUR, J. This action was brought to secure an adjudication that the plaintiff has overpaid the state of California the sum of \$186,711.22, for taxes upon properties of the Southern Pacific Railroad Company in the state of California, this amount having been paid under protest, the plaintiff suing under and by virtue of the provisions of section 3669a of the Political Code, as added by St.

1917, p. 357, to establish the illegality of the tax and to secure judgment upon which basis an appropriation for reimbursement may be sought from the Legislature. The court sustained a general demurrer to the complaint and rendered judgment in favor of the defendant. Several questions are raised by the parties with relation to the authority of the plaintiff to bring the suit in question and as to the authority of the defendant to represent the state of California in defending against the claims of the plaintiff. We will, however, consider the main question upon its merits. The plaintiff claims that the state board of equalization improperly included in the gross receipts, upon which the tax of $5\frac{1}{4}$ per cent. was computed, the sum of \$3,556,404.28, which amount constitutes the amount charged against the United States of America for transportation of passengers and freight for war purposes. The appellant thus states his position:

"The ground of our claim that the sum sued for was erroneously and excessively levied, and collected from the Director General is that it represents $5\frac{1}{4}$ per cent. of the value of—not the amount collected for—transportation furnished by the United States to itself on, and while in exclusive possession and operation of, Southern Pacific Company operative properties in California during the calendar year 1918, and that, as the constitutional provision and statutes authorizing the gross receipts method of taxation use the words 'gross receipts from operation,' such amounts so included over the protest of the plaintiff were not gross receipts or any receipts at all."

[1, 2] The rule is well settled that the carrier's own transportation should not be considered in estimating the gross receipts of the railroad. In support of this rule appellant cites *McHenry v. Alford*, 168 U. S. 651, 18 Sup. Ct. 242, 42 L. Ed. 614; *United Pacific Railroad Co. v. United States*, 99 U. S. 402, 25 L. Ed. 274; *State v. Minnesota & International Ry. Co.*, 106 Minn. 176, 118 N. W. 679, 1007, 16 Ann. Cas. 426; *State v. Northwestern Telephone Exchange Co.*, 107 Minn. 390, 120 N. W. 534. It may be conceded that the transportation of the railroad company's freight would not augment the gross receipts of the company. The question presented here is quite different. Under section 15 of the Federal Control Act, 40 U. S. Stats. at Large, pp. 451, 458 (U. S. Comp. St. 1918, U. S. Comp. St. Supp. 1919, § 3115 $\frac{1}{2}$), it is provided:

"Nothing in this act shall be construed to amend, repeal, impair, or affect the existing laws or powers of the states in relation to taxation or the lawful police regulations of the several states, except wherein such laws, powers, or regulations may affect the transportation of troops, war materials, government supplies, or the issue of stocks and bonds."

We think it clear from this provision of the federal statute that it was intended that the

taxes to be paid by the Director General to various states or municipal bodies were to be ascertained in the same manner that it would have been levied and assessed had the railroad corporation remained in control. This view has also been entertained by the courts. *Wabash R. Co. v. Board of Review*, 288 Ill. 159, 123 N. E. 259; *Penn. Coal Co. v. Saddle River Township* (N. J. Sup.) 114 Atl. 157; *St. Louis-San Francisco Ry. Co. v. Middlekamp*, 256 U. S. 226, 41 Sup. Ct. 489, 65 L. Ed. 905. For that reason it was proper to include in the taxes the revenue derived from government transportation.

[3] Appellant's contention, however, is that the amount of \$3,556,404.28 merely represents an estimate at regular tariff schedules of the amount which would be chargeable at those rates to the government, and that it is, therefore, not a receipt at all. It is so alleged in the complaint and admitted by demurrer. The point is thus stated in the appellant's brief:

"The amounts representing what would have been charged the United States Government for transportation of men and property of United States, if the Southern Pacific Company had remained in control, should have been excluded from the gross receipts, and the tax based thereon was erroneous and excessive."

The respondent claims that this question cannot be raised upon the record, for the reason that the statement furnished by the plaintiff to the state board of equalization upon which the tax was levied and collected showed that said amount had been paid and was included in the gross receipts. However, we will assume, as alleged by the plaintiff and admitted by the demurrer, that the amount has not been paid by the United States to the plaintiff, its agent, or to the railroad company, and that the statement made to the state board of equalization is also susceptible of that construction. Nevertheless, if the taxes were to be levied and assessed exactly as if in private ownership, as seems to be contemplated by the Federal Control Act (section 15, supra), there was no error in the assessment. It is true that the United States, through the plaintiff, was operating the road as a private owner would, and was not therefore required to charge to itself any freight pertaining to the operation of the railroad, or pay or charge to itself freight or passenger fares for war transportation, but for purposes of state taxation it is clear that the United States intended, as manifested in its Federal Control Act (section 15, supra), that such taxes should be ascertained on the same basis as if the railroad had remained in private ownership. Otherwise, the power of the state would be "affected" by the change of management. The system of taxation by requiring a percentage of the gross receipts to be paid to the state is merely a basis for the taxation of the property of

railroads (Pullman Co. v. Richardson [Cal. Sup.] 197 Pac. 346), and the value of the railroad is obviously the same, whether operated by the company itself, or by the Director General. To depreciate the value of the property by a failure to include in the gross receipts the amount of transportation furnished the government, which would be a charge in private ownership, would be to fix a different property tax in one case from that in the other, and thus affect the state tax in violation of section 15 of the Federal Control Act, supra. That being true, it follows that the tax in question was properly collected.

Judgment affirmed.

We concur: LENNON, J.; SHURTLEFF, J.; SLOANE, J.; LAWLOR, J.; WASTE, J.

SHAW, C. J. I concur.

The agreement under which the United States took possession of the railroad system of the Southern Pacific Company provided that the Director General should pay all taxes lawfully assessed by the state on the property taken, or on the right to operate as a carrier, or save said company harmless therefrom. Under the scheme of taxation provided in the Constitution of California (article 13, § 14), the state imposes upon the railroad company annually a percentage tax upon the "gross receipts from operation" of its lines situated within this state. If the company had continued to operate the lines and the United States had transported thereon the same freight and passengers that were transported for the road for government purposes under the management of the Director General during the year in controversy, the earnings from such transportation would have included the amount produced at the regular rates for such carriage. It is evident that the taxes should be computed on the same basis as if such operation had continued, and that it was not contemplated that the earnings from the transportation on government account should go free from the burden of taxation, as the plaintiff, in effect, demands.

(189 Cal. 78)

O'BRIEN v. SUPERIOR COURT IN AND FOR CITY AND COUNTY OF SAN FRANCISCO et al. (S. F. 10246.)

(Supreme Court of California. June 5, 1922.)

1. Executors and administrators ⇨296—Receipt for inheritance taxes is prerequisite to distribution, only if report shows taxes due.

Inheritance Tax Law 1921, § 10, forbidding the distribution of the property of any estate, unless a receipt for the inheritance tax due thereon, signed by the state controller, shall first be filed in the court, must be construed with section 16, permitting a report by the

appraiser to the court that no inheritance tax was due, and, when so construed, does not prohibit distribution without production of a receipt for the tax, if the report filed shows no tax was due.

2. Mandamus ⇨169—Proceedings dismissed after compliance with alternative writ.

Where respondent has complied with the alternative writ of mandate, it is unnecessary to proceed further, and the cause will be dismissed.

In Bank.

Application by Constancia O'Brien for writ of mandate, prayed to be directed to the Superior Court of the City and County of San Francisco, and Hon. Frank H. Dunne, as Judge thereof, requiring said judge to sign and file a decree of distribution. Proceeding dismissed, because of compliance with alternative writ.

J. F. Bluxome, of San Francisco, for petitioner.

PER CURIAM. [1] In this case the superior court refused to sign and file a decree of distribution, after the same had been prepared, basing its refusal on the ground that section 10 of the Inheritance Tax Law of 1921 (Stats. 1921, p. 1510) forbids the distribution of any property of an estate, unless a receipt for the inheritance tax due thereon, signed by the state controller, shall first be filed in said court. In this case it appears that, after the proceeding in administration was begun, the inheritance tax appraiser, regularly appointed to that office, reported to the court an appraisal of the estate in question, showing that the shares of the several parties interested therein were all exempt from inheritance tax, and that no inheritance tax was leviable upon any part of the estate. Thereafter this report was submitted to the court, and the court made an order approving the same and declaring that no tax was due upon the property of said estate. All this was done in pursuance of the provisions of section 16 of said act. These two sections are to be considered together and in such a manner as to be harmonious. There is no difficulty in doing this. Section 10 applies only to cases where the report of the inheritance tax appraiser shows taxes due upon the property of the estate or some part thereof, or where, after that report is made, other property has been discovered upon which no report has been made. It has no application to cases where the record in the estate itself shows that no tax is due. Therefore the court should have signed the decree of distribution.

[2] An alternative writ of mandate was issued herein, in accordance with the petition, to compel the court to sign said decree. Up-

on the service of that writ, the court complied with it and makes return accordingly.

This makes it unnecessary to proceed further in the case, and the proceeding is dismissed.

SHAW, C. J., and LENNON, SHURTLEFF, WASTE, WILBUR, LAWLOR, and SLOANE, JJ., concur.

(189 Cal. 87)

MARTIN v. BARTMUS. (L. A. 7128.)

(Supreme Court of California. June 6, 1922.)

1. Quieting title ☞10(2)—One in course of acquiring title to government land may maintain action to quiet title.

A person, in the course of acquiring title to government land, may maintain an action to quiet title against parties to whose claims of title her equities are superior. Code Civ. Proc. § 738.

2. Judgment ☞747(6)—Judgment for unlawful detainer not admissible, under plea in bar in action involving title to premises in dispute.

A judgment for unlawful detainer, is not admissible, under a plea in bar in an action involving the title to the premises in dispute.

3. Public lands ☞106(1)—Holding of Department of Interior determining rights of conflicting claimants to public lands final.

Where the record in an action disclosed that the question of the conflicting rights of the parties to the action to obtain title from the United States Government, under the Desert Land Act March 3, 1877, as amended by Act March 3, 1891 (U. S. Comp. St. §§ 4674-4678), was fully presented to the Department of the Interior, in the method provided by said act for determining the rights of the conflicting claimants, and was therein finally determined, such holding is final and conclusive as to the issues involved in such hearing.

4. Quieting title ☞51—Trespassers not entitled to reimbursement for voluntary improvements.

Where, in an action to quiet title, defendants by counterclaim alleged that, while in possession of the land, they had made certain improvements thereon, but in respect to these the trial court found that such improvements were voluntary and made while the defendants were mere trespassers, defendants were not entitled to reimbursement for such improvements.

5. Quieting title ☞50—Granting writ of possession in action to quiet title held proper.

In an action to quiet title, the trial court, after finding defendants were mere trespassers on the land in question, and finding otherwise in plaintiff's favor, did not err in granting to the successful plaintiff the incidental remedy of a writ of possession, permitted by the express terms of Code Civ. Proc. § 380.

In Bank.

Appeal from Superior Court, Imperial County; Franklin J. Cole, Judge.

Action by Lillie E. Martin against Peter Bartmus and others. From a judgment for plaintiff, defendant named appeals. Affirmed.

Sebold L. Cheroske, of Los Angeles, and E. R. Simon, of El Centro (W. J. Tremear, of Los Angeles, of counsel), for appellant.

Frank C. Prescott and Frank G. Falloon, both of Los Angeles, for respondent.

RICHARDS, Justice pro tem. This is an appeal from a judgment in favor of the plaintiff, in an action to quiet title to a tract of 320 acres of land in the Imperial Valley. The land was and still is government land, subject to entry and acquisition under the provisions of the act of Congress approved March 3, 1877, and amended March 3, 1891, commonly known as the Desert Land Act (U. S. Comp. St. §§ 4674-4678). By the terms of the act, the entryman was not required to live upon the land but was required to make first, second, third, and fourth and final proof of certain expenditures toward the irrigation, reclamation, and cultivation of such lands. The plaintiff, in her complaint herein, alleges that, on the 4th day of March, 1913, she had filed a desert land entry upon said land and that, on the 4th day of March, 1914, she had submitted in due and legal form her first annual proof as required by said act, and thereafter had also in due time and form submitted her second and third annual proofs, and had thereby gained the right to take possession of said land and to make her fourth and final proofs necessary to secure a patent to said land, but that the defendant has wrongfully and illegally entered upon said land and forcibly and wrongfully holds and occupies the same to the exclusion of the plaintiff, and, by so doing, prevents her from the acquisition of such possession of the same as is necessary to enable her to make her final proofs thereon and obtain her patent therefor. Wherefore the plaintiff prays that the defendant be required to set forth the nature of his adverse claims, in order that the same may be determined and her right and title to said land be quieted as against such claim, and that she may be adjudged entitled to the possession of said land and have a writ of possession for the same.

The defendant in his answer denies most of the material averments of the plaintiff's complaint. He also, by way of a further and separate answer, alleges the existence of a certain judgment in his favor in an action of unlawful detainer brought by the plaintiff against him, and which he alleges constitutes a bar to the present action. He also pleads certain affirmative matter by way of counterclaim and also of cross-complaint. There were certain other parties named in the complaint besides the appellant, Bartmus, but as to these they either defaulted or filed disclaimers, and no relief was sought or awarded.

ed as to them. The facts, as developed at the trial and as found by the trial court, were briefly these: The plaintiff had, as she averred, and as the defendants admitted, filed her desert land entry on March 4, 1913, and a year later had submitted in due form her first annual proof as required by the Desert Land Act. On October 26, 1914, the defendants Peter and Dora Bartmus filed a contest in the United States land office at Los Angeles against the plaintiff's said entry, to which contest the plaintiff herein filed an answer. Upon the hearing thereon, the local land officers decided the same in the contestants' favor, but, upon appeal by plaintiff herein to the Commissioner of the General Land Office and thence to the Secretary of the Interior, said contest was finally decided in the said plaintiff's favor, the Secretary of the Interior by his decision dismissing said contest and deciding that the said plaintiff had made a legal desert land entry and had duly made her first annual proofs thereon and had duly submitted her second and third annual proofs thereon and was entitled to have the same approved. Said decision of the Secretary of the Interior was rendered on March 12, 1917, but, prior thereto and on the 25th day of June, 1915, the defendants Bartmus had entered upon said land and continued thereafter to hold the same to the exclusion of the plaintiff therefrom. During the time of their said possession of said land, the said defendants had made certain improvements thereon, which, however, the court found to have been made by them voluntarily and while said defendants were trespassers upon said land. In August, 1917, the plaintiff commenced an action in unlawful detainer against said defendants, in which action the defendants prevailed, the court finding and adjudging that the plaintiff was not at said time entitled to recover possession of the premises from the defendants. The trial court in the present action, however, found that the issues tendered in that action were not the same as those presented in the instant case and hence that the judgment therein did not constitute a bar to the present action. The conclusion of the trial court in the instant case was that the plaintiff was entitled to have her title quieted as against said defendants, and to have a writ of possession for the lands in question as against the defendants, whose adverse claims were adjudged to be invalid. From this judgment, the defendant Peter Bartmus prosecutes this appeal.

[1] The appellant's first contention is that, since it appears that the title to the premises in question is still in the United States government, she is not in a position to maintain her action to quiet her title to said premises as against the appellant. There is no merit in this contention. It has been repeatedly held by this court that a person who is in the course of acquiring title to government land

may maintain an action to quiet title or in ejectment, the same as against other parties to whose claims of title her equities are superior. *Wilson v. Madison et al.*, 55 Cal. 5; *Orr v. Stewart*, 67 Cal. 275, 7 Pac. 693; *Kitts v. Austin*, 83 Cal. 169, 23 Pac. 290; *Wormouth v. Gardner*, 105 Cal. 149, 38 Pac. 646. The same doctrine has been declared by the Supreme Court of the United States in *Gauthier v. Morrison*, 232 U. S. 452, 34 Sup. Ct. 384, 58 L. Ed. 680. The cases cited by the appellant in support of his contention in this regard do not run counter to the rule above stated. They are to the effect that a party holding merely the certificate of the receiver of the United States land office cannot maintain an action in ejectment against one in possession of property, the title to which is in the United States. The present action is not, however, an action in ejectment but an action to determine adverse claims under section 380 of the Code of Civil Procedure, by the terms of which section of the Code a writ of possession may follow a judgment in the plaintiff's favor.

[2] The appellant's next contention is that the judgment pleaded in his answer, as having been rendered in his favor in an action for unlawful detainer, and which was not appealed from, constituted a sufficient plea in bar to the present action. It has been consistently held by this court that, in such an action, the sole question in issue is the right of present possession and that the question of title cannot be litigated therein (*Felton v. Millard*, 81 Cal. 540, 21 Pac. 533, 22 Pac. 750; *Knowles v. Murphy*, 107 Cal. 107, 40 Pac. 111), and hence that the judgment roll in an action of unlawful detainer is not admissible under a plea in bar, in an action involving the title to the premises in dispute (*Fish v. Benson*, 71 Cal. 428, 12 Pac. 454).

[3] Furthermore, the record in this case discloses that the question of the conflicting rights of the parties to this action to obtain title to the same from the United States government under the Desert Land Act was fully presented to the Department of the Interior, in the method provided by said act for determining the rights of conflicting claimants under said act, and was therein finally determined in the plaintiff's favor. Such holding is final and conclusive as to the issues involved in such hearing. *Green v. Hayes*, 70 Cal. 281, 11 Pac. 716; *Shanklin v. McNamara*, 87 Cal. 378, 26 Pac. 345; *Grant v. Oliver*, 91 Cal. 158, 27 Pac. 596, 861; *Wormouth v. Gardner*, 125 Cal. 316, 58 Pac. 20; *Gage v. Gunther*, 136 Cal. 338, 68 Pac. 710, 89 Am. St. Rep. 141. The defendants herein by their answer attempt to put in issue the same matters which were decided adversely to them by the Department of the Interior.

[4, 5] This, under the foregoing authorities, they cannot be permitted to do. In their counterclaim the defendants alleged that,

while in possession of said land, they had made certain improvements thereon in the way of preparing the land for irrigation and of erecting certain buildings thereon, but, in respect to these, the trial court found that such improvements and expenditures were voluntary in character, and were made while the defendants were mere trespassers upon the premises, and hence that they were not entitled to reimbursement from the plaintiff for the same. We perceive no error in this ruling; nor do we think that the trial court, after finding that the defendants were mere trespassers upon the land in question and finding otherwise in the plaintiff's favor, was in error in granting to the successful plaintiff the incidental remedy of a writ of possession, permitted by the express terms of section 380 of the Code of Civil Procedure.

Judgment affirmed.

We concur: SHAW, C. J.; LENNON, J.; SHURTLEFF, J.; SLOANE, J.; WILBUR, J.; LAWLOR, J.

189 Cal. 92

CONSOLIDATED ADJUSTMENT CO. OF CALIFORNIA v. SUPERIOR COURT OF SONOMA COUNTY et al. (S. F. 10162.)

(Supreme Court of California. June 6, 1922.)

1. Courts — 120—Demand in action must be \$300 to give superior court jurisdiction.

In order that the superior court may have jurisdiction under the Constitution, the demand in the action must amount to \$300.

2. Courts — 122—Amount of demand in action, and not in prayer of petition, determines superior court's jurisdiction.

The determining factor in ascertaining the amount involved in a suit to determine jurisdiction are the allegations of fact, and not the amount in the prayer of complaint.

3. Courts — 121(2)—Amount demanded in action on contract determined to fix jurisdiction.

A contract for commissions for collections due plaintiffs, where initial payment of \$148.23 was made, with agreement by defendant to prosecute and adjust claims for plaintiff for three years, and, unless an agreed sum was collected, to return the initial payment, and to receive a commission on all amounts collected over the sum fixed, *held* not an agreement within Civ. Code, §§ 1448, 1449, governing agreements requiring performance of one of two acts, but that the amount demanded in an action on the contract was the amount of initial payment, and that the circuit court did not have jurisdiction thereof.

4. Prohibition — 3(2) — Question of plain, speedy, adequate remedy by appeal one of fact.

The question of whether there is a plain, speedy, and adequate remedy by appeal is a

question of fact, depending upon the circumstances of the particular case.

5. Prohibition — 3(2) — Appeal to district court of appeal involving inconvenience and expense held not plain, adequate, speedy remedy.

Where an appeal to the district court of appeal would involve considerable expense in transporting witnesses a distance of 50 miles and preparing transcript, *held* not a plain, speedy, and adequate remedy as contemplated in Code Civ. Proc. § 1103.

In Bank.

Proceedings in prohibition to prevent the Superior Court of the County of Sonoma from assuming jurisdiction and proceeding with the trial of an action therein, entitled William Evart and others against the Consolidated Adjustment Company of California. Writ of prohibition issued.

P. R. Lund and Russell W. Cantrell, both of San Francisco, for petitioner.

Emmett I. Donohue, of Sebastopol, for respondents.

SHAW, C. J. This is a proceeding in prohibition to prevent the superior court of the county of Sonoma from assuming jurisdiction and proceeding with the trial of an action therein, entitled William Evart et al., plaintiffs, versus Consolidated Adjustment Company of California, defendant.

The petition is based upon the proposition that the complaint in the action shows that the cause of action set forth therein is for the recovery of money to the amount of \$148.23 and no more, and that the superior court has no jurisdiction of a cause of action to recover less than \$300. The question for determination is whether or not said complaint sets forth a cause of action for the recovery of \$300 or more.

The complaint alleges that, in April, 1918, plaintiffs and defendant entered into a contract, whereby, in consideration of the payment by plaintiffs to defendant of \$148.23, and the agreement to pay commissions on collections thereafter made by defendant, of claims due to the plaintiffs, the defendant agreed to act in behalf of plaintiffs for the period of three years in the prosecution and adjustment of claims aggregating \$3,650.37. The agreement then proceeded as follows:

"The Consolidated Adjustment Company of California guarantees that it will recover in cash, or secured net settlement, from the claims of said client at least \$518.80, or to refund the full initial fee paid at the termination of this contract."

It also contained a reservation by the defendant of the right to rescind the contract within twelve months, which is immaterial here. The complaint then proceeds to allege that thereupon the plaintiffs delivered to de-

fendant for prosecution and adjustment the claims referred to in said contract and paid the defendant said initial fee of \$148.23; that said agreement had terminated on April 29, 1921; that defendant has not recovered \$518.80 on said claims, or any other sum whatever, and has not refunded to plaintiffs, or either of them, the initial fee aforesaid at the termination of the contract or at all. Thereupon the complaint prayed for \$518.80.

[1, 2] The fact that the prayer of a complaint is for the recovery of more than \$300 does not conclusively determine the proposition that the action is for the recovery of that amount and that the superior court has jurisdiction thereof. In order that the superior court may have jurisdiction, under the Constitution, the demand in the action must amount to \$300. In *Lehnhardt v. Jennings*, 119 Cal. 198, 48 Pac. 56, 51 Pac. 195, the court had under consideration the question whether the prayer of the complaint, or the facts stated therein, constituted the determining factor in ascertaining whether the demand in suit amounted to \$300, and it determined that the amount demanded was not conclusive, but that the allegations of fact were determinative of the question, and that, where the complaint showed that less than \$300 was really in controversy, there was no jurisdiction in the superior court. In *California, etc., Association v. Ainsworth*, 134 Cal. 462, 66 Pac. 586, the complaint prayed judgment for \$700. Upon considering the facts alleged, the court determined that the utmost the plaintiff was entitled to under the facts alleged was \$14. Thereupon it held that the action was not within the jurisdiction of the superior court. The point for consideration, therefore, is whether or not, under the facts stated in the complaint, a recovery by the plaintiff of \$300 or more can be had.

[3] The plaintiffs claim that the case comes within the terms of sections 1448 and 1449 of the Civil Code. They read as follows:

"1448. If an obligation requires the performance of one of two acts, in the alternative, the party required to perform has the right of selection, unless it is otherwise provided by the terms of the obligation.

"1449. If the party having the right of selection between alternative acts does not give notice of his selection to the other party within the time, if any, fixed by the obligation for that purpose, or, if none is so fixed, before the time at which the obligation ought to be performed, the right of selection passes to the other party."

We do not think the agreement in question comes within the provisions of either of these sections. In order to do so there must be a time when, under the terms of the obligation, the party having the option will be able to do either one or the other of the acts, as he may desire, and so may choose between the alternatives. Such is not the case here. The contract extended for three years. During

that period it was the duty of the defendant to perform its obligation to prosecute and adjust the claims due to the plaintiffs. Up to that time there was neither obligation nor opportunity to refund the initial fee. After that time there was neither obligation nor opportunity to continue the prosecution and adjustment of the claims. At the termination of the contract the defendant, even if it had desired to do so, could not have proceeded to prosecute and adjust the claims. Its duties in that regard were ended. It had not collected anything upon the claims. It therefore at that time had no alternative. The contract did not allow it then to do "one of two acts," or the other, at its pleasure. It was required to do but one; that is, to refund the initial fee of \$148.23. It could not have refunded that fee before and terminated the contract, except by exercising its right of rescission, which it was under no obligation to do. The consequence is that the only duty which the defendant owed to the plaintiffs at the termination of the contract, upon the facts alleged in the complaint, was to refund the initial fee of \$148.23. The cause of action stated was for the recovery of that sum and no more. Consequently it was not within the jurisdiction of the superior court.

[4, 5] Respondents also contend that the proceeding should be dismissed because an appeal to the District Court of Appeal would be a plain, speedy, and adequate remedy. Prohibition lies against any inferior tribunal only where there is not a plain, speedy and adequate remedy in the ordinary course of law. Code Civ. Proc. § 1103. It has been held in several cases that, where an inferior court, such as a police or justice's court, is proceeding in a cause of which it has no jurisdiction, the right to appeal to the superior court of such county is plain, speedy, and adequate, and that prohibition will not lie. *Hamberger v. Police Court*, 12 Cal. App. 153, 106 Pac. 894, 107 Pac. 614; *Simpson v. Police Court*, 160 Cal. 530, 117 Pac. 553; *Germain Seed & Plant Co. v. Justice's Court*, 41 Cal. App. 397, 182 Pac. 784. The question whether or not there is a plain, speedy, and adequate remedy in such cases is a question of fact depending upon the circumstances of the particular case. In the cases cited regarding the police and justice's courts, it is obvious that an appeal to the superior court of the county in which the justice is acting is plain and ordinarily will be speedy, and that it is presumed to be adequate, since the appeal will be heard in the same county and may be heard quickly, and it is to be presumed that the superior court will decide the cause in accordance with law. In the present case, however, it appears that the office and principal place of business of the defendant is in the city and county of San Francisco, which is alleged to be more than 50 miles distant from the city of Santa Rosa, where the trial is to be had by the superior court of that

county, and it is alleged that the defendant will be put to the cost of transporting its witnesses to that county. Also it is obvious that an appeal to the District Court of Appeal in such a case will involve considerable expense, since the transcript must be prepared and filed and all the expense thereof must be paid. This will also entail considerable delay and the expense of attending the district court at its courtrooms in the county of Sacramento. We think the case comes within the rule laid down in *Ophir, etc., Co. v. Superior Court*, 147 Cal. 467, 82 Pac. 70, 3 Ann. Cas. 340, and that the appeal is not a plain, speedy, and adequate remedy under the circumstances.

It is ordered that the writ of prohibition issue as prayed for.

We concur: SLOANE, J.; LAWLOR, J.; WILBUR, J.; LENNON, J.; SHURTLEFF, J.; RICHARDS, Justice pro tem.

189 Cal. 97

GARROWAY v. JENNINGS et al.
(L. A. 7324.)

(Supreme Court of California. June 6, 1922.)

1. Frauds, statute of $\S$ 18(2)—**Promise to debtor to pay attorney fees due from latter held an original obligation which need not be written.**

A promise to a debtor for a consideration to pay attorney's fee due from the latter is an original obligation within Civ. Code, $\S$ 2794, and need not be in writing.

2. Judgment $\S$ 143(3)—**Refusal of motion to set aside judgment by default on account of neglect of party held proper.**

In an action by an attorney for fees, motion of defendant to set the judgment by default aside under Code Civ. Proc. $\S$ 473, permitting a court to relieve a party from a judgment against him through his inadvertence or excusable neglect, was properly overruled, where defendant, an attorney, alleged that he believed that an order overruling a demurrer was appealable and would stay all proceedings until the appeal was determined, and did not know that default and judgment would be entered against him for failure to answer the complaint while the appeal was pending.

3. Appeal and error $\S$ 654—**Appellant held entitled to amend record by filing therein an authenticated notice of appeal.**

Under Code Civ. Proc. $\S$ 953, as amended by St. 1921, p. 194, $\S$ 3, where a record on appeal does not contain a notice of appeal, the appellant is entitled to amend the record by filing a copy of the notice of appeal.

In Bank.

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Action by Samuel M. Garroway against Netta O. Jennings and J. O. Davis. From judgment for plaintiff, defendant Davis appeals. Affirmed.

J. O. Davis, of Los Angeles, in pro. per.

Winslow P. Hyatt, of Los Angeles, for respondent.

SHAW, C. J. The complaint states a cause of action to recover judgment against the two defendants. It alleges that the defendant Jennings became indebted to Lantz, Hyatt, and Garroway in the sum of \$972.66 for services as her attorneys in two certain actions, in one of which a judgment was recovered in her favor for over \$7,000, that thereafter she assigned the judgment to the defendant Davis, who, in consideration of said assignment, promised his codefendant that he would pay the said attorneys' fees due to the said Lantz, Hyatt, and Garroway, and that said parties before the action was begun assigned the claim against said defendants to the plaintiff.

[1] To this complaint the defendant Davis separately demurred. The sole ground of demurrer is that the complaint seeks to charge Davis with the debt of Jennings upon an undertaking not in writing. The basis of this objection is that the contract alleged against Davis was a contract of suretyship or guaranty, which is invalid unless made in writing and signed by the party to be charged. This principle does not apply to contracts of the character alleged in the complaint. It was not a contract to guarantee or become surety for the obligation of Jennings, but was an original obligation on his part to pay the debt of Mrs. Jennings directly to her creditors, and it was based upon a sufficient consideration; that is, the transfer to him by her of the judgment above mentioned. It comes within the description of such original obligations set forth in section 2794 of the Civil Code, and it need not be in writing. The demurrer thereto was properly overruled. The defendant failed to answer the complaint and thereupon judgment was entered against him by default, from which he appealed. The only objection that can be made to the judgment is that it is not supported by the complaint. It is, as we have seen, not well taken. The judgment therefore must be affirmed.

[2] After the taking of the default and judgment against him, Davis moved to set it aside under section 473, Code of Civil Procedure, on the ground that it was taken against him by his inadvertence and excusable neglect. In support of the motion it was shown that after the order was made overruling his demurrer to the complaint he attempted to take an appeal from said order by filing a notice of appeal therefrom.

His excuse for failure to answer is that, although he was an attorney at law, admitted to practice as such in the courts of this state, he was not familiar with the rules and procedure of the courts, that he believed that the order overruling the demurrer was appealable, and that an appeal therefrom would stay all further proceedings in the action until said appeal was determined, and, further, that he did not know that default and judgment would be entered against him for failure to answer said complaint while such appeal was pending. All of these things he could have readily and easily ascertained by taking the trouble to read the provisions of the Code of Civil Procedure relating thereto, and the numerous decisions of this court directly holding that no appeal lies from an order overruling a demurrer. Instead of showing an excuse for his failure to file the answer, his affidavit shows that it was due to his own gross neglect to take any pains whatever to inform himself as to the law affecting his case. The only reason he gives for his ignorance is that he had never been in active practice. That being the case, reasonable care would have induced him to make some inquiry and research to ascertain the law with which he professed to be familiar and which he could easily have ascertained. In denying a motion to set aside a default the court below was exercising its discretion. We cannot overturn its decision thereon unless the discretion was abused. We see no ground upon which to say that it was abused in this case. We are of the opinion that the motion was properly denied. The defendant appealed from the order denying that motion. We are forced to the conclusion that this appeal is also without support in the record.

[3] As the jurisdiction on appeal depends on the fact of the filing of a notice of appeal and not upon the fact of its being contained in the record, we have deemed it advisable to treat the case on its merits. It will therefore be unnecessary to act upon the application made by the appellant, since the filing of a transcript, to amend the same by inserting therein an authenticated copy of the notice of appeal. The appellant would be entitled to amend the record by filing such copy, as, of course, under section 953, Code of Civil Procedure, as amended in 1921. We have assumed that the appeal was properly taken, and that the record discloses it, although the notice of appeal was set forth in the bill of exceptions and was not directly certified by the clerk as a correct copy.

The judgment and order appealed from are affirmed.

We concur: SHURTLEFF, J.; WASTE, J.; LENNON, J.; SLOANE, J.; LAWLOR, J.; WILBUR, J.

189 Cal. 79

STOKES v. WATKINSON. (S. F. 9593.)(Supreme Court of California. June 6,
1922.)**1. Municipal corporations ⌘572—"Refusal" to pay assessment necessary before liability for attorney's fee arises in suit on assessments for public improvements.**

Under the Street Improvement Act of 1911, § 27, as amended by St. 1915, p. 1469, § 11, providing that, where personal demand has been made on the owner of property or his agent for an assessment for a public improvement, the plaintiff shall recover such sum as the court may fix as attorney's fees, and, when suit has been brought, after a personal demand has been made and a refusal to pay such assessment so demanded, an attorney's fee of \$15 may be recovered, notwithstanding the suit may be settled or tender made before recovery, and providing that a single action may be brought irrespective of the number of lots assessed where the parties defendant are identical, and giving the court power to consolidate separate actions brought in such cases, where suit is brought on separate assessments after a demand and a refusal of payment, an attorney's fee of \$15 accrues on filing of the complaint, and the subsequent consolidation of actions would not deprive an attorney of the specified fee, but such a "refusal" must be more than neglect to pay, and must be equivalent to denial of a demand.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Refuse—Refusal.]

2. Municipal corporations ⌘527—Statute permitting collection of attorney's fee for non-payment of assessment must be strictly construed.

The Street Improvement Act of 1911, § 27, as amended by St. 1915, p. 1469, § 11, provid-

ing for the collection of an attorney's fee as a penalty for nonpayment of a tax for public improvement, must be strictly construed.

3. Municipal corporations —572—Delay in paying assessments held insufficient to show refusal to pay authorizing collection of attorney's fee.

In separate actions to foreclose street assessment liens against 331 lots owned by defendant's testator, under the Street Improvement Act of 1911, § 27, as amended by St. 1915, p. 1469, § 11, providing for collection of \$15 attorney's fee in each suit after a demand and refusal of payment of the assessment, where the owner of the lots did not refuse to pay, and stated that he was short of money, and that he would be paid some before long, a mere delay in payment was insufficient to justify a finding of fact by the trial court that there had been a refusal to pay the assessments.

4. Municipal corporations —572—Amount of attorney's fee to be allowed plaintiff in suit on street assessments, in absence of a refusal to pay, is in discretion of trial court.

In an action by the owner of liens for street assessments against a property owner, to foreclose the liens under Street Improvement Act 1911, § 27, as amended by St. 1915, p. 1469, § 11, the amount of the attorney's fees to be allowed plaintiff in absence of a demand and refusal of payment by the property owner is in the discretion of the trial court.

In Bank.

Appeal from Superior Court, Contra Costa County; A. B. McKenzie, Judge.

Action by G. H. Stokes against Henrietta P. Watkinson. From a judgment allowing plaintiff less attorney's fees than he asked, plaintiff appeals. Affirmed.

See, also, 201 Pac. 134.

Faulkner & Faulkner, of San Francisco, for appellant.

Wm. T. Kearney, of Richmond, and Edward C. Harrison, of San Francisco, for respondent.

WILBUR, J. [1] The plaintiff brought 331 separate suits for the foreclosure of assessments levied against 331 separate lots owned by the defendant's testator upon an assessment made by the street superintendent of the city of Richmond for the construction of sewers in said city, by which a separate amount was assessed against each lot as provided in the Street Improvement Act of 1911 (St. 1911, p. 730). This appeal by the plaintiff involves his right to a separate attorney's fee of \$15 in 43 of these separate cases which were consolidated by the trial court. Before the trial the defendant offered to allow judgment for the full amount of the assessment but without costs or attorney's fees. Upon the refusal of this offer the defendant filed an answer attacking the validity of the assessment. The

trial court rendered judgment in favor of the plaintiff for the foreclosure of the street assessment liens amounting to \$15.08 on each lot and costs, but only allowed \$25 as an attorney's fee, fixing the amount of 60 cents as the attorney's fee upon each separate action. Appellant contends that he should have been allowed \$15 as attorney's fee in each of the actions so consolidated, making an aggregate attorney's fee therein of \$645. The plaintiff bases his claim to an allowance upon section 27 of the Street Improvement Act of 1911, as amended in 1915 (Stats. 1915, p. 1469, § 11). This section authorizes the recovery of the unpaid assessment with interest at 10 per cent. per annum in a suit brought not less than 35 days after the date of the warrant. The provision with reference to attorney's fees is as follows:

"And in all cases of recovery under the provisions of this act, where personal demand has been made upon the owner or his agent, but not otherwise, the plaintiff shall recover such sum as the court may fix, in addition to the taxable cost as attorney's fees, but not any percentage upon said recovery. And when suit has been brought, after a personal demand has been made and a refusal to pay such assessment so demanded, the plaintiff shall be entitled to have and recover the sum of fifteen dollars as attorney's fees, in addition to all taxable costs, notwithstanding that the suit may be settled or a tender may be made before a recovery in said action, and he may have judgment therefor."

This section also makes provision for the bringing of a single suit against the owner of a number of lots and for the consolidation of separate suits as follows:

"It shall be competent to bring a single action under any such assessment irrespective of the number of lots assessed where the parties defendant are identical, and where separate actions are brought, the same may be consolidated by order of the court."

Upon a similar but not identical provision of the Vrooman Act (Stats. 1885, p. 147, § 12, amended, Stats. 1889, p. 168, § 12) it was held in *Hughes v. Alsip*, 112 Cal. 587, 44 Pac. 1027, and *McCaleb v. Dreyfus*, 156 Cal. 204, 103 Pac. 924, that the plaintiff was entitled to only one attorney's fee where he included in one complaint several causes of action arising out of street assessment liens. In *Realty, etc., Mtg. Co. v. Superior Court*, 165 Cal. 543, 132 Pac. 1048, it was held that the plaintiff could bring separate actions for each assessment, and that he was entitled to \$15 attorney's fee in each action under section 12 of the Vrooman Act, and that a subsequent consolidation by the court of such actions would not deprive him of an attorney's fee in each separate action. In that regard the court stated as follows:

"While the effect of a consolidation of actions is that for the purposes of all further proceedings, such as trial, etc., the cases are to be treated as if all the causes of action had been united originally, we are entirely satisfied that the consolidation should not be held to have the effect of depriving a party of his right to recover legal costs already paid, or as to which the right of the plaintiff had accrued. Such we believe to be the situation as to the attorney fee provided for in such cases as these. The fee is one fixed by statute, and the trial court is entirely without discretionary power in regard thereto. The plaintiff is entitled to it as matter of right under the terms of the statute, in any action properly instituted by him, in the event that he ultimately recovers therein. In the cases involved here, the plaintiff had the absolute legal right to commence a separate action on each cause of action, with the result that, under the express terms of the statute, he became entitled to a fifteen dollar attorney fee in each, in the event of recovery. We are satisfied that the trial court could not impair this right by any order of consolidation, any more than it could impair it without a consolidation."

Section 12 of the Vrooman Act as originally enacted (Stats. 1885, pp. 147-157) contained the following provision concerning attorney's fee:

"* * * And in all cases of recovery, under the provisions of this act, the plaintiff shall recover the sum of fifteen dollars. * * *"

That statute also authorized the street superintendent to receive the amount due on any assessment at any time and to give a good and sufficient discharge therefor, and enter a satisfaction of the lien upon the record of the assessment, providing, however, that, after suit was brought to enforce the lien, the lien should not be discharged without the payment of plaintiff's costs. Stats. 1885, pp. 147, 156, § 10. Thus the defendant by payment before judgment could defeat the plaintiff's claim to attorney's fees.

As amended in 1889 (Stats. 1889, p. 168) section 12 provided as follows:

"And in all cases of recovery under the provisions of this act, the plaintiff shall recover the sum of fifteen dollars, in addition to the taxable cost, as attorney's fees, but not any percentage upon said recovery. And when suit has been brought, after a personal demand has been made and a refusal to pay such assessment so demanded, the plaintiff shall also be entitled to have and recover said sum of fifteen dollars as attorney's fees, in addition to all taxable costs, notwithstanding that the suit may be settled or a tender may be made before a recovery in said action, and he may have judgment therefor."

It is to be observed that the \$15 is to be recovered in every case where foreclosure is decreed. Such recovery is in the nature of a statutory penalty. *Engelbrechtsen v. Gay*, 158 Cal. 30, 109 Pac. 879. If, however, there had been a personal demand and a refusal

to pay the assessment, then the sum of \$15 was payable notwithstanding a settlement or a tender of payment.

The Street Improvement Act of 1911, as originally enacted (Stats. 1911, § 27, pp. 730, 746), and as amended in 1915 (Stats. 1915, § 27, p. 1469), is essentially different, in that the latter act provides that the recovery of attorney's fees can only be had where there is a personal demand, and shall be such sum as the court may fix. This statute, like the Vrooman Act, also provides that, where there has been a personal demand and a refusal to pay the assessment so demanded, the plaintiff shall be entitled to have and recover the sum of \$15 as attorney's fees, in addition to all taxable costs, etc. The attorney's fee is no longer fixed arbitrarily by the statute at \$15 in every case, but is within the discretion of the trial court, and allowable only after personal demand. The court also has the discretion to consolidate separate actions for the collection of separate assessments as was done in this case. Thus by the terms of the Vrooman Act (section 12) the right to a separate attorney's fee upon each separate assessment to the same owner depended upon the election of the lien claimant either to set forth the several assessments in separate counts in a single complaint, in which case he could recover but \$15 attorney's fee, or to bring a separate action upon each count, in which case he could recover \$15 in each action. But, under section 27 of the Street Improvement Act of 1911, supra, the court had power in the exercise of a sound discretion not only to consolidate all the separate cases, but to fix a single attorney's fee in the consolidated action when and only when a personal demand had been made upon the owner. If the demand upon the owner for payment was met by a refusal, the statute expressly provides that the attorney's fee accrued notwithstanding the suit may be settled or tender made before recovery.

Thus the statute makes a distinction between a personal demand and a failure to pay and a demand followed by a refusal to pay. As was said by the Supreme Court of Maine in the case of *Inhabitants of Cape Elizabeth v. Boyd*, 86 Me. 317, 29 Atl. 1062:

"A refusal to pay a tax is one thing. A failure to pay is another. The former may be the result of willfulness or a denial of the legality of the tax. The latter may be the result of sickness and poverty and an utter inability to pay. In the former case, an action may be expedient. In the latter, inexpedient."

For some purposes a failure to pay after demand is deemed equivalent to a refusal (*Kimball v. Rowland*, 6 Gray [72 Mass.] 224, 225); but ordinarily a refusal means more than neglect, and is equivalent to a denial of a demand (*Parish v. Wheeler*, 22 N. Y. 494, 514; *Bowen v. Young*, 75 N. Y. Supp.

1027, 1029; *Burns et al. v. Fox*, 113 Ind. 205, 14 N. E. 541; *Duffy v. State*, 37 Misc. Rep. 547, 60 Neb. 812, 84 N. W. 264; *Brooklyn Heights R. Co. v. Brooklyn City R. Co.*, 105 App. Div. 88, 93 N. Y. Supp. 849; *People v. Perkins*, 85 Cal. 509, 26 Pac. 245).

[2] Under this statute the "refusal" which upon the bringing of the action vests in the plaintiff a right to an attorney's fee must be something more than a mere failure to pay resulting from an inability or unwillingness to make the payment. It must, in short, be a refusal to pay as distinguished from mere neglect. The lien is valid for two years, and the lien claimant is not compelled to bring his action for two years. If the property holder intends to contest the validity of the assessment, and for that reason refuses to pay the amount thereof, such refusal would necessitate the bringing of a suit for foreclosure, but, if the property holder merely asks for time in which to secure the money with which to pay the assessment, or promises in good faith to pay at some future time, or merely fails to pay, there has been no "refusal" within the meaning of the statute which penalizes such refusal by making the attorney's fee accrue at once upon the filing of the complaint. The statute permitting the collection of the attorney's fee as a penalty for nonpayment of tax, like all statutes imposing a tax, must be strictly construed.

In this case, if there was a personal demand without a refusal to pay, the statute provides that the court shall fix the attorney's fee, and under this statute, construed in the light of *Realty, etc., Mtg. Co. v. Superior Court*, supra, where separate actions are brought upon several assessments after personal demand and a refusal to pay, the right to at least \$15 attorney's fee would accrue in each action upon the filing of the complaint. The subsequent consolidation of the actions would not deprive the plaintiff of this attorney fee which had accrued upon the beginning of the several actions. It is claimed in this case that there was such a refusal to pay after personal demand. The court so finds the fact.

[3] The respondent claims that there is no evidence to support the conclusion of the court that the defendant refused to pay the street assessments. The evidence relied upon by the appellant to establish such refusal consists of a conversation between defendant's testator and Fred G. Meyers, the contractor in whose favor the assessment was levied, and who subsequently assigned his assessments to plaintiff for collection. He testified that he made a demand upon Mr. Watkinson, defendant's testator, some time in March, 1916, a month or two before he died; that Mr. Watkinson replied that he was short of money, and that he would see about it pretty soon. The witness testified:

"I said it should be paid, and, if it wasn't paid, I was going to sell the assessments,

* * * Q. Did he say he would pay you, if at all? A. Well, he naturally said they were a little short of money. Q. That is all he said when you made the demand upon him for the money due? A. Of course, he even said that the People's Water Company had not paid him—that he was going to get some money from them pretty quick."

On cross-examination the witness stated that Mr. Watkinson told him that he was expecting to get some money from the People's Water Company, but that he was temporarily pressed for a little money. This evidence falls far short of proof of a refusal to pay. On the contrary, it indicates a willingness to pay only defeated by a lack of funds. The failure to pay rendered the owner liable for interest and costs, and a reasonable attorney's fee, but the discretion of the court was not limited to a minimum fee of \$15 in each action, in the absence of a refusal.

It is conceded that a failure to pay after a personal demand and the lapse of an unreasonable time for payment might justify the court in concluding that there had been a refusal; but here the owner died within two or three months after the demand, and no claim or demand was made upon the executrix of his will. As the penalty for refusal to pay the assessment was greater than the assessment (if we include the costs and attorney's fee in each separate action), it would seem but reasonable that the defendant should have some notice or warning that the plaintiff intended to treat the defendant's delay in payment as a refusal to pay the assessment. However that may be, in the absence of any actual refusal, and in the presence of an implied promise to pay and the subsequent death of the owner, the mere delay in this case was insufficient to justify the finding of fact by the trial court that there had been a refusal to pay the assessments.

In this connection it may be noted that the Legislature in session at the time the decision in *Realty, etc., Mtg. Co. v. Superior Court*, supra, was under consideration by this court amended section 12 of the Vrooman Act, so as to require a written demand personally served upon the owner, and a failure to pay for 10 days after such demand as a condition precedent to the maintenance of the foreclosure action, and as a basis of a claim for \$15 attorney's fee in the action unless one year has elapsed after the date of the assessment. The amended section required the court to consolidate separate actions, and to allow only \$15 attorney's fee in the consolidated action "unless otherwise ordered by the court," and permitted such allowance of attorney's fees upon settlement or tender (Stats. 1913, pp. 402, 408, § 12, approved June 6, 1913). The amendment of 1915 to the Improvement Act of 1911 (Stats. 1915, pp. 1464, 1469, § 27), retained the pro-

visions of the law of 1911 (section 27) now under discussion, but the amendment of 1921 (Stats. 1921, p. 218, § 1) provides for the recovery of a reasonable fee after a personal demand in the foreclosure or upon settlement or tender where demand and refusal to pay has been shown, and also provides:

"That if the court finds an unnecessary number of actions have been brought, where the parties are identical, it may allow the costs of one action only."

These amendments show the continued effort of the Legislature to distinguish between a mere failure to pay after a constructive demand, a failure to pay after a personal demand, and a refusal so to do after a personal demand. Our reference to amendments to the Vrooman Act in 1913 and to the Improvement Act of 1911 in 1921 are only relevant in this action to emphasize the distinction already pointed out between the language of section 27 of the act of 1911 and the provisions of section 12 of the Vrooman Act of 1885, as amended in 1889, construed in the cases relied upon by the parties and hereinbefore cited.

[4] The matter of the amount of the attorney's fees to be allowed plaintiff, in the absence of a refusal to pay on the part of the owner after a personal demand so to do, is in the discretion of the trial court.

Judgment affirmed.

We concur: SHAW, C. J.; LENNON, J.; LAWLOR, J.; SLOANE, J.; SHURTLIFF, J.

57 Cal. App. 470

LEDESMA v. STANLEY. (Civ. 3832.)

(District Court of Appeal, Second District, Division 1, California. April 27, 1922.)

Parent and child — 12—Widow acquiescing in benefits of exchange of property assignable to her cannot maintain action for conversion thereof.

Where son of decedent, whose estate consisted solely of a team and wagon of the value of \$500, exchanged it in part payment for interest in a truck which he used for support of his mother and family, and the mother had knowledge of the use of the truck, held that under Code Civ. Proc. § 1469, the mother as widow of decedent could have had the property assigned absolutely to her, and could not maintain an action for conversion of the property, when on default of the payments on truck vendee recovered it.

Appeal from Superior Court, Ventura County; Merle J. Rogers, Judge.

Action by Margarita Guzman de Ledesma, as administratrix of Odilon Ledesma, deceased, against Clarence E. Stanley. From a judgment for defendant, plaintiff appeals. Affirmed.

Scott McReynolds, of Ventura, for appellant.

Drapeau, Orr & Gardner, of Ventura, for respondent.

JAMES, J. This action was brought to recover damages for the alleged conversion of a team of horses, a wagon, and a set of harness, which it was alleged were of the value of \$500. Judgment was for the defendant. The plaintiff has appealed.

Plaintiff was the widow of her intestate. The husband died November 19, 1919, leaving surviving him, besides plaintiff, several minor children, the eldest of whom was a son about the age of 18 years. The only property owned by the husband at the time of his death was that mentioned in plaintiff's complaint. The team and wagon had been used by the husband and father to aid in providing support for the family, in which endeavor he was assisted by the son mentioned. After his death the boy assumed the responsibility of earning a livelihood for the family, and continued to use the team and wagon for such purpose. About the 1st of February, 1920, he arranged with two men, close relatives of his, to enter into a business partnership to do hauling. It was agreed that they should purchase a motortruck. It was further arranged that the team and wagon hereinbefore referred to, together with a similar outfit owned by his associates, should be lumped together and delivered to the defendant, who was a dealer in motortrucks, as an initial payment on the purchase of a truck. The purchase price of the truck was in excess of \$3,000, and the horses, wagons and harness were taken in at a credit value of about \$950. The boy and his associates took the truck, used it in conducting the business of hauling merchandise and products, and divided the income received therefrom. That portion of the income received by the boy he delivered to his mother for use in support of the family. More than four months elapsed, and, the vendees having failed to make payments required of them, the vendor, exercising the right expressed in the contract, recovered the truck. On August 25, 1921, plaintiff received letters of administration in the matter of the estate of her husband, and on September 19, 1921, commenced this action. As it was asserted by her in her testimony that the deceased possessed no other property at the time of his death than the property described in her complaint, it is evident that the sole purpose of instituting the probate proceedings was to obtain the necessary authority to commence this suit in the representative capacity indicated. The position taken by the administratrix is that there was no authority in the son to transfer title to the property in the absence of some order in probate authorizing him so to do. Re-

spondent's answer to this contention is that, as the value of the property was less than \$1,500, appellant, as the widow of the deceased, had the right under the provisions of section 1469, Code of Civil Procedure, to have the property assigned absolutely to her, and that any act committed by her showing an acquiescence in or an adoption of the transaction as made by the son would effectually estop her from denying effect to the contract. That contention seems to be fully sustained by the pleadings, evidence, and the findings made by the court. The widow was entitled to have the property set apart to her as a matter of right and wholly free from the claims of creditors. Estate of Palomares, 63 Cal. 402; Estate of Atwood, 127 Cal. 427, 59 Pac. 770. While she testified that she did not consent to the plan of her son to exchange the team and wagon as part payment for the truck, she admittedly was fully informed of the transaction, knew that the son was using the truck in earning money for the support of the family, and received and used those earnings. She at no time prior to the bringing of this suit (which was commenced nearly 2 years after the truck was purchased) notified the defendant that she disclaimed any agency in her son to act in the transaction.

The judgment is affirmed.

We concur: CONREY, P. J.; SHAW, J.

57 Cal. App. 620

WIXOM v. DAVIS. (Civ. 3802.)

(District Court of Appeal, Second District, Division 1, California, May 5, 1922.
Rehearing Denied June 1, 1922.)

Chattel mortgages ⇨ 162—Mortgagee held entitled to possession on default of mortgagor.

In view of Civ. Code, §§ 2927, 2967, 3005, and Code Civ. Proc. § 694, a chattel mortgagee is entitled to possession of the mortgaged goods on default by mortgagor.

Appeal from Superior Court, Imperial County; M. W. Conkling, Judge.

Action by Bertha E. Wixom against George Herrick Davis. Judgment for defendant, and plaintiff appeals. Reversed.

H. E. Gleason, for appellant.

J. F. Seymour, of El Centro, for respondent.

CONREY, P. J. This is an action brought by the owner of a chattel mortgage to recover damages for conversion of the mortgaged property. Judgment having been entered in favor of defendant, plaintiff appeals therefrom.

The mortgage, which was recorded in the office of the county recorder of Imperial

county on the 13th day of February, 1920, covered an undivided one-third interest in 16 bales of cotton of the value of \$1,442. The mortgage notes matured May 1, 1920. The balance unpaid thereon at the time of the alleged conversion exceeded one-third of the value of the cotton. The court found that during the months of October and November, 1920, the defendant took and carried away said cotton, and sold and disposed of the same to his own use, pursuant to the terms of a certain agreement dated October 25, 1920, entered into between the defendant and certain other parties, one of which was one of the makers of the notes held by the plaintiff. It is found that, under this agreement, the makers of the notes held by plaintiff were to work on the defendant's ranch and raise cotton. The defendant was to furnish all moneys for the planting, cultivation, and raising of the cotton, and the title of all cotton raised on the land was to remain in the name of the defendant. After payment of all expenses, the makers of the notes were to receive three-fourths of the profits, if any there were, and the defendant one-fourth. There were no profits. The court further found "that the defendant expended in the matter of expense connected with said crop herein referred to the sum of \$2,511.74; that there was received from the sale of the cotton from the first picking \$1,405.15; that there was no deficiency, but there was a loss and no profit." From these facts the court concluded "that the defendant did not convert the said cotton to the plaintiff's damage" in any sum whatever, and that the defendant was entitled to judgment for costs.

On the facts found, it is manifest that the 16 bales of cotton could not have been any part of the cotton referred to in the agreement of October 25th. The cotton taken and sold by the defendant in October and November could not have been planted and raised in five weeks. The facts found concerning the agreement of October 25th, even if the plaintiff had not been a stranger thereto, were immaterial to the plaintiff's cause of action.

The plaintiff alleged, and the answer denied, that at the time of the alleged conversion the plaintiff was entitled to possession of the mortgaged property. Upon this issue the findings are silent. Section 2927, Civil Code, reads as follows:

"A mortgage does not entitle the mortgagee to the possession of the property, unless authorized by the express terms of the mortgage; but after the execution of the mortgage the mortgagor may agree to such change of possession without a new consideration."

Having in view that section of the Civil Code, the decisions usually have defined the mortgagee's right of possession as one de-

pending solely upon said express agreement. 5 Cal. Jur. p. 115. We think that there is a necessary exception in the case of a chattel mortgage after the debt secured thereby has become due. This was tacitly recognized by the Supreme Court in *Summerville v. Stockton Milling Co.*, 142 Cal. 529, 542, 76 Pac. 243, 247, when the court said:

"A chattel mortgage does not pass title to the mortgagee or give him a right to possession of the mortgaged property before the debt becomes due, unless the mortgage so provides. *Bank of Ukiah v. Moore*, 106 Cal. 680."

The reason for the exception arises out of the statutory provisions defining the remedy of the mortgagee on nonpayment of the debt.

"A mortgagee of personal property, when the debt to secure which the mortgage was executed becomes due, may foreclose the mortgagor's right of redemption by a sale of the property, made in the manner and upon the notice prescribed by the title on 'pledge,' or by proceedings under the Code of Civil Procedure." Civ. Code, § 2967.

A pledgee's sale must be made by public auction, in the manner of a sale of personal property under execution. That mode of sale, where the personal property is capable of manual delivery, requires that the property be within view of those who attend the sale. Civ. Code, § 3005; Code Civ. Proc. § 694. It follows that, to make a valid sale of personal property, it must be present at the sale, whether it be sold as a pledge or under order of sale upon a decree of foreclosure. Therefore it is necessary that the mortgagee, or some one acting on his behalf, shall obtain such possession in order that the property may be applied to the payment of the debt secured thereby. *Ely v. Williams*, 6 Cal. App. 455, 457, 92 Pac. 393. We conclude that, from the facts found in this case, it necessarily followed that the plaintiff was entitled to possession of the mortgaged property at the time of defendant's conversion thereof.

The judgment is reversed.

We concur: SHAW, J.; JAMES, J.

57 Cal. App. 515

PEOPLE v. BARNES. (Cr. 877.)

(District Court of Appeal, Second District, Division 1, California. April 29, 1922.)

1. Larceny — 22 — Bringing automobile stolen without jurisdiction within jurisdiction is a felony.

Under Pen. Code, § 27, providing that all who commit any offense without the state which, if committed within the state, would be larceny, robbery, or embezzlement, and bring

the property stolen or embezzled or are found with it or any part of it within the state, are liable to punishment, and section 497, providing that a person who in another state or country steals or embezzles property, or receives it knowing it to have been stolen or embezzled, and brings it into the state, is liable to punishment as if the larceny, embezzlement, or receiving had been committed within the state, where the accused stole an automobile in a foreign country and brought it within the state, the offense committed was a felony.

2. Larceny — 55 — Evidence held sufficient to sustain conviction of bringing stolen property into the state.

In a prosecution for bringing an automobile stolen by the accused in a foreign country into the state, evidence held sufficient to sustain a conviction.

3. Criminal law — 564(1) — Evidence held sufficient to prove jurisdiction of offense was in the court in which the case was tried.

Under Pen. Code, § 789, providing that the jurisdiction of a criminal action for stealing or embezzling in any other state the property of another or receiving it knowing it to have been stolen or embezzled, and bringing it into this state, is in any county into or through which such stolen or embezzled property had been brought, evidence held sufficient to prove jurisdiction of the court of the county in which the case was tried.

Appeal from Superior Court, San Diego County; W. P. Cary, Judge.

William A. Barnes was convicted of bringing a stolen automobile into San Diego county, and he appeals. Affirmed.

Edward J. Kelly, of San Diego, for appellant.

U. S. Webb, Atty. Gen., and Arthur Keetch, Deputy Atty. Gen., for the People.

CONREY, P. J. [1] The information charged that the defendant, having first stolen a Ford touring car at Tia Juana, Lower California, Mexico, the same being the personal property of one M. L. McKelvey, brought the same into the county of San Diego, state of California. The described offense is a felony. Pen. Code, §§ 27 and 497. Having been convicted of this offense, defendant was sentenced to imprisonment in the state prison, and now appeals from the judgment.

The evidence establishes the following facts: Mrs. McKelvey, owner of the car, permitted her son to drive the car, and he went with it to Tia Juana. He saw the defendant standing near the place where he parked the car. When McKelvey returned for the car it had disappeared. This was on the 27th day of July, 1921. The car was a touring car, model 1920, and carried the license number 369341. On the next following day appellant arrived at the home of one F. J. Knight, in the county of San Diego, driving a late

model Ford touring car, and remained there about four days. There is no further direct identification of the car that was in his possession at that time. On the 19th day of August appellant came to the place of business of one Green, near Bakersfield, in Kern county. He came there in a car which was identified as the car of Mrs. McKelvey. He had taken out the certificate of registration, which later was found in the bedding of the room assigned to him on Green's premises. The license plates bearing the number 369341 were on that car when he arrived there. He told Mr. Green that his name was J. McKelvey and that he had bought the car at El Paso, Texas.

Appellant was arrested at Green's place in Kern county, and was brought back to San Diego county by J. H. Kilby, a deputy sheriff of that county. Appellant told Kilby that he bought this car at Ensenada, in Lower California, on the 28th day of July; that on that night he camped at the junction of the highway and Rose Canyon road. Kilby testified that the Rose Canyon road joins the state highway on the north side of La Jolla, in San Diego county.

[2] In support of his appeal, appellant claims that the evidence is insufficient to sustain the conviction, in that there is no evidence, beyond the mere possession of the stolen car by him in Bakersfield, which in any way connects him with the theft of the automobile. But there is something more proved than such mere possession. The facts that appellant concealed the certificate of registration; that he claimed to have bought a car which was in fact stolen, and that he assumed the family name of the true owner, and made other false statements which we need not specify, constitute circumstances which, together with the possession of the car, were sufficient to connect the defendant with the larceny committed at Tia Juana and to warrant the conclusion that he was the guilty party. *People v. Lang*, 142 Cal. 482, 76 Pac. 232; *People v. Majors* (Cal. App.) 190 Pac. 636.

[3] Next it is contended that the evidence is not sufficient to prove jurisdiction of the superior court of San Diego county over the offense charged. "The jurisdiction of a criminal action for stealing or embezzling, in any other state, the property of another, or receiving it knowing it to have been stolen or embezzled, and bringing the same into this state, is in any county into or through which such stolen or embezzled property has been brought." Pen. Code, § 789. The evidence which we have stated is clearly sufficient to have warranted the jury in finding it to be the fact that after stealing Mrs. McKelvey's car at Tia Juana, which is near the San Diego county line, the defendant did bring the car into San Diego county.

The only other point suggested is that the court erred in giving a certain instruction, in that by such instruction the court improperly assumed that the automobile had been shown to have been stolen, whereas such a conclusion was a question at issue for determination by the jury. A single sentence of this instruction is quoted in the brief of appellant. Reading the entire instruction in connection with that sentence, it is manifest that the court made no such assumption, but left the fact entirely to the determination of the jury.

The judgment is affirmed.

We concur: SHAW, J.; JAMES, J.

57 Cal. App. 563

KRUG v. SINCLAIRE. (Civ. 3891.)

(District Court of Appeal, Second District, Division 1, California. May 3, 1922. Hearing Denied by Supreme Court June 29, 1922.)

1. Quieting title $\S$ 44(4)—Proof of foreclosure deed to plaintiff and plaintiff's possession held sufficient to establish title in him.

In action to quiet title, proof of recorded mortgage foreclosure sale deed to plaintiff, and plaintiff's possession of the property subsequent to execution of such deed, held sufficient proof of plaintiff's title without proof of the chain of title precedent to the foreclosure decree under Code Civ. Proc. § 1928.

2. Judgment $\S$ 682(1)—Determination as to invalidity of deed on street assessment foreclosure in purchaser's action against owner conclusive in owner's subsequent action against purchaser's grantee.

Determination as to invalidity of deed given on foreclosure of a street assessment in purchaser's action against owner was conclusive as to invalidity of deed in owner's action to quiet title against purchaser's grantee.

3. Pleading $\S$ 291(4) — Plaintiff's failure to deny under oath "genuineness and due execution" of instrument set up in answer held not an admission of the validity thereof.

Under Code Civ. Proc. § 448, providing that, where a defense is founded upon a written instrument which is copied into the answer, "the genuineness and due execution of such instrument are deemed admitted" unless there is an answer under oath denying the same, a plaintiff, by failure to deny the genuineness and due execution of deeds set out in answer, did not admit validity thereof, but merely that the party who appears to have made deeds attached his signature thereto, and caused it to be delivered.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Genuineness.]

Appeal from Superior Court, Los Angeles County; John W. Shenk, Judge.

Action by Frank J. Krug against M. N. Sinclair. Judgment for plaintiff, and defendant appeals. Affirmed.

J. Irving McKenna and Catherine A. McKenna, both of Los Angeles, for appellant.

Duke Stone, of Los Angeles, for respondent.

JAMES, J. From a judgment entered in favor of the plaintiff, intervener, Sinclair, has appealed.

[1] This action was to quiet title to certain real property. Plaintiff exhibited in evidence a deed from the sheriff of Los Angeles county made pursuant to a decree foreclosing a mortgage lien against the property in question. This deed was dated the 21st of July, 1916, recorded in the office of the county recorder on July 26th of the same year. It appeared that during all the time subsequent to the making of said deed plaintiff had been in possession of the property described therein, and claimed to have title thereto. This proof was sufficient prima facie to prove ownership. It furnishes sufficient proof of title upon which to base a decree favorable to the plaintiff, without making it necessary that the chain of title precedent to the decree of foreclosure be established. Section 1928, Code Civ. Proc.; *Zilmer v. Gerichten*, 111 Cal. 73, at page 77, 43 Pac. 408. The only interest claimed to be possessed by the intervener was such as he might have obtained by reason of a deed issued to his grantor, one Warden, who had made a purchase under a sale had for a delinquent assessment against the property on account of street improvement work. Sinclair in this action set forth in full in his answer: (1) The deed of the tax and license collector of the city of Los Angeles, dated the 2d day of September, 1915, purporting to convey the interest of Robert H. Punter (the alleged owner) to Julia P. Warden; and (2) a quitclaim deed dated the 13th day of January, 1920, from said Warden to said intervener. In a former action (*Warden v. Bittleston Law & Collection Agency et al.*, 41 Cal. App. 1, 181 Pac. 834), in which the plaintiff here was a defendant, it was held that the first-mentioned deed was void and of no effect because of the failure of the vendee to give sufficient notices to the owners of the property of the fact that application had been made for a conveyance. The judgment in the action last entitled was reversed because an affirmative judgment in favor of the defendant was not sustained by the findings. After a reversal was ordered in the case cited, plaintiff, Warden, dismissed the action, and

made her quitclaim deed to the intervener, Sinclair.

[2] The determination of the court as to the invalidity of the deed in question must be taken as establishing the law affecting that instrument, and it must, of course, affect also any conveyance attempted to be made by the said Warden. As against the plaintiff's proof of title, we then find that the intervener rested upon nothing better than the conveyance from the person whose title was supported only by the void deed.

[3] The intervener insists that, because of the fact that he set forth the deeds in full, and no affidavit was filed by the plaintiff denying the genuineness and due execution thereof, the deeds must be taken as transferring whatever they purport on their face to convey. This contention results from a mistaken idea regarding the effect of the provisions of section 448, Code of Civil Procedure. That section provides only that, where a defense is founded upon a written instrument which is copied into the answer, "the genuineness and due execution of such instrument are deemed admitted," unless there is an answer under oath denying the same. That an instrument is genuine and has been duly executed can mean only that the party who appears to have made it has attached his signature thereto knowingly, and caused it to be delivered. *Moore v. Copp*, 119 Cal. 429, 51 Pac. 630. Plaintiff could not deny that the deeds had been signed by the purported parties or delivered. It was admissible, however, for him to prove that the conveyance to Warden was void. This he did by showing the insufficiency of the notices which by the former decision had been held to render the deed void. He showed, too, that at the time the former action was pending he had offered to pay the amount of the assessment charges, and all costs and penalties, which were less than the sum of \$10, and made a continuing offer to pay the same to the defendants in this action, and particularly to the intervener. A tender of these amounts made before a deed had been legally applied for had the effect of extinguishing the assessment lien, and that lien thereafter would have only an apparent existence—apparent because the books of the tax collecting office would not show a discharge of the debt. This condition would create a cloud upon plaintiff's title which he would be entitled to have removed.

The judgment is affirmed.

We concur: CONREY, P. J.; SHAW, J.

57 Cal. App. 449

PEOPLE v. WHITNEY. (Cr. 907.)

(District Court of Appeal, First District, Division 1, California. April 25, 1922. Hearing Denied by Supreme Court June 24, 1922.)

1. Criminal law §1167(1)—Insurrection and sedition §2—Indictment charging criminal syndicalism need not allege name of organization, and omission held harmless.

An indictment charging a violation of the Criminal Syndicalism Act by organizing and becoming a member of an organization to teach criminal syndicalism is sufficient without alleging the name of the organization which defendant is charged with joining, and defendant is not prejudiced by such omission where she was fully advised upon examination of the jurors and by the opening statement of the district attorney of the name of the organization involved.

2. Insurrection and sedition §2—Evidence of character of affiliated organizations admissible in prosecution for criminal syndicalism.

In a prosecution for criminal syndicalism by organizing and joining the Communist Labor Party, evidence of the character and pernicious activities of other organizations with which Communist Labor Party was affiliated or regarding which it had from time to time expressed its approval and sympathy was competent.

3. Criminal law §24—Insurrection and sedition §2—Defendant, knowing aims of organization, charged with knowledge they were unlawful; intent presumed from unlawful act.

A defendant who joined the Communist Labor Party and participated in drawing the resolutions adopted by it, which were in violation of the Criminal Syndicalism Act, cannot rely as a defense on a claim that she did not realize she was aiding disloyalty, and, under Code Civ. Proc. § 1962, a guilty intent is conclusively presumed from the deliberate commission of an unlawful act.

Appeal from Superior Court, Alameda County; James G. Quinn, Judge.

Charlotte A. Whitney was convicted of criminal syndicalism, and she appeals. Affirmed.

Hearing denied; Lawlor and Lennon, JJ., dissenting.

Nathan C. Coghlan, John Francis Neylan, and J. E. Pemberton, all of San Francisco (William F. Herron, of San Francisco, of counsel), for appellant.

U. S. Webb, Atty. Gen., John H. Riordan, Deputy Atty. Gen., Ezra W. Decoto, Dist. Atty., John U. Calkins, Asst. Dist. Atty., and Myron Harris, Deputy Dist. Atty., all of Oakland, for the People.

RICHARDS, J. This appeal is from a judgment of conviction of the defendant for the alleged violation of the provisions of the Criminal Syndicalism Act (St. 1919, p. 281).

The information filed by the district attorney against the defendant consisted of five separate counts based upon the several subdivisions of said act. The jury found the defendant guilty as to the first count in the information, but disagreed as to the other counts therein, and dismissals as to these were subsequently filed. The charging part of the first count in said information upon which the conviction of the defendant was had is in the language of the statute and reads as follows:

"The said Charlotte A. Whitney prior to the time of filing this information, and on or about the 28th day of November, A. D. 1919, at the said county of Alameda, state of California, did then and there unlawfully, willfully, wrongfully, deliberately, and feloniously organize and assist in organizing, and was, is, and knowingly became a member of an organization, society, group, and assemblage of persons organized and assembled to advocate, teach, aid, and abet criminal syndicalism."

[1] The first contention of the appellant herein is that said first count in said indictment, of which the foregoing excerpt is the charging part, was insufficient to state a public offense; the alleged particular insufficiency therein being its omission to specifically designate the name of the organization, society, group, or assemblage of persons which she is charged with having organized and assisted in organizing and which were organized and assembled to teach, aid, and abet criminal syndicalism. Since the original submission of this cause the Supreme Court has decided the case of *People v. Taylor* (Cal. Sup.) 203 Pac. 85, covering the precise point which the appellant urges upon this contention. The two cases are identical as to the form of the charge and as to the procedure with relation to the trial thereon in the trial court. In each case the defendant was fully advised upon the voir dire examination of the jurors and in the opening statement of the district attorney that the organization which the defendant was charged with having organized and assisted in organizing in violation of the terms of the Criminal Syndicalism Act was the Communist Labor Party of Oakland, a local branch of the Communist Party of California. This being so, we are bound, in conformity with the decision in *People v. Taylor*, supra, to hold that the appellant's first contention is void of merit.

The next contention which the appellant urges upon this appeal is that the evidence is insufficient to justify her conviction upon said count in the information. The record is voluminous, and no useful purpose would be subserved by a detailed review of the evidence which it contains. Upon the main question, however, as to the part which the defendant took in organizing and assisting

to organize the Communist Labor Party, there is no dispute. In the brief of the appellant upon this appeal it is stated to be an "admitted fact that the defendant became a member of the so-called Communist Labor Party, attended a party convention November 9, 1919, and was one of the committee on resolutions which reported the platform herein above set forth." In addition to the foregoing admission the evidence abundantly shows that the defendant not only took a leading and active part in the organization of the Oakland branch of the Communist Labor Party of California, but also in the subsequent meetings and acts of said organization. Notwithstanding this admission and these proofs, the appellant insisted upon the trial of the cause and now insists that said organization was not of such character and purposes as to bring it within the class of organizations forbidden and condemned by the terms of the Criminal Syndicalism Act. It was upon this branch of the case that the larger part of the evidence adduced on behalf of the prosecution upon the trial of this cause was presented.

[2] It is the appellant's contention that the admission of a very large portion of such evidence designed to show the pernicious activities of other organizations with which the Communist Labor Party of California was affiliated, or regarding which, or the membership of which, it from time to time by resolution or otherwise expressed its approval and sympathy, was highly prejudicial to the defendant's case, particularly in view of the fact that, as is claimed, her knowledge of and participation in these baneful activities was not sufficiently shown. As to the propriety of the admission of such evidence as tending to show the character and purposes of the Communist Labor Party of California there can be no further doubt, in view of the very full discussion of this subject in the case of *People v. Taylor*, supra, and of the determination of the Supreme Court therein. As to the knowledge which the defendant had and of her participation in the aims, expressions, and activities of the Communist Labor Party of California there can also be no doubt, in view of the admitted intelligence of the defendant and of her participation in the drafting of the resolutions and formulation of the constitution of the organization itself.

[3] That this defendant did not realize that she was giving herself over to forms and expressions of disloyalty and was, to say the least of it, lending her presence and the influence of her character and position as a woman of refinement and culture to an organization whose purposes and sympathies savored of treason is not only past belief, but is a matter with which this court can have no concern, since it is one of the con-

clusive presumptions of our law that a guilty intent is presumed from the deliberate commission of an unlawful act. Code Civ. Proc. § 1962.

As to the appellant's only remaining contention with relation to the alleged misconduct of the district attorney upon the examination of a juror, we have examined the record, and do not find that the episode complained of was of such prejudicial character or consequence as to justify a reversal of the case.

Judgment affirmed.

We concur: TYLER, P. J.; KERRIGAN, J.

57 Cal. App. 477

RILEY v. SOUTHERN PAC. CO. et al.
(Civ. 2430.)

(District Court of Appeal, Third District, California, April 27, 1922. Hearing Denied by Supreme Court June 26, 1922.)

1. Carriers ⇨318(8) — Passenger's testimony held to show carrier's liability for injury in attempting to board train.

Testimony by a passenger that the train stopped at the station but an instant, and started again while the passenger was in the act of stepping onto the step, as a result of which the passenger fell with his feet under the cars and was injured, which testimony was substantially corroborated by another witness to the accident, was sufficient to establish liability of the carrier for the injury.

2. Carriers ⇨247(3)—One injured while attempting to board train to become a passenger is a "passenger."

A person who, intending to board a train and become a passenger thereon, was injured while in the act of mounting the steps of the train, was a "passenger" within the definition that one is a passenger from the time he puts himself in the care of the carrier or directly within the carrier's control with the bona fide intention of becoming a passenger and is accepted as such by the carrier.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Passenger.]

3. Jury ⇨67(3)—Rules governing disqualification of jurors governs disqualification of sheriff to summon.

The same rule governs the disqualification of a juror and the disqualification of the sheriff to summon the jury; the theory of the law being that a biased and prejudiced officer will select biased and prejudiced jurors.

4. Jury ⇨67(3) — Sheriff's affidavit held to show he did not have such opinion as to disqualify him to summon jurors.

Where the sheriff, at the request of plaintiff's attorneys, went to the railroad station and made certain observations with respect to the speed of the cars, the view of the operatives

thereof, and reported the result of his observations to plaintiff's attorneys, and testified to them at the trial, but his affidavit that he had no knowledge of the facts in the case except a general statement made by plaintiff's attorneys and had formed and expressed no opinion as to the merits was uncontradicted, the trial court was justified in finding he had no such opinion as would disqualify him as a juror, under Code Civ. Proc. § 602, subd. 6, and therefore was not disqualified to summon the jury.

5. Jury ☞67(3)—Fact sheriff testified to material matters does not establish disqualification to summon jurors.

The fact that the sheriff gave testimony in the case as to matters which the jury might find to be material does not alone show that he was disqualified to summon the jurors.

6. Jury ☞110(9) — Disqualification of sheriff to summon jurors is waived by failure to object at first opportunity.

Where defendant learned during the course of the trial of the facts which it claimed showed the sheriff was disqualified to summon the jurors in the case, but made no objection at the time and no motion to discharge the jury, and chose to take its chances with that jury, it thereby waived its right to object thereafter to the disqualification of the sheriff.

7. Appeal and error ☞1170(1)—Disqualification of sheriff was not prejudicial where jurors were summoned by deputies.

Even if the sheriff was disqualified by reason of his opinion to summon jurors for the trial of a case, and his disqualification technically extended to his deputies, a party was not prejudiced thereby where in fact the jurors were summoned by deputy sheriffs without consulting the sheriff, who had no voice in their selection, and they were fairly and impartially chosen from the citizens of the county, so that the sheriff's disqualification does not require reversal under Const. art. 6, § 4½.

8. Jury ☞110(9)—Method of selecting jurors is not a constitutional right.

The manner and method of summoning a jury is a matter of legislative control rather than a constitutional provision, so that objections thereto may be waived.

9. Appeal and error ☞1170(1) — Invasion of constitutional right does not require reversal if it was immaterial.

Even if a constitutional right was invaded, the error should be disregarded on appeal under Const. art. 6, § 4½, if it appears from an examination of the record that there was no miscarriage of justice.

10. Appeal and error ☞1004(3) — Judge's statement in requiring remittitur held not to show entire verdict was result of passion.

A statement by the trial judge in requiring a remittitur of a portion of the damages awarded by the verdict as a condition of denying a motion for a new trial that the amount of the verdict was excessive, and the excess was the result of passion and prejudice, does not show that it was the trial court's opinion that the

entire verdict was the result of passion and prejudice, and therefore does not require a reversal of the judgment rendered after remittitur for an amount which was not excessive.

11. Appeal and error ☞758(3)—Particular error in instruction must be pointed out.

A suggestion that an instruction given by the trial court was erroneous may be disregarded by the appellate court where there was no attempt to point out any error in the instruction.

12. Carriers ☞321(2)—Instructions held not to state plaintiff was passenger while waiting at station.

Where one of the instructions stated that the plaintiff was not a passenger while the train was standing at the station unless actually attempting to board the train or so near the train and in such a position as to indicate his intention to board it, an objection that the instructions as a whole stated that plaintiff was a passenger from the time he went upon the station platform was untenable.

13. Appeal and error ☞1066 — Instruction plaintiff was passenger while waiting at station held not prejudicial.

An erroneous instruction that plaintiff was a passenger while waiting for the train at defendant's station was not prejudicial, where there was no evidence that plaintiff received any injury until he actually attempted to board the train.

14. Carriers ☞348(4) — Omission from requested charge on contributory negligence held not erroneous.

An omission from a requested instruction that, if the train had started, and plaintiff attempted to board it while it was in motion or while the gates were closed, he was contributorily negligent, of a portion stating that the rule was true whether the train stopped for a reasonable time at the station or not, because, if it did not stop or the stop was unreasonably short, plaintiff was not thereby justified in attempting to board it while it was traveling at a high rate of speed or while the gates were closed, was not erroneous, since the omitted statement added nothing to the instruction.

15. Carriers ☞348(13)—Statement requiring plaintiff to prove freedom from negligence was properly omitted from instructions.

A requested instruction requiring plaintiff to establish negligence of defendant unmixed with any negligence on his own part proposed to put on plaintiff the burden of proving freedom from contributory negligence, as to which the burden of proof was on defendant, and the omission therefrom of the reference to contributory negligence was proper.

16. Trial ☞295(7) — Instructions, considered as a whole, held not to eliminate contributory negligence.

Where the trial court inserted in many of the hypothetical questions given at plaintiff's request the phrase "without plaintiff's fault," and on defendant's request fully instructed on the law of contributory negligence, the instructions as a whole were not subject to the objec-

tion that they eliminated from consideration the issue of contributory negligence.

Appeal from Superior Court, Tulare County; J. A. Allen, Judge.

Action by Guy Riley against the Southern Pacific Company and James O. Davis, substituted as Director General of Railroads. Judgment for plaintiff, and defendant Davis appeals. Affirmed.

W. I. Gilbert, of Los Angeles, and Power & McFadzean, of Visalia, for appellant.

Russell & Heid, of Tulare, and Farnsworth, McClure & Burke, of Visalia, for respondent.

BURNETT, J. At Vine street station in the city of Berkeley, while attempting at night on May 5, 1919, to board an electric train operated by appellant, plaintiff was seriously injured, and the appeal is from a judgment in his favor for the sum of \$41,200. No objection is made to the sufficiency of the complaint, nor do we understand it to be seriously disputed that the evidence supports the verdict. However, that the peculiar feature of the case may be portrayed, we quote the following from the testimony of plaintiff:

"We (referring to a Miss Paiva and himself) took the street car down to the ferry building in San Francisco and took the ferryboat between 11 o'clock and 12 o'clock, and we ferried across the Bay. At the Oakland mole we took the Southern Pacific train and got off at Vine street station. We didn't know just exactly when the train came back, but we did know that was the last train I could go back on. Miss Paiva lived a distance of about four or five blocks from this station, so we decided to sit there and wait for this train to go back. * * * We went over to the side of the station and sat down and waited for this train to come back, because it was the last train I could get to San Francisco. It wasn't very long until it came back, and I immediately, when I saw the train coming around the curve here (indicating on the diagram), got up from my seat and walked straight out to the first track and waited for it to come on. When I saw this train coming around the curve it was coming at a pretty good rate of speed. I walked straight out from this seat here to the first track and stood there and the train was still coming on. It wasn't slowing down very much, and I stood there for a second and walked over to the second track. I didn't get clear over to the second track, but in about halfway between the two tracks, and the train was going at a speed that I didn't think it would stop where I expected it to right opposite the seat, so I turned and walked diagonally out there south, thinking that the train would go a little past my expectation and I would be that much further ahead. I got down there and walked right on down to the train, and I got just about to it and the train stopped, and I took and grasped the rear handle of the left-hand gate of the first car going toward San Francisco, and the train was stopped, and I grasped the handle,

and it was still stopped when I stepped my left foot up on the lower step. As I did that, the train started; it just stopped a second, and threw my feet both to the ground. Then I was trying to get my balance, but in doing that I was half dragged and half ran along the side of the train still holding the handle with my right hand, and I must have gone that way 15 or 20 feet, or maybe further, trying to get up speed. I thought when I could get enough speed pushing I would throw my feet out and swing up around on this step, and when I thought I reached that rate of speed I swung, and, instead of my feet going on the step, they were swung back between the step and they lodged in the mechanism of the second car, the car behind the one I was trying to get on. And when I was gradually being dragged under the car and such pressure being brought on my hands, in time I would have to let go and slip right back under the car. Instead of waiting for that, I swung my whole body and arms away from the rail I was holding to and dropped. As I dropped, my feet were caught and held so they didn't swing clear of the track, and when I dropped both trucks of the last car ran over my feet and limbs. The gates on the last car were shut, so I walked immediately right down to the car ahead of it. That was the rear end of the first car, and the gate on my side was open, and the train stopped still. * * * Just as I stepped with my left foot the train jerked out, and jerked my foot off and I fell to the pavement. Just the start of the train jerked my foot off, and I lost my balance."

[1] His testimony was substantially corroborated by that of Miss Mary Paiva, who witnessed the accident, and there is no doubt that a case is thus presented against appellant within the undisputed and well-established principle of liability of common carriers for the safety of their passengers. 10 Corpus Juris, 948; Nilson v. Oakland Trac-tion Co., 10 Cal. App. 103, 101 Pac. 413; Franklin v. Visalia Electric Ry. Co., 21 Cal. App. 270, 131 Pac. 776; Raub v. Los Angeles T. Ry. Co., 103 Cal. 473, 37 Pac. 374; Boone v. Oakland Transit Co., 139 Cal. 490, 73 Pac. 243; Cody v. Market St. Railway Co., 148 Cal. 90, 82 Pac. 666.

[2] In the light of plaintiff's testimony we must, of course, regard him as a passenger and entitled to the highest degree of care on the part of defendant. This conclusion is in accordance with the definition of a passenger contained in an instruction to the jury given by the court on request of defendant as follows:

"A passenger is one who undertakes, with the consent of the carrier, to travel in a conveyance furnished by the carrier otherwise than in the service of the carrier, as such. The relation of carrier and passenger depends upon a contract of carriage, expressed or implied, between the carrier and the passenger, made by themselves, or their respective agents. The relation begins when the person puts himself in the care of the carrier, or directly within the

carrier's control, with the bona fide intention of becoming a passenger, and is accepted as such by the carrier."

But, as before stated, there seems to be no serious controversy between the parties as to this feature of the case. Indeed, at the oral argument, while not waiving any of the points made in the briefs, the learned counsel for appellant confined himself to a discussion of two considerations which he deemed of sufficient importance to merit the careful attention of the court.

The first of these relates to the supposed disqualification of the sheriff of Tulare county to summon the jury which tried the case. It seems that on June 27, 1920, more than a year after the accident happened, said sheriff, Court Smith, delivered some prisoners to the state penitentiary at San Quentin, and on his return went to San Francisco to attend the National Democratic Convention that was then in session. While there he met two of respondent's attorneys, and at their request, on the evening of June 29, 1920, he accompanied them to said Vine street station in Berkeley, where he made certain observations with respect to the speed of the cars and powers of observation of operatives and others upon said cars. At the trial, in rebuttal, Mr. Smith testified, without objection, to the results of these observations. He completed his testimony on the afternoon of the day preceding the submission of the case to the jury, and immediately thereafter a recess was taken, at which time counsel for appellant claim that they learned for the first time the facts that constituted the disqualification of the sheriff. No suggestion, however, of such asserted disqualification was made to the trial court until the argument of the motion for a new trial. At said hearing affidavits were presented by both parties, and wherein there is any conflict as to the facts we must, of course, be controlled by the showing in favor of respondent. In his affidavit the sheriff deposed:

"That while at said Vine street station he was requested by said Messrs. Russell & Heid to make certain observations and inform them the result thereof, the exact nature and extent of which more fully appears from affiant's testimony as given at the trial of the above-entitled action; that said Messrs. Russell & Heid did not discuss with affiant the merits of the plaintiff's contention or the defendant's defense in the above-entitled action other than to state to him in a general way their understanding of how an accident occurred wherein one Guy Riley, the plaintiff in said action, was injured; that after making said observations and informing said Messrs. Russell & Heid the result thereof affiant returned to San Francisco and paid no further attention to said case until he was called as a witness to testify therein on behalf of the plaintiff.

"That affiant was not familiar or acquainted with, either on the 8th day of July, 1920, when said special venire was issued and said jury

summoned as aforesaid, or on the 9th day of July, when he testified as a witness in said case, or at any other time, the merits of the plaintiff's claim, or of the defendants' defense, and did not entertain any opinion or conclusion with respect thereto, and particularly he did not entertain any opinion or conclusion that the plaintiff should recover any damages in said case. Affiant further states the fact to be that he was not acquainted with and did not even know Guy Riley, the plaintiff in said action, by sight or otherwise."

After denying that he made certain purported statements to appellant's counsel he proceeded:

"Affiant states the fact to be positively and absolutely that he did not state to W. I. Gilbert, E. L. Barnes, or any other person, or persons, at any time, that plaintiff ought to recover in said case, and affiant further states that he made no statement and used no words of similar import, or that could be construed to have that meaning.

"Affiant further states that he did not at any time said jurors were so summoned, or at the time of the trial of said case, or at any other time, have an unqualified or other opinion or belief as to the merits of the action, either founded upon knowledge of its material facts, or some of them, or otherwise, and further that there was not a state of mind in affiant evincing either enmity against or bias to either party."

There were other affidavits lending support to the contention of respondent that there was no legal disqualification on the part of the sheriff, but it is entirely unnecessary to go further to show a complete justification for the court's ruling.

[3] It is not disputed that the same rules govern the disqualification of a juror and the summoning officer; the theory of the law being that a biased and prejudiced officer will select biased and prejudiced jurors. *People v. Le Doux*, 155 Cal. 535, 102 Pac. 517.

[4] The disqualification, if any, therefore in the present case must fall within the specification of subdivision 6 of section 602 of the Code of Civil Procedure, as follows:

"Having an unqualified opinion or belief as to the merits of the action founded upon knowledge of its material facts or some of them."

The leading case upon the question, as it deals with criminal cases, is *People v. Reynolds*, 16 Cal. 129, wherein is discussed with great learning the character of the opinion that will disqualify a juror for implied bias. It was said that—

The statute implies "that, to exclude the juror, he must have a settled conviction of the guilt or innocence of the party, or has expressed such a conviction. * * * A mere suspicion or inclination of the mind towards a conclusion is not enough; the state of mind must be more decided. He must have reached a conclusion like that upon which he would be willing to act in ordinary matters. In other

words, we repeat, the effect upon his mind must be more than an impression; it must amount to a conviction, in order to exclude him for implied bias."

This decision was approved in *People v. Symonds*, 22 Cal. 349, and subsequent cases, but, as the principle is undisputed, we need cite no further. Manifestly the rule would be no more strictly applied in civil than in criminal cases, and as thus applied, it is quite apparent that no serious objection could be made to the qualification of the sheriff. According to his affidavit, he had no knowledge of any of the material facts connected with the accident, nor had he been informed, except in a very general way, of the nature of the case. The trial judge was therefore warranted in believing his verified statement that he had neither formed nor expressed any opinion as to the merits of the action, and that he entertained neither prejudice nor enmity against either party.

It cannot be disputed that the question of the disqualification of the sheriff was one in the first instance for the trial judge to determine, and the showing was not such as to compel a finding in favor of appellant's contention. *Graybill v. De Young*, 146 Cal. 421, 80 Pac. 618.

[5] Of course it will not be argued that the mere fact that the sheriff testified as to some matters that might be considered of importance by the jury would disqualify him within the contemplation of the statute. This would be a strained and unreasonable construction of the law and would tend to interfere greatly with the practical administration of justice.

The *Le Doux Case*, supra, was entirely different, for therein it appeared that the sheriff "had an unqualified opinion of the guilt of the defendant, based upon his own activity in gathering evidence for the prosecution and founded upon his direct investigation of the facts."

[6] Moreover, it is equally plain that, if any disqualification existed, it was waived by the failure of appellant to make timely objection. As before stated, appellant became aware of the supposed disqualification a day before the conclusion of the trial, and there is no reason shown why it did not immediately seek to arrest the proceedings. It chose, however, to take chances upon receiving a favorable verdict; and in such cases the just and well-established rule is that, after the case goes against him, he cannot object to the validity of the verdict because of circumstances within his knowledge which he has declined to seasonably urge.

The principle is clearly stated in 24 Cyc. 316, from which we quote:

"It is well settled that a failure to challenge or object operates as a conclusive waiver if the ground of objection is known to the party at the time the jury is impaneled, is discovered

during the progress of the trial, if he has knowledge of facts sufficient to put him upon inquiry, or is otherwise chargeable with knowledge of the ground of objection."

Many cases are cited by respondent illustrating this doctrine in various phases, of which we may mention the following: *People v. Hamilton* (Cal. App.) 192 Pac. 467; *Monaghan v. Rolling Mill Co.*, 81 Cal. 190, 22 Pac. 590; *Ipswitch v. Fernandez*, 84 Cal. 639, 24 Pac. 298; *People v. Ah Lee Doon*, 97 Cal. 171, 31 Pac. 933; *Sherwin v. Southern Pacific Co.*, 168 Cal. 722, 145 Pac. 92.

The authorities, indeed, seem to be uniform that a known cause of challenge is waived by withholding it until after verdict, "since such practice is incompatible with good faith and fair dealing which should characterize the administration of justice."

[7] Again, if it be conceded for the sake of argument that the sheriff was disqualified and that timely objection was made, what answer is there to the contention of respondent that no prejudice resulted to appellant? The special veniremen were summoned by deputy sheriffs without consulting the sheriff, who had no voice in the manner of selection or in naming the persons to be selected, and the jurors selected were fairly and impartially chosen from the citizens of Tulare county by persons entirely unbiased and unprejudiced and who knew nothing whatever about the facts of the case. In other words, the jurors were summoned in exactly the same way, and we must assume that persons of the same type and qualifications were obtained as though the coroner or an elisor had served the process. While, therefore, if the sheriff was disqualified, the disqualification would technically affect his deputies, it would not follow that the error was prejudicial. In fact, in view of the showing made on the hearing of the motion for a new trial, we can safely say that, if any error was committed, the case is one for the application of section 4½ of article 6 of the state Constitution.

[8] As to the contention of appellant that the question involves a constitutional right which cannot be reached by said section 4½, it is sufficient to quote the following:

"The manner and method of summoning a jury is a subject-matter of legislative control rather than of constitutional provision, * * * the benefit of which may be waived." *People v. Nakis*, 60 Cal. Dec. 433, syllabus (184 Cal. 105, 193 Pac. 92).

[9] But, even if it were a constitutional right that was invaded and it appeared from an examination of the record that there was no "miscarriage of justice," the error should be disregarded on appeal. *People v. O'Bryan*, 165 Cal. 55, 130 Pac. 1042.

It may be added, as pointed out by respondent, that when the trial was completed

and the jury were about to retire to deliberate upon their verdict, the sheriff was sworn to take charge of them, and no objection whatever was made to the proceeding. This constituted not only a waiver, but evidence that appellant was satisfied that he had suffered no prejudice by reason of the alleged irregularity.

[10] The other point emphasized at the oral argument is, in our judgment, also entirely without merit. It is based upon the opinion of the trial judge expressed in determining the motion for a new trial as follows:

"(1) That the amount of the verdict rendered by the jury was and is excessive, and in that respect was not justified by the evidence; (2) that the excessive amount of the verdict was the result of passion and prejudice on the part of the jury."

It was further stated that the amount of the verdict was greatly in excess of any verdict allowed to stand in any of the courts of this country for a similar injury, and the court concluded that \$20,000 should be remitted or else a new trial granted. Respondent consented to the reduction, whereupon the court denied the motion for a new trial, reciting that—

"Judgment in favor of plaintiff and against defendant in the said sum of \$41,200 and costs is supported by the evidence."

It is not disputed that it was within the discretion of the trial court to make such conditional order, but it seems to be the claim of appellant that, in the opinion of the trial judge, the whole of the verdict was tainted with passion and prejudice, and therefore it was his duty to set it aside and grant the motion for a new trial. This view would rather imply a serious reflection upon the good faith of the trial judge, although we are satisfied that no such charge was contemplated by the capable and courteous counsel who argued the cause. The record shows conclusively that by the use of said terms the court simply meant that to the extent of \$20,000 the verdict was not supported by the evidence, and to that extent only it might be said to be the result of passion or prejudice. If the trial judge had believed that the whole of the verdict was the product of passion or prejudice, he would not have recited in the order that the balance was supported by the evidence, and he would, of course, have set the verdict aside.

Indeed, in the use of said expressions the trial judge probably had in view the decisions holding that said language is in legal contemplation equivalent to a declaration that the amount of the verdict is not supported by the evidence. In *Kinsey v. Wallace*, 36 Cal. 462, the Supreme Court declared "that a verdict for a sum so greatly disproportionate to the actual damage of the plaintiff, under the facts of the case, is of it-

self sufficient evidence that it was rendered under the influence of passion or prejudice," but this circumstance was not deemed sufficient to vitiate the entire verdict, as the Supreme Court made a conditional order allowing the plaintiff the privilege of remitting a part of it with the alternative of a reversal of the judgment.

In *Doolin v. Omnibus Cable Co.*, 125 Cal. 141, 57 Pac. 774, it is said:

"To say that verdict for damages was enhanced by passion or prejudice is one mode of saying that the evidence did not justify it; and the only means of discovering therein the element of passion or prejudice, within the meaning of the statute, is by comparing the amount with the evidence which was before the court at the trial. *Harrison v. Sutter Street Ry. Co.*, 116 Cal. 156. Whatever may be the rule which should govern the trial judge, it is certain that when his action in granting a new trial on the ground of excessive damages, or requiring a reduction of the amount as the condition of denying one, comes to be reviewed on appeal, his order will not be reversed unless it plainly appears that he abused his discretion; and the cases teach that when there is material conflict of evidence regarding the extent of damage the imputation of such abuse is repelled, the same as if the ground of the order were insufficiency of the evidence to justify the verdict."

It may be added that appellant expressly admits that the amount of the verdict as allowed by the trial judge is not at all disproportionate to the extent of the injury suffered by plaintiff, and this admission virtually nullifies the force of his criticism of said action of the trial judge.

The other objections urged in the briefs deserve, we think, but scant consideration.

[11] Appellant, while intimating that instruction No. 7 as given by the court is erroneous, has not attempted to point out any error, and we might therefore disregard the suggestion. It embodies, we may add, however, a generally accepted principle of liability on the part of common carriers for the safety of one attempting, without fault on his part, to board a train, and was undoubtedly applicable to the facts as related by plaintiff.

[12] Appellant is mistaken in the claim that the court instructed the jury that "from the time the plaintiff in this case went upon the cement platform adjacent to Vine street station, as it is called, he was to be considered a passenger, and that the defendant was in duty bound to use the utmost care and caution for his protection." We think no such inference can be fairly drawn from the consideration of the various instructions upon the subject which were given by the court. We are satisfied the jury must have understood the law to be as admitted by appellant that a person "does not become the object of the utmost care of the railroad company

until he actually starts to make his entry upon the train." Indeed, it is made to appear clearly by the various instructions of the court that the utmost care was required of appellant only in case plaintiff was a passenger, and there was a specific direction that "plaintiff in this case was not a passenger and cannot be considered by you as such while the train mentioned in the pleadings was standing at Vine street station, unless plaintiff, in the exercise of reasonable care and prudence on his part, was actually attempting to board defendant's said train, or was so near to said train, and in such a position as to indicate his intention so to board the same," etc. It is not at all probable that the jury was misled as to this feature of the case.

[13] Moreover, if any error was committed in that respect, it was entirely without prejudice, for the reason that there was no evidence or no contention that any act of appellant contributed to the injury except the negligence in starting the train while plaintiff was attempting to board it. The care required of appellant toward plaintiff while he was sitting or standing on the platform was entirely foreign to the issues and could not have been regarded by the jury. There were only two theories presented by the pleadings and the evidence. The one urged by plaintiff which we have already indicated and the other by appellant that plaintiff attempted to board the train while it was in motion and while the gates were shut, and the jury were instructed with great particularity and precision as to the law applicable to each of these theories. There was no room for confusion or misunderstanding as to what was required of each party upon either hypothesis.

[14] Appellant complains because the trial court omitted from a requested instruction the following:

"This statement holds true, whether the train stopped for a sufficient or reasonable time at Vine street station to allow passengers to board the same or not, because, if the stop made at Vine street station was unreasonably short, or if said train did not stop at Vine street station at all, the plaintiff would not have been justified in attempting to board it while it was traveling at a dangerously high rate of speed, or while the gates were closed, regardless of the rate of speed at which it was traveling or whether it was moving at all or not."

It is perfectly apparent that this clause added nothing to the portion of the proposed instruction which was given by the court as follows:

"If the car or train described in the complaint had started away from Vine street station, and if the plaintiff, seeing that it had started, ran after it and attempted to board it while it was in motion, and was injured because of the rate of speed at which said train was traveling, or if plaintiff attempted to board

said train when the gates thereof were closed regardless of the rate of speed at which it was traveling or whether the train had started at all or not, in either event he (the plaintiff) did not exercise and was not exercising that reasonable care and caution which he should have exercised in protecting himself from injury, and such failure to so exercise reasonable care and caution for his own safety was the direct and proximate cause of the injury he received, and plaintiff cannot recover."

Beside, these various contingencies were specifically covered by other instructions given by the court, and the rejected clause was also argumentative, and misleading by reason of the suggestion that the train might not have stopped at said station, whereas the evidence all showed to the contrary.

[15] There was no error in striking from defendant's proposed instruction No. 21 the phrase "unmixed with any negligence on his own part contributing directly and proximately to such injury." The instruction as proposed put upon plaintiff the burden of proving not only that the negligence of defendant contributed to the injury, but that he was free from contributing negligence; whereas the law is well settled that the duty is cast upon defendant to prove such contributing negligence, and the plaintiff is not required to anticipate such defense. Besides, this identical phrase is contained in a similar instruction, No. 17, given by the court on plaintiff's request. It was more favorable to appellant than he had a right to expect, but of this he cannot complain.

[16] It is entirely a misapprehension of the situation to say that the issue of contributory negligence was eliminated from the case by the instructions of the court. In many of the hypothetical instructions given at the request of plaintiff the modification "without plaintiff's fault" was introduced by the court, and on appellant's request the doctrine was fully presented. It is sufficient to quote the following:

"If it should appear to you from the evidence that the plaintiff in this case neglected those precautions for his own safety indicated in and required by these instructions, and you should further find that said conduct directly or proximately contributed to his injury, you must find in favor of the defendant, even though you may believe that the employés of the train were guilty of negligence while engaged in operating said train."

We fail to see any contradiction in any material respect in the instructions. As we have stated, they presented the law applicable to the different theories of the parties. It was the duty of the court to so instruct the jury, leaving it to them to determine which theory was in consonance with the facts. There was no invasion of the province of the jury, but there would be cause for complaint if the court had failed to ac-

commodate and adapt the instructions to any rational inference that might be derived from the evidence.

The fact is that a careful examination of the record justifies the statement that the case was tried with extraordinary care, the rights of both parties were apparently guarded with scrupulous concern, and we have not been able to discern any error in the proceedings from beginning to end.

The judgment is affirmed.

We concur: FINCH, P. J.; HART, J.

57 Cal. App. 509

Ex parte TOSELLO. (Cr. 1057.)

(District Court of Appeal, First District, Division 2, California. April 29, 1922.)

1. Municipal corporations  **§ 111 (4) — Section of ordinance not unconstitutional because another section was invalid.**

One section of a city ordinance, which prohibited keeping saloons, etc., where intoxicating liquors were sold or given away was not rendered invalid by another section which permitted intoxicating liquors to be given to guests in homes, and to be sold under certain conditions, contrary to Const. U. S. Amend. 18.

2. Intoxicating liquors  **§ 13, 132 — Neither Eighteenth Amendment nor the Volstead Act was intended to affect local prohibitory laws.**

Neither Const. U. S. Amend. 18 nor the Volstead Act was intended to nullify prohibitory state or local laws.

Application of John Tosello for a writ of habeas corpus, prayed to be directed to the Sheriff of Santa Clara county to secure the release of the petitioner from custody. Writ denied.

H. A. Gabriel, of San Jose, for petitioner.

Archer Bowden, City Atty., of San Jose, for respondent.

NOURSE, J. [1] The petitioner alleges that he is unlawfully confined by the sheriff of Santa Clara county under color of a commitment of the police court of the city of San Jose after his conviction of a violation of an ordinance of that city approved November 6, 1917, entitled, "an ordinance pertaining to and providing for limiting and regulating the sale of spirituous, malt, vinous or other alcoholic liquors, * * *" and that the conviction and confinement are void because the ordinance is unconstitutional as contravening the Eighteenth Amendment to the Constitution of the United States, in that it regulates, limits, and permits the sale of intoxicating liquors under certain conditions.

The first section of the ordinance provides as follows:

"On and after January 1, 1918, no person, either as principal, agent, servant or employee, shall open, establish, keep, maintain or carry on within the corporate limits of the city of San Jose any tipping house, dramshop, cellar, saloon, bar, barroom, sample room, buffet or other place where spirituous, vinous, malt or other alcoholic liquors are sold or given away, except as provided in section two (2) hereof."

The second section provides that it shall not be unlawful under the ordinance to serve alcoholic liquors in the home to members of the family or to guests without compensation, to distribute wine at sacramental service, for any registered pharmacist to sell or dispense alcoholic liquors at a pharmacy for medicinal purposes only, to sell or serve vinous and malt liquors with meals in any hotel, restaurant, or club under a permit obtained from the city council, or to sell alcoholic liquors in sealed or corked packages under a license for that purpose obtained from the city council. Section 4 of the ordinance authorizes the city council to grant permits to sell liquors in accordance with the terms of the ordinance.

The complaint on which the petitioner was tried and convicted charges that he did "at the time and place aforesaid, willfully and unlawfully open, establish, keep, maintain, and carry on within the corporate limits of the city of San Jose * * * a tipping house, dramshop, sample room, and place where spirituous, vinous, malt, and other alcoholic liquors were sold and given away, contrary to the provisions of said ordinance of said city."

In brief, the position of the petitioner is that, inasmuch as section 2 of the ordinance permits the city council to license a sale of intoxicating liquors contrary to the provisions of the Eighteenth Amendment to the Constitution of the United States, and as the provisions of that section cannot be segregated from the provisions of section 1, the whole ordinance must fall. Cases are cited to the proposition that, where the constitutional and unconstitutional provisions of the statute are so inseparably blended together as to make it clear that either clause would not have been enacted without the other, the whole act is void. The weakness of this argument is that the ordinance was not unconstitutional in any respect when it was enacted. We are not, therefore, concerned with what the people intended when they enacted the ordinance, or whether they would have enacted the provisions of section 1 without the exceptions contained in section 2. The fact is that they enacted it just as it reads today, and they alone can repeal it. The ordinance having been constitutional when enacted, and not having been repealed by the city, the question is: How far did the constitutional amendment No. 18 suspend its operation? The first section is plainly a prohibition against the

sale or giving away of intoxicating liquors in any tippling house, dramshop, saloon, or similar place of business. To this extent the ordinance is prohibitory, and is in harmony with the provisions of the constitutional amendment. The petitioner is charged with doing this very thing. The exception relates only to the "other place" where spirituous, vinous, malt, or other alcoholic liquors are sold or given away, such as private homes, churches, pharmacies, hotels, restaurants, clubs, and places where alcoholic liquors are sold in sealed or corked packages. As the constitutional amendment (Const. U. S. Amend. 18) and the Volstead Act (41 Stat. 305) which followed it were designed to prohibit the manufacture, sale, and distribution of intoxicating liquors for beverage purposes, certain portions of the provisions of section 2 of the ordinance were, of course, rendered inoperative. This does not, however, affect the prohibitory features of section 1.

A similar question arose in *People v. Capelli* (Cal. App.) 203 Pac. 837. In that case the appellant had been convicted of violation of the Wylie Act (St. 1911, p. 599), and based his appeal upon the ground that, because section 11 of that act authorizes the electors of any subdivision which had become no license territory to vote upon the question of licensing the sale of alcoholic liquors therein, the whole act was rendered void by the adoption of the constitutional amendment. The appellate court held that, though the provisions of section 11 of the Wylie Act were inoperative because of the constitutional amendment, this did not affect the prohibitory features of the act as a whole. To the same effect is *Ex parte Crookshank* (D. C.) 269 Fed. 980, 987.

[2] To the point that neither the constitutional amendment nor the Volstead Act were intended to affect or nullify prohibitory state or local laws, see *In re Volpi* (Cal. App.) 190 Pac. 1090; *People v. Collins* (Cal. App.) 202 Pac. 344; *In re Polizzotto* (Cal. Sup.) 205 Pac. 676; *Woods v. City of Seattle* (D. C.) 270 Fed. 315; *State v. District Court*, 58 Mont. 684, 194 Pac. 308; *State v. Turner*, 115 Wash. 170, 196 Pac. 638.

The writ is discharged, and the prisoner remanded to the custody of the sheriff.

We concur: LANGDON, P. J.; STURTEVANT, J.

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57 Cal. App. 609

SORAN v. HARRIS. (Civ. 3814.)

(District Court of Appeal, Second District, Division 1, California. May 5, 1922. Hearing Denied by Supreme Court July 3, 1922.)

1. Detectives — Evidence held to sustain an allowance to plaintiff on his account for money paid out for defendant.

In an action on account to recover balance due plaintiff for salary, commissions, and ex-

penses arising out of employment of plaintiff by defendant, a detective, evidence by defendant that he told plaintiff that if F., another employee of defendant, got a sum of money paid for handling a case, it should be charged to defendant, and testimony of plaintiff that he paid the money to F., held sufficient to sustain the allowance of that amount of money to plaintiff in his account.

2. Detectives — Evidence held sufficient to sustain finding under which an amount was allowed detective on an account.

In an action by detective to recover the balance due on a mutual account for salary, commissions, and expenses arising out of the employment, evidence held sufficient to sustain findings allowing plaintiff part of customary final charge for handling case.

Appeal from Superior Court, Los Angeles County; Russ Avery, Judge.

Action by W. T. Soran against Nicholas B. Harris. From judgment for plaintiff, defendant appeals. Affirmed.

Warren L. Williams and Seymour S. Silvertown, both of Los Angeles, for appellant.

Howard F. Shepherd, of Los Angeles, for respondent.

CONREY, P. J. The plaintiff brought this action to recover a balance claimed to be due to him on mutual account for salary, commissions, and expenses arising out of the employment of the plaintiff by the defendant, whose business was that of a detective. The plaintiff recovered judgment, and the defendant appeals therefrom. The sole ground of appeal is that the evidence is insufficient to sustain the findings, in this, that certain items were improperly allowed to the plaintiff.

The amount of the judgment is \$431.96. Appellant concedes that the items constituting this amount are sustained by the evidence to the extent of \$173.66. This leaves a disputed balance of \$258.30.

[1] The first disputed item is the sum of \$125 paid by the plaintiff to one Fuentez out of a certain sum of \$250 which plaintiff received from Mrs. D'Aleria in the course of certain business transacted by defendant for Mrs. D'Aleria. Plaintiff was in charge of the D'Aleria case at San Diego, and Fuentez was another employee of defendant who had been sent to San Diego to assist the plaintiff. Appellant, in his testimony, admitted that he told the plaintiff that if Fuentez got the \$125, it should be charged to appellant. Respondent testified that he did pay that amount to Fuentez. The evidence is sufficient to sustain the allowance of this amount to the plaintiff in his account.

[2] Next it is contended that, under the evidence, the plaintiff is not entitled to a credit of \$125 for "closing the D'Aleria

case." The plaintiff testified to a long-standing arrangement under which, upon the making of a special charge for the closing of a case, and where there were two "operators," the operators received 50 per cent. of this closing charge. He therefore claimed 25 per cent. of the closing charge of \$500 which was made and paid in that case. The defendant testified that the reason, and the only reason, why the plaintiff was not entitled to this item, was that the plaintiff was in a drunken condition at the time when the case was closed. He stated that in this particular case, if the plaintiff had not been drunk, he would have been entitled to share in the fee. There is testimony, by a witness who was present on the occasion in question, that the plaintiff was not intoxicated at that time. The evidence is sufficient to sustain the findings under which this item was allowed. There is a group of items stated in the testimony, and referred to in the brief for respondent, which satisfactorily covers at least \$8 of the \$8.30 of disputed items. We have not made an extended search for the other 30 cents.

The judgment is affirmed.

We concur: SHAW, J.; JAMES, J.

57 Cal. App. 442

HELMS et al. v. PACIFIC MILL & TIMBER CO. (Civ. 2407.)

(District Court of Appeal, Third District, California. April 25, 1922. Hearing Denied by Supreme Court June 22, 1922.)

1. Pleading — 398—Where plaintiffs' names in title of complaint appeared as individuals and in the body as partners, and the court found a partnership, variance immaterial.

Under Code Civ. Proc. § 469, providing that a variance is not to be deemed material unless it has actually misled, and section 470, providing that where the variance is not material the court may direct the fact to be found according to the evidence, where a trial court found that a contract was executed by plaintiffs as copartners, where plaintiffs' names appeared in the title of a complaint as individuals and in the body of the complaint they were alleged to be copartners and that each became owner of one-half of certain goods manufactured by them and that an agent acting for both of plaintiffs sold the goods to defendant, the complaint was not prejudicially defective.

2. Appeal and error — 174—The objection that complaint failed to allege partnership name cannot be first raised on appeal.

In an action by copartners against a purchaser of goods to recover the price agreed to be paid therefor, in which defendant urged on motion for nonsuit that the cause of action is a partnership demand and the action was prosecuted in their individual names, the ob-

jection that the partnership name was not alleged in the complaint, and if the partnership was fictitious and no certificate had been filed as required by Civ. Code, § 2466, the matter would have been delayed until the filing and publication of the certificate if plaintiffs elected so to act, not being raised at the trial, cannot be raised for the first time on appeal.

3. Sales — 82(4)—Seller under contract held entitled to payment upon each delivery of the goods as ordered.

Where contract for the sale of 100,000 grape stakes consisted of an accepted order from the buyer to "ship to ourselves at instructions to follow," and in pursuance thereof six carloads, amounting to about half of the total order, were shipped as ordered by the buyers during a period of 17 days, held, that the seller was entitled to payment upon each delivery as ordered, so that the seller was not in default in not shipping more stakes until those already shipped were paid for.

4. Sales — 82(4)—Contract of sale held to entitle seller to payment on delivery of goods.

Where a seller contracted to sell all railroad ties he made during a certain year, with a specified minimum quantity to be delivered by the end of the year, which were to be delivered from time to time as made throughout the year, in view of seller's inability to furnish a bond as required in the contract of sale and of the fact that the buyer advanced \$500 on the contract price, the contract held to contemplate payment on delivery of each shipment.

Appeal from Superior Court, Humboldt County; Denver Sevier, Judge.

Action by J. F. Helms and another against the Pacific Mill & Timber Company. From a judgment for plaintiffs, defendant appeals. Affirmed.

Sterling Carr, of San Francisco, and E. W. Wilson, of Eureka, for appellant.

Puter & Quinn and H. L. Ford, all of Eureka, for respondents.

FINCH, P. J. Plaintiffs, alleging that they were copartners, sued for the recovery of the agreed price of certain grape stakes sold to defendant. In appellant's opening brief it is argued that the court erred in denying defendant's motion to strike out the fourth amended complaint, but in the reply brief it is admitted that such objection is not tenable on this appeal.

[1] It is urged that there is a fatal variance between the allegations of the complaint and the proofs, in that plaintiffs sue as individuals and allege a contract made by them as individuals while the evidence shows that the contract was executed by the partnership. Plaintiffs' names appear in the title of the complaint as individuals merely, but in the body of the complaint it is alleged that the plaintiffs, as copartners, manufactured the grape stakes; that thereupon each became the owner of one-half thereof; and

that Helms, acting for both, sold them to defendant. While the pleading is not a model, it is difficult to see in what manner defendant has suffered prejudice from any defect therein. A variance is not "to be deemed material, unless it has actually misled the adverse party to his prejudice." Code Civ. Proc. § 469. "Where the variance is not material, as provided in the last section, the court may direct the fact to be found according to the evidence." Code Civ. Proc. § 470. The court found that the contract was executed by plaintiffs as copartners.

[2] In appellant's brief it is said that if the partnership name had been alleged, and "if the same was fictitious and no certificate had been filed as required by the Civil Code" (section 2466), the defendant could have alleged such failure "and the matter would then have been delayed until the filing and publication of such certificate, if plaintiffs elected so to act." The answer in no manner raised the question here urged, and the evidence does not show under what name the partnership business was conducted or whether any certificate was filed. The record does not disclose that such objection was made at any stage of the case in the trial court; the contention there urged, on motion for nonsuit, being that the cause of action proved "is a partnership demand, and the action is prosecuted in their individual names." The question cannot be raised for the first time on appeal.

[3] It is contended that the plaintiffs failed to perform their part of the contract. The contract consisted of a written order by the defendant and its acceptance on behalf of plaintiffs. The order reads as follows:

"Ship to ourselves at instructions to follow. Prices are f. o. b. Humboldt points Eureka rate. 100,000 2x2x6 No. 1 split redwood grape stakes pointed 23.00. Please sign and return promptly to us at San Francisco."

Six carloads of grape stakes, amounting to a total of 50,490, were shipped as ordered from time to time during a period of 17 days, from September 25 to October 11, 1917. The shipments were made direct to defendant's customers as ordered by its agent at Eureka. It does not appear when defendant next ordered a shipment of the stakes, but its president testified that he made several demands for delivery after October, 1917. Plaintiffs refused to make further deliveries until paid for the stakes furnished, and defendant declined to make payment, claiming that no payments were due until the entire 100,000 stakes were delivered. Nielson testified:

"We made a contract with the defendant for the sale of 100,000 redwood grape stakes, and there was present Helms, myself and Herrick. * * * I don't remember when they were to be delivered, but not all at once. They were to be delivered at several times, we could not deliver all at once."

Herrick was the Humboldt county representative of defendant. Nielson testified relative to the failure of defendants to make payment as follows:

"They said they would send money up time and again, but it failed to come. * * * I was present when Helms and Herrick talked over the failure of the defendant to pay. The amount of the conversation was that Herrick told Helms not to ship any more until they made him a payment. * * * Herrick said nothing to the effect that they would not pay anything till they got the other part of the shipment."

Witnesses for the defendant contradicted much of Nielson's testimony, but it was for the trial court to decide whom to believe.

The written contract provided for shipments "at instructions to follow." This provision, construed in the light of the attending circumstances and the manner in which the contract was carried out by the parties in so far as performed, justifies the inference that the parties understood at the time the contract was executed that a considerable time might elapse between the first and the last deliveries thereunder. The defendant might, at its discretion, have postponed the last delivery for months. Under the circumstances shown, it would be unreasonable to hold that the parties intended to make the time of payment dependent upon the will of the purchaser. It must be held that the plaintiffs were entitled to payment upon each delivery as ordered. *Veerkamp v. Hulburd C. & D. Co.*, 58 Cal. 229, 41 Am. Rep. 265; *United Canneries Co. v. Seelye* (Cal. App.) 192 Pac. 341; *Morton v. Clark*, 181 Mass. 134, 63 N. E. 409; *Dees v. Self*, 165 Ala. 229, 51 South. 735; *Press v. Vandergrift*, 165 App. Div. 180, 150 N. Y. Supp. 238; *Neal v. Shewalter*, 5 Ind. App. 147, 31 N. E. 848; *People v. Grant*, 138 Mich. 60, 100 N. W. 1006.

By way of counterclaim, the defendant alleged damages in the sum of \$198.04 by reason of plaintiffs' failure to deliver the remainder of the grape stakes. Since the plaintiffs were justified in refusing to make further deliveries until paid for the stakes furnished, the defendant had no just cause of counterclaim.

[4] The defendant filed a cross-complaint against plaintiff Helms, praying for damages alleged to have been suffered by reason of his failure to deliver certain railroad ties in accordance with the terms of a contract between them. By written contract, dated January 15, 1917, Helms agreed to sell to the defendant "all the 6x8 split Rwd. railroad ties I make during the year 1917 at 36c apiece, * * * minimum quantity to be delivered 30,000 by January 1st, 1918." The contract further provided:

"The Pacific Mill & Timber Company agree to advance \$1,300.00 to be deducted from the

first shipment. I agree to put up a bond of \$2,000 which will be satisfactory to the Pacific Mill & Timber Company."

Helms was unable to furnish the required bond, and on August 13, 1917, Helms and defendant agreed to reduce the number of ties to 5,000 and defendant agreed to advance \$500 on the contract and took an assignment of Helms' right in and to all 6x8 ties owned by him at that time, Helms agreeing to promptly manufacture and deliver to defendant such additional ties as, added to those on hand, would, "at the price listed in the contract already entered into as aforesaid, fully compensate party of the second part for said advance of \$500.00." Helms delivered 1,605 ties under this contract which, at the contract price, amounted to more than the \$500 advanced. He thereupon refused to make any further deliveries unless defendant would pay for each carload as delivered. What has been said relative to the contract for grape stakes is equally applicable here. From the provisions of the contract it appears that the ties were to be delivered from time to time as made throughout the year. Helms' inability to furnish a bond and the provision for an advancement to him of \$500 on the contract price indicate that the parties understood that his financial ability to carry out his part of the contract was dependent upon receipt of payment on delivery of each shipment.

The evidence supports the court's findings in favor of the plaintiffs on their complaint and against the defendant on its counterclaim and cross-complaint.

The judgment is affirmed.

We concur: HART, J.; BURNETT, J.

57 Cal. App. 553

SCOTT v. AUSTIN. (Civ. 4136.)

(District Court of Appeal, First District, Division 1, California. May 3, 1922. Hearing Denied by Supreme Court June 29, 1922.)

1. Husband and wife ⚭270(8)—Evidence in action by guardian of insane wife held to prove husband's transfer of community property to third person without consideration.

In an action by guardian of insane wife to require defendant to account for one-half of certain personal property constituting community property transferred to defendant by the husband shortly before his death without the wife's consent, in which it was claimed that the husband gave third party a gift of community property in violation of Civ. Code, § 172, evidence held to justify conclusion that the transfer of the property was not supported by any valuable consideration.

2. Husband and wife ⚭265—Guardian of insane wife could not recover one-half of sum given by husband to third party and used by him to pay husband's debts and funeral expenses.

Where the husband shortly before his death gave third party a certain sum of money for payment of the husband's debts, and third party spent the money partly for such purpose and partly to defray the funeral expenses of the husband, the guardian of the insane wife could not recover one-half thereof from third person on the ground that it was community property.

3. Husband and wife ⚭265—Husband could make gift of community property without wife's consent, where acquired before marriage or prior to amendment of statute prohibiting such gifts.

Where community property was acquired either before marriage or prior to amendment of Civ. Code, § 172, prohibiting gifts of community property by a husband without wife's consent, the husband could make a gift of such property without the wife's consent.

4. Husband and wife ⚭262(1)—Property acquired by either husband or wife other than by gift, bequest, devise, or descent presumed to be community property.

Property acquired by either party to a marriage other than by gift, bequest, devise, or descent is presumed to be community property, but there is no presumption as to the time of such acquisition.

5. Husband and wife ⚭262(1)—No presumption as to whether community property given away by husband was acquired before marriage or when gift valid.

In action by guardian of insane wife to compel third party to account for one-half of community property transferred to third party shortly before death on the ground that the husband gave the third party a gift of community property without the wife's consent, in violation of Civ. Code, § 172, as amended, there is no presumption as to whether such property was acquired before marriage or prior to the amendment of such statute so as to make the statute applicable.

6. Husband and wife ⚭270(10)—Judgment awarding wife one-half of community property as against donee of deceased husband free from claims of creditors and expenses of administration held erroneous.

In an action by insane wife's guardian to compel defendant to account for one-half of the personal property transferred to defendant by husband shortly before his death, in which it was claimed the husband made a gift to the defendant without the wife's consent, in violation of Civ. Code, § 172, it was error to award the wife one-half the property free from the claims of creditors and expenses of administration, but under section 1402, the court should merely have limited its judgment to declaring the wife the owner in an undivided one-half interest in the property, subject in common with the remaining property of the estate to the payment of the husband's debts,

the family allowance, and expenses of administration.

7. Husband and wife §270(10)—Wife's share of community property on husband's death subject to debts, family allowance, and charges and expenses of administration.

The court will at the instance of a wife set aside a voluntary conveyance by the husband of community property so far as it affects the interest therein to which she succeeds at his death, but the right to have such relief does not free her recovery of the property from the burden imposed upon it by Civ. Code, § 1402, providing that on husband's death the wife's share in the community property is equally subject to the debts, family allowance, and charges and expenses of administration.

Appeal from Superior Court, Monterey County; Pat R. Parker, Judge.

Action by Emma Scott, an insane person, by J. A. Cornett, guardian of her person and estate against Milton W. Austin, as administrator of the estate of Horace W. Austin, deceased, substituted instead of Horace W. Austin, deceased. Judgment for plaintiff, and defendant appeals. Reversed.

C. F. Lacey, of Salinas, for appellant.

Wyckoff & Gardner, of Watsonville, and Daugherty & Theille, of Salinas, for respondent.

KERRIGAN, J. This is an appeal from a judgment in favor of the plaintiff in an action brought by her guardian to compel the defendant to account for one-half of certain personal property consisting of cash in the sum of \$450, and a stock of merchandise, and the fixtures of a drug store, which had been transferred to him by John B. Scott, the husband of plaintiff, a few days before Scott's death.

Plaintiff and her deceased husband intermarried May 14, 1873, and continued to be husband and wife until the death of the former on February 18, 1920. Plaintiff is a patient in the state hospital for the insane at Stockton, Cal., and has been such for over 30 years. Prior to Scott's death he transferred to the defendant the stock and fixtures of his drug store and \$450 in cash; he also conveyed to him certain real property, in consideration of which conveyance the defendant entered into an agreement in writing whereby he undertook to pay for the support and maintenance of the plaintiff herein "such amounts as from time to time may be fixed or required by the public authorities," and to furnish her with necessary clothing. The court found that the money and personal property was community property of the deceased and plaintiff, and that the turning over of said money and personal property constituted a gift amounting in value to about \$6,450, and that the plaintiff had no knowledge and did

not consent to said transfer. As matter of law the court concluded that plaintiff was entitled to judgment for one-half of said personal property, and one-half the income and profits thereof from the date of the death of deceased. Interlocutory judgment was rendered accordingly, and the defendant was ordered to account to plaintiff for said cash, personal property, and profits. A referee was appointed for the purpose of rendering such an account. It was further ordered that upon the filing of said referee's report final judgment in favor of plaintiff be entered for one-half of the value of said personal property and one-half of said income and cash, together with costs. From this judgment defendant appeals.

The first contention of the appellant is that the finding of the court that the transfer to him of the fixtures and stock of merchandise was a gift is not supported by the evidence. On this subject the evidence shows that this transfer was made by a written assignment dated January 31, 1920, and executed by John B. Scott less than three weeks before his death. The day preceding the transfer said Scott conveyed to the defendant a parcel of real property of the value of \$20,000, and on the same day the defendant executed and delivered to Scott the following writing:

"Salinas, Cal., January 30, 1920.

"In consideration of a deed of conveyance this day made to me by John B. Scott I hereby agree that from and after the death of said John B. Scott I will pay towards the care and support of his wife, now confined in the asylum for the insane at Stockton, California, such amounts as from time to time may be fixed or required by the public authorities, and will likewise furnish her with necessary clothing.

"This obligation is to continue until the death of the said wife of John B. Scott, and is to bind my heirs, executors and administrators.

"In witness whereof," etc.

[1] The defendant undertook to testify that this agreement on his part was also the consideration for the transfer to him of the personal property; but in this connection he also testified that at the time of the execution and delivery of such assignment nothing was said, either by Scott or himself, with reference to it. It will be observed that the written agreement recites that the consideration therefore was the conveyance of the real estate made and delivered on the day of the execution and delivery of said agreement, and makes no mention of the transfer of the personal property. It is also significant that at the very time of its transfer to the defendant he was the holder of a note for \$2,000 against Scott, which, notwithstanding said transfer and conveyance was not surrendered to the maker nor agreed to be regarded as paid, and at the time of the trial of this action was still retained by the de-

fendant as an existing obligation against the estate of the deceased. In view of this state of the testimony we think the trial court was amply justified in concluding that the transfer of the personal property was not supported by any valuable consideration.

[2] As we have seen, the judgment awards to the plaintiff one-half the sum of \$450, treating it as money given by the decedent to the defendant. The only testimony on this point, however, is that John B. Scott turned over this money to the defendant three or four weeks before his death for the purpose of paying bills against the drug store, and that it was used partly for that purpose and partly to defray the funeral expenses of the deceased. Under these circumstances, while it would be the duty of the defendant to account to the personal representatives of the deceased for this sum, we do not perceive how this fact entitles the plaintiff to a judgment against the defendant for one-half thereof. To this extent the judgment of the trial court is erroneous.

[3] The third contention of the appellant must also be sustained, namely, that the court erroneously made its judgment cover the fixtures in the drug store. The record is totally devoid of evidence as to when this particular property was acquired. It is admitted that the community existed from the year 1873 down to the death of the deceased. If these fixtures were acquired either before marriage or prior to the amendment of section 172 of the Civil Code, prohibiting gifts of community property without the wife's consent, a gift thereof was within the power of the husband without such consent. *Spreckels v. Spreckels*, 116 Cal. 339, 349, 48 Pac. 228, 36 L. R. A. 497, 58 Am. St. Rep. 170; *Clavo v. Clavo*, 10 Cal. App. 447, 449, 102 Pac. 556.

[4, 5] While it is well settled that property acquired by either party to a marriage other than by gift, bequest, devise, or descent is presumed to be community property, there is no presumption as to the time of such acquisition; and a wife makes no case for the setting aside of a gift by the husband of community property, unless she shows that it was acquired subsequent to the going into effect of said amendment.

[6, 7] The appellant's final contention is that the judgment in favor of plaintiff is incorrect in form, because it awards to her one-half of the community property in question free from the claims of creditors and the expenses of administration. This contention also we think to be correct. Section 1402 of the Civil Code provides that the share of the wife in the community property is equally subject to the debts, family allowance, and

charges and expenses of administration. Although the court will at the instance of the wife set aside a voluntary conveyance by the husband of community property so far as it affects the interest therein to which she succeeds at his death, the right to have such relief does not free her moiety of the property from the burden imposed upon it by the provision of the Code cited. We think, therefore, that the court should have limited its judgment to declaring the plaintiff to be the owner of an undivided one-half interest in the property in question, subject in common with the remaining property of the estate to the payment of the debts of the decedent, the family allowance and expenses of administration. It is true that in the case of *Dargie v. Patterson*, 176 Cal. 716, 169 Pac. 360, the judgment in terms declared the wife to be the "owner of an undivided one-half interest in the property in question," without this qualifying clause; but in that case the evidence disclosed that such property was but a very small part of the estate, and that there remained ample property to meet such debts and expenses. That it was not intended by the opinion in that case to lay down the rule that the wife may recover her community interest freed from such burden we think is evident from other language used by the court in the same case, namely:

"The privilege of avoiding the gift is conferred upon her [the widow] as a means of protecting her interest in the community property. We see no reason why in assailing the gift she should enjoy greater rights than she would have had if the gift had never been made."

The respondent points out that in the case cited the widow was held to be entitled to recover an undivided one-half interest in certain property voluntarily conveyed by the husband "without regard to the amount or condition of the estate remaining in his hands at the time of his death," but the language quoted was used in disallowing a contention made in that case that the conveyance ought not to be set aside, since there was ample property in the estate from which the widow could recoup the loss of her community interest in the property conveyed, and had no reference to the condition of the estate with regard to debts and expenses of administration.

For the errors adverted to, we think the judgment should be reversed; and it is so ordered.

We concur: TYLER, P. J.; KNIGHT, Justice pro tem.

(57 Cal. App. 504)

BOYD v. PENDEGAST et al. (Civ. 3888.)(District Court of Appeal, Second District,
Division 1, California. April 28, 1922.)**1. Officers ⇨77—Possession of office creates no vested property right in officers.**

The possession of an office, or the enjoyment of employment with the government, or under any of its agencies, does not confer a vested property right of any quality whatsoever; the ancient offices to which the common law attached the property character of incorporeal hereditament finding no legal counterpart under the political systems of government in this country.

2. Constitutional law ⇨277(2)—Lack of due process of law not involved in removal from office.

Under whatever procedure is adopted to work the removal of a person from office, the constitutional question as to lack of due process of law cannot be involved.

3. Officers ⇨66—May be removed without cause.

Whether for cause, or without cause, when the removal of an officer is accomplished, after full compliance with the existing regulations affecting the matter, no ground is left on which to found any action against the removing power.

4. Officers ⇨70—Procedure on removal from office.

In the absence of regulations fixing the procedure for removal from office, the law defining the term may be looked to in deciding the question.

5. Officers ⇨50, 72(1)—Appointments during pleasure terminated at any time without notice.

Appointments to hold office during the pleasure of the appointing power may be terminated at any time and without notice.

6. Officers ⇨66, 72(1)—Appointments during good behavior terminated only for cause.

Appointments to office, "to continue during good behavior or for a fixed term of years," cannot be terminated, except for cause, and the office holder is entitled to notice and an opportunity to be heard.

7. Officers ⇨66, 72(1)—Right to remove for cause permits removal without hearing.

A right to remove an officer "for cause," with no right of appeal or review, where the statute does not specify the particular causes, leaves the determination of the cause and its sufficiency to the removing power, which may act summarily and without according a hearing to the officer.

8. Municipal corporations ⇨185(4)—Police officers held entitled to hearing on application.

Los Angeles Charter, as amended in 1911 (St. 1911, p. 2107, art. 9, § 93), makes findings of police commissioners as to cause for removal of officer final and conclusive, regardless of any defect or deficiency in the evidence, but contemplates that a police officer, ordered to

be suspended or removed, shall be accorded a hearing before the commissioners, if he applies for it within five days after the chief of police has given him notice of the order.

9. Municipal corporations ⇨185(4)—Notice of suspension by chief of police need not contain description of acts making delinquency charge.

Notice by chief of police of the city of Los Angeles to a police officer that he was suspended for "neglect of duty" was sufficient, without setting out the acts making up the delinquency charge; it being presumed that the commissioners, on request, would acquaint him with the details, under Los Angeles Charter, as amended in 1911 (St. 1911, p. 2107, art. 9, § 93).

10. Municipal corporations ⇨185(3)—Notice of suspension in effect a removal.

A police officer, removed from the force of the city of Los Angeles, cannot complain that the notice was only to the effect that he was suspended; the suspension, not stating the time for reinstatement, being in effect a removal, under Los Angeles Charter, as amended in 1911 (St. 1911, p. 2107, art. 9, § 93).

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Certiorari by Ambrose Boyd against Lyle Pendegast and others, to review an order of the Board of Police Commissioners of Los Angeles County. From a judgment denying certiorari, petitioner appeals. Affirmed.

Abrahams & D'Orr, of Los Angeles, for appellant.

Jess E. Stephens, City Atty., and Robert L. Hanley, Deputy City Atty., both of Los Angeles, for respondents.

JAMES, J. Appellant, having been removed from his position as a member of the police force of the city of Los Angeles, brought this proceeding in the superior court, asking that a writ be issued requiring defendants to certify for review the record of the proceedings had and evidence taken upon which the order of removal was made. A demurrer was interposed to the petition, and sustained. Judgment dismissing the proceeding followed. From that judgment petitioner has appealed.

By the demurrer of defendants several objections to the petition were urged, only one of which need be here considered. The general ground that sufficient facts were not stated to entitle petitioner to the writ sought presents questions which are determinative to this appeal.

The charter of the city of Los Angeles, as amended in 1911 (section 93, art. 9, p. 2107, Stats. 1911), makes provision for the appointment of police officers by the chief of police subject to the approval of the police commission and such civil service regulations as may be existent. It is then provided that:

"The chief of police shall have the power to suspend or remove any officer or employee in the police department; but no such suspension or removal shall be made except for cause, which shall be stated in writing and filed with said board, with certification that a copy of such statement has been served upon the person so suspended or removed, personally, or by leaving a copy thereof at his last known place of residence if he cannot be found. Upon such filing the suspension or removal shall take effect. Within fifteen days after such statement shall have been filed, the said board, upon its own motion may, or upon written application of the person so suspended or removed, filed with said board within five days after service upon him of such statement, as above provided, shall, proceed to investigate the grounds for such suspension or removal. If, in the case of a removal the said board, after such investigation, shall find in writing that the grounds stated were insufficient, or were not sustained, and also finds in writing that the person removed is a fit and suitable person to fill the position from which he was removed the said board shall reinstate him in such position; and if, in the case of a suspension the board, after such investigation, shall find in writing that the grounds stated were insufficient, or were not sustained, the said board shall restore the person so suspended to duty. The order of said board with respect to such suspension or removal shall be final and conclusive."

The petition of appellant, as filed herein, set forth that petitioner was served with a notice by the chief of police that he was suspended from his position for (as stated in the notice) "neglect of duty"; that within five days thereafter he applied for a hearing before the board of police commissioners. He alleged, further, that said board did not, nor did the chief of police, serve him with a statement of any specific charges and did not confront him with any witnesses; that the board, however, "permitted" petitioner to appear before it and relate "the history of his work in the police department for the many years that he had served as such member"; that the board on a later date made an order peremptorily removing petitioner from his position; and that the chief of police gave him written notice of the making of said order.

[1-3] The possession of an office, or the enjoyment of employment with the government, or under any of its agencies, does not confer a vested property right of any quality whatsoever. The more ancient offices to which the common law attached the property character of incorporeal hereditament find no legal counterpart under the political systems of government in this country. *Connor v. City of New York*, 5 N. Y. 285; *Trimble v. Phelps*, 19 Colo. 187, 34 Pac. 981, 41 Am. St. Rep. 236; *Matter of Carter*, 141 Cal. 316, 74 Pac. 997. It is not necessary here to consider whether, as between the office holder, and a stranger to the appointing power, there may be, in abstract contemplation, a qualified

property right which may be subject to damage. In general, then, it follows necessarily that, under whatever procedure is adopted to work the removal of a person from office, the constitutional question, as to lack of due process of law, cannot be involved. Whether for cause or without cause, where the removal of an officer is accomplished after full compliance with existing regulations affecting the matter, no ground is left upon which to found any action against the removing power.

[4-7] In the absence of regulations fixing the procedure on removal from office, the law defining the term may be looked to in deciding the question. Appointments to hold during the pleasure of the appointing power may be terminated at any time and without notice; appointments to continue "during good behavior" or for a fixed term of years, cannot be terminated except for cause, and the authorities are generally to the effect that in the latter cases the office holder is entitled to notice and an opportunity to be heard. *Dillon on Municipal Corporations* (5th Ed.) vol. 2, § 473; *Mechem on Public Officers*, p. 454; In the *Matter of Carter*, supra; *Coleman v. Glenn*, 103 Ga. 458, 30 S. E. 297, 68 Am. St. Rep. 608; *Ex parte Hennen*, 13 Pet. 227, 10 L. Ed. 138; *Reagan v. U. S.*, 182 U. S. 419, 21 Sup. Ct. 842, 45 L. Ed. 1162. There are cases holding that the right to remove "for cause," with no right of appeal or review, where the statute does not specify the particular causes, leaves the determination of the cause and its sufficiency to the removing power, which may act summarily and without according a hearing to the officer. *Trimble v. People*, 19 Colo. 187, 34 Pac. 981, 41 Am. St. Rep. 236; *People v. Martin*, 19 Colo. 565, 36 Pac. 543, 24 L. R. A. 201. Observing the generally accepted rule, the question to be determined here is whether the procedure outlined by the charter provision was in the case of petitioner substantially followed. That provision makes the findings of the police commissioners final and conclusive, which means that such findings must be so accepted, regardless of any defect or deficiency in the evidence.

[8-10] However, it seems clear that it is contemplated that a police officer ordered to be suspended or removed shall be accorded a hearing before the commissioners, if he applies for it within five days after the chief of police has given him notice of the order. The provision does not in terms require that there be stated in the notice of the chief of police a description of the acts which make up the delinquency charged against the officer, although it will be presumed that, if an investigation is had, the commissioners will, upon request of the officer, acquaint him with such details. The manner in which the investigation is to be conducted and the class of evidence to be heard is left with the commission. It is imperative only that a

hearing be accorded the officer upon his request, and that he be permitted to produce his evidence. The commission acts in a quasi judicial way (*Speed v. Common Council*, 98 Mich. 360, 57 N. W. 407, 22 L. R. A. 842, 39 Am. St. Rep. 555), and may be required by appropriate writ to accord a hearing to the person affected by a removal order. When such a hearing has been had, the decision, by the very terms of the charter, is placed beyond the reach of any review by the courts.

The petition in this case shows that the petitioner was permitted to appear before the commission and that he narrated a history of his work in the police department. There is no allegation in the petition of any request that a more particular statement of the charge against him be furnished, or that a demand was made that he be allowed to produce witnesses. It may well have been that the commission, upon petitioner's own statement, was satisfied that the order of suspension should stand. In the final notice given by the chief of police, advising petitioner that he was removed from his position, was contained the statement that there was attached a "copy of findings of police commission." Whatever the contents of these findings were, the petition does not show. The fact that the chief of police in his subsequent notice advised the petitioner that he was removed from his office, whereas the first notice advised him that he was suspended, is of no moment, for a suspension without a time stated for reinstatement, would be in effect a removal. Upon the petition, as it represented the facts of appellant's case, the ruling of the trial court was right.

The judgment is affirmed.

We concur: CONREY, P. J.; SHAW, J.

(189 Cal. 243)

PEOPLE v. LEW FAT. (Cr. 2400.)

(Supreme Court of California. July 6, 1922.)

1. Criminal law $\S$ 407(1)—Deceased's accusatory statements in defendant's presence properly admitted to show latter's acts and conduct on hearing them.

In a prosecution for murder, accusatory statements by deceased in the presence and hearing of defendant, who made no reply, were properly admitted, not as evidence of the truth of the facts stated, but to show defendant's acts and conduct on hearing such accusations.

2. Criminal law $\S$ 1137(5)—Defendant cannot complain of refusal to strike hearsay testimony elicited by his own counsel by improper cross-examination.

In a prosecution for murder, where defendant's counsel, on cross-examination of a police officer, who had not testified in chief respecting defendant's membership in a Chinese tong, invited him to give a general dissertation on tongs before asking him whether defendant was a member of a particular tong, to which he replied that he had always understood him to be a member and was informed by an officer thereof that he had been expelled after the shooting, and, after a motion to strike out such testimony as hearsay was denied, persisted in pursuing such inquiries on the express assumption of defendant's membership therein, defendant could not complain of the court's refusal to strike out the testimony.

3. Criminal law $\S$ 730(8)—Refusal to direct jury to disregard state's attorney's remarks as to existence and location of bullet hole near place of homicide held not erroneous.

In a prosecution for murder, where a diagram showing a bullet hole, the existence of which defendant claimed was not shown, in or near a door of the room in which the shooting took place, was in evidence and being exhibited to the jury when objection was made to remarks relative to the fact and location thereof by the state's attorney and the jury had inspected the premises with particular regard to its location, the court did not err in refusing to direct the jury to disregard such remarks; defendant not being injuriously affected thereby.

4. Criminal law $\S$ 829(12)—Refusal to give instruction substantially covered by those given not erroneous.

In a prosecution for murder, where the court gave instructions in the usual and approved forms that defendant's guilt must be proved to a moral certainty and beyond a reasonable doubt and clearly and correctly charged as to the presumption of innocence, its refusal to give requested instructions with respect thereto in more diffuse and amplified forms was not error.

5. Homicide $\S$ 253(2)—Evidence held sufficient to sustain conviction.

Evidence, though circumstantial, held sufficient to sustain a conviction of murder in the first degree.

In Bank.

Appeal from Superior Court, City and County of San Francisco; Louis H. Ward, Judge.

Lew Fat was convicted of murder in the first degree, and he appeals. Affirmed.

George R. Perkins and R. Porter Ashe, both of San Francisco, for appellant.

U. S. Webb, Atty. Gen., John H. Riordan, Deputy Atty. Gen., Matthew Brady, Dist. Atty., Stanislaus A. Riley, Asst. Dist. Atty., and Harry E. Michael, Special Prosecutor, all of San Francisco, for the People.

PER CURIAM. The appellant herein was convicted of murder in the first degree; his crime consisting in the alleged slaying of one Lum Bing, an elderly Chinese, in a building in Chinatown in the city and county of San Francisco, on the afternoon of May 18, 1921. He appeals from the judgment following such conviction and urges several grounds of error upon his said appeal.

[1] His first ground of alleged error is that the trial court erred in the admission of evidence of certain accusatory declarations made by the dying decedent in the presence of the arresting officers and of the defendant, and of the acts and conduct of the latter at the time such accusations were made. The first of these occurred within a few moments after the deceased had been shot and mortally wounded and after the defendant had been arrested within a short distance of the scene of the crime with a discharged and still smoking weapon in his hand. The arresting officer took the defendant into the presence of the wounded man, and he testified that when the latter saw the defendant he pointed his finger at him and said in the English language, "That man shot me," to which accusation the defendant made no reply. A short time thereafter, when the mortally wounded man had been taken to the harbor emergency hospital, the defendant and an alleged accomplice were again brought into his presence, and, when asked by one of the arresting officers who shot him, the dying man pointed at the defendant and said in English, "That was the man." To all of this evidence the defendant objected on the ground that it was not shown that the defendant understood the English language. He urges the same objection here, but the record before us does not sustain him in that regard. Prior to the introduction of the evidence thus objected to, a police officer had testified to having held conversations at various times with the defendant in English and to having received replies in that language. Another officer had also testified to numerous occasions in which he had spoken to the defendant in English and received re-

plies from him in that language. There was also some testimony to the effect that during the trial of the cause the defendant and his attorney held conferences in the courtroom in the English language. This evidence brings the case fully within the rule laid down by this court in *People v. Ong Mon Foo*, 182 Cal. 697, wherein upon a much less satisfactory showing of a knowledge of the English language on the part of the defendant in that case this court held that the evidence of accusatory statements made by the deceased in the presence and hearing of the defendant were properly admitted in evidence for the limited purpose for which this class of evidence is admissible. It is to be noted that the trial court in its instructions to the jury herein carefully limited the purpose for which such evidence was admissible and was to be considered by the jury, viz. not as evidence of the truth of the facts stated in the accusation, but only for the purpose of showing the acts and conduct of the defendant in the presence of the accusation. The action of the trial court was not erroneous in the admission of this evidence for the purpose to which it was thus confined.

[2] The next contention of the appellant is that the trial court committed prejudicial error in refusing to strike out as hearsay certain evidence given by a police officer as to defendant's membership in the Suey Sing Tong. The evidence and ruling of the court thus assailed arose during the cross-examination of a police officer by counsel for the defendant, who asked the witness this question: "Q. Do you know whether this defendant is a member of the Suey Sing Tong?" It is to be noted that the witness who was asked this question had given no testimony upon his examination in chief respecting the defendant's membership in the Suey Sing Tong; his only reference to this particular society consisting in the statement that he had once seen the defendant in a building belonging to this society and had held some conversation with him there. It is thus evident that the question was not cross-examination, but was apparently an independent inquiry upon the part of the defendant's counsel for the purpose of learning what knowledge the witness had of the defendant's membership in this particular tong. The answer of the witness was:

"I have always understood him to be a member of the Suey Sing Tong and in fact I was informed by * * * Tom Wah, member of the Suey Sing Tong and also one of its officers, that following the shooting, this man [the defendant] was thrown out of the society."

The defendant's counsel moved to strike out this answer as hearsay, which, after some discussion, the court denied. Preceding this question and answer, the defend-

ant's counsel had invited the witness to give a general dissertation as to what Chinese tongs were and as to the nature and qualities of their membership and their purposes in general. After the foregoing question had been asked and answered and said motion made and denied, the defendant's counsel persisted in pursuing these inquiries upon the express assumption of the defendant's membership in this particular tong. Under the foregoing circumstances, the entire inquiry of the defendant's counsel being an excursion outside the limits of cross-examination, and being in part predicated at least upon the assumption of the defendant's membership in this tong, we fail to see what basis of complaint he can have over this bit of hearsay evidence elicited on his own initiative and in the course of an inquiry which was not properly cross-examination, and which, in the main, called for information on the part of the witness which was in the nature of things chiefly hearsay.

[3] The next contention of the appellant is that the trial court was in error in its refusal to direct the jury to disregard certain remarks made by the deputy district attorney with respect to the fact and location of a certain bullet hole in or near a door of the room in which the shooting of the deceased had taken place, and in the drawing of certain inferences by him from the fact and location of the said bullet hole at said point. The appellant claims that there was no showing of the existence of any such bullet hole, but, in the colloquy which occurred between defendant's counsel and the court at the time of making the objection, it appeared that there was in evidence, and then being exhibited to the jury, a diagram of the premises upon which a bullet hole at the indicated point was shown, and it was upon this showing that the trial court allowed the deputy district attorney to proceed with his argument. The record also discloses that the jury had been taken to the premises and had inspected the same with particular regard to the location of the bullet hole. This being so, it is apparent that the defendant could not have been injuriously affected by any remarks or inferences which the prosecuting officer might indulge in with respect to a nonexistent bullet hole, if such were the fact. We see no error in the action of the trial court in refusing to give the requested direction to the jury.

[4] The appellant's next contention is that the trial court erred in its refusal to give certain instructions requested by the defendant. The first group of these instructions which the appellant insists should have been given undertake to set forth in various forms the familiar rule that the guilt of the defendant must be proved to a moral certainty and beyond a reasonable doubt. The reason assigned by the judge of

the trial court for his refusal to give these instructions were that they had been given in substance elsewhere in the general body of his instructions. The record fully bears out this assertion as to each one of these instructions, showing them to have been framed and given in the usual and ordinary and approved forms of expression of the rule. The defendant was entitled to no more than this. The next group of his requested instructions which the defendant claims should have been given refer to the presumption of innocence to the benefit of which the defendant was entitled throughout his trial and up to the moment of the determination by the jury of his guilt or innocence. But an examination of the instructions which the court gave discloses that it covered the entire matter of these instructions with a clear, concise, and correct charge. It was not required to repeat the rule in the more diffuse and amplified form of the defendant's requested instructions.

[5] Finally, the appellant contends that the evidence is insufficient to sustain the verdict, but as to this point the appellant concedes that the evidence is substantially conflicting as to the main circumstances of the case upon which the appellant's conviction rests. In view of the fact, however, that this is a capital case, we have carefully scrutinized the record and are entirely satisfied that the evidence sustains the verdict. Without attempting to review all of the facts elicited at the trial, a single set of circumstances may be adverted to as indicating the seriousness of the case against the defendant. The deceased, an aged and inoffensive Chinese, living with his wife in a building in San Francisco's Chinatown, and seldom leaving his own room except to go to another room in the same building to play with two little children who lived there, was going from or returning to his own room on the afternoon on the day of his murder, when he was shot six times through the body. At the report of these shots two police officers, who happened to be passing the building, rushed in and dashed up the stairs, at the top of which they met two Chinese, each with a revolver in his hand. One of these pointed his weapon at the approaching officers, who promptly knocked him down and arrested him. The other defendant, the defendant herein, threw away his still smoking revolver just before his arrest, which, being recovered, was found to be still hot and smoking, with all of its cartridges exploded, and which weapon was also found to be of the same caliber as that with which the deceased had been mortally wounded. When taken immediately into the presence of the victim he was identified by him as the man who had shot him, to which

accusation he made no reply. There were many other circumstances tending to show the defendant's motive for the commission of the crime, while his explanations of his presence with a smoking revolver so near the place and moment of the homicide were neither probable nor convincing. The evidence, while circumstantial, was overwhelming as to the defendant's guilt of the crime. The judgment is affirmed.

SHAW, C. J., and LAWLOR, WILBUR, LENNON, SLOANE, and WASTE, JJ., and RICHARDS, Justice pro tem. concur.

189 Cal. 149

NICOLAS HERNANDEZ & CO. v. W. T. WELISCH & CO. (S. F. 9941.)

(Supreme Court of California. June 15, 1922.)

1. Brokers ⇐66 — Under contract between broker in Porto Rico and broker in United States, former held entitled to share in commissions on sales made in United States.

Under a contract between plaintiff broker in Porto Rico and defendant broker in United States, plaintiff "to receive your share of the profits on all orders received directly or indirectly from your territory," plaintiff was entitled to its share of commissions earned by defendant on sales to the Porto Rico Food Commission, though the execution of the contracts on the part of such purchaser were made within the United States.

2. Brokers ⇐66—Brokers held to share equally in profits under contract.

Under a contract between two brokers dealing in rice, whereby one of them was to receive "five cents per pocket of 100 pounds, which is one-half of our profit, as soon as we receive same from the seller," held that the brokers intended that there should be an equal division of the commission where it amounted to less than 10 cents per pocket, the brokerage usually received.

In Bank.

Appeal from Superior Court, City and County of San Francisco; George H. Caba-niss, Judge.

Action by Nicolas Hernandez & Co. against W. T. Welisch & Co. From a judgment for part of the relief demanded, plaintiff appeals. Reversed, with directions.

Hadsell, Sweet & Ingalls, of San Francisco, for appellant.

Percy E. Towne, of San Francisco, for respondent.

PER CURIAM. We approve the conclusion of the District Court of Appeal in this case that, under the contract made between the plaintiff and the defendant, the plaintiff's

share of the profits on orders received directly or indirectly from the island of Porto Rico was not to be more than one-half of the amount of commissions or profits received by the defendant. In making the calculation, however, the District Court included, as a part of the profits, the sum of \$650, being 6½ cents per pocket on 100 pounds on the sale of 10,000 pockets made on June 15, 1918. It appears from the findings that the defendant did not receive \$650, either as commissions or as profits, on that sale, but received only one-half thereof; that is, \$325. The result is that the computation made by the District Court of Appeal allows the plaintiff \$162.50 in excess of the amount it is entitled to. The opinion stated that the amount shown by the findings as due to the plaintiff was \$3,325; that being one-half of the total sum of \$6,650. It should have stated that the amount for which the plaintiff was entitled to judgment was the sum of \$3,162.50, being one-half of \$6,325, which the findings show to be the total amount received by defendant, and that he was entitled to interest on \$2,000 thereof at 7 per cent. per annum from May 10, 1918, and interest on the balance from the date of the commencement of the action. With this modification, the opinion of the District Court is adopted. Excepting the last paragraph thereof, which, as above stated, we find erroneous, the remainder of the opinion is as follows:

"This is an appeal by plaintiff from a judgment in its favor in the sum of \$2,420; its contention being that the judgment should have been for a greater sum.

"Both the plaintiff and the defendant are rice brokers; the former doing business in the island of Porto Rico, and the latter in San Francisco, Cal. They entered into a written contract by which the plaintiff agreed to conduct in Porto Rico a branch office of and for the defendant, the contract being in the form of a letter addressed by the defendant to the plaintiff, the terms of which the latter accepted. Among the provisions of said contract were the following:

"Division of profits. On all sales confirmed by us we will allow you 5 cents per pocket of 100 pounds, which is one-half of our profit, as soon as we receive same from seller.

"Exclusive arrangement. It is agreed that you will not offer rice from any other source than ours with the present exception of Southern rice (La. Tex. Ark.). * * * We, in turn will not offer rice in your territory (hereinafter described) excepting through you. You to receive your share of the profits on all orders received directly or indirectly from your territory.

"Territory. Your territory will be the entire island of Porto Rico."

"According to the findings of the court the defendant during the existence of this contract, as broker, sold to the 'Porto Rico Food Commission, of San Juan, Porto Rico,' four several lots of rice, namely, 40,000 pockets on November 2, 1917, two lots of 20,000 pockets each

on April 22, 1918, and 10,000 pockets on June 15, 1918, and received as brokerage on such sales a total sum of \$6,650, being \$2,000 on each of the three lots first enumerated, and \$650 upon the last. It credited the account of plaintiff with one-half the brokerage so received upon the second and third of said lots, which it claims to have done by error, and refused to pay the plaintiff either the amount so credited or any part of the brokerage received upon the remaining two lots. The court also found that the contracts for the sale of said four lots of rice were made and executed by the seller and an officer of said Porto Rico Food Commission, of San Juan, Porto Rico, within the borders of the United States, and were negotiated by defendant without assistance from the plaintiff.

"As a conclusion of law from the facts so found the trial court decreed that the plaintiff was entitled to judgment for \$2,000, with interest thereon from the 10th day of May, 1918—the date upon which the defendant had credited the plaintiff's account with said sum, and judgment was accordingly entered. Thereafter the plaintiff moved to set aside and vacate said judgment, and for an order entering another and different judgment, upon the ground that the conclusions of law upon which it was entered were not consistent with and not supported by the findings of fact. This motion was denied, and the sole question on this appeal is whether the judgment entered was correct in view of the court's finding as to the facts in the case.

[1] "It seems clear to us that the four sales above referred to come within the terms of the contract. They were made to the 'Porto Rico Food Commission, of San Juan, Porto Rico'; and although the execution of the contracts on the part of said purchaser was made within the territory of the United States by one of its officers, the provision of the contract giving to the plaintiff the right to share with the defendant 'the profits on all orders received directly or indirectly' from its territory would seem to be designed to cover a sale made under these circumstances. That this is the true construction of the contract is strongly suggested by the action of the defendant in crediting the account of the plaintiff with one-half the brokerage on two of these sales, and the fact that it afterwards changed its mind would not affect the plaintiff's right. And in any event these four sales having been made under precisely similar conditions, if the plaintiff was entitled to recover upon two of them (as the court found), its right to recover upon the remaining two cannot be denied.

[2] "The appellant contends that it should have judgment at the rate of 5 cents per pocket upon the 90,000 pockets forming the aggregate of the sales in question; but we think that, reading the contract as a whole, the plaintiff's share was limited to one-half the amount received by the defendant. The language is, 'We will allow you 5 cents per pocket of 100 pounds, which is one-half of our profit as soon as we receive same from the seller; and in the next paragraph, 'You to receive your share of the profits on all orders received directly or indirectly from your territory.' Upon one of such sales the defendant's commission only amounted to 5 cents, and upon another one of them to

only 6½ cents per pocket. The brokerage usually received by the defendant was 10 cents, and it was doubtless expected that most of the transactions between the parties would be governed by this figure; but the statement that 5 cents was one-half the brokerage, construed with the later provision of the contract giving to the plaintiff the right to share with the defendant brokerage upon sales coming indirectly from the plaintiff's territory, sufficiently indicates that the plaintiff's share could not be more than one-half the amount received by the defendant."

The judgment is reversed, and the trial court is directed to enter judgment in accordance with this opinion.

SHAW, C. J., and SLOANE, WILBUR, LAWLOR, LENNON, and WASTE, JJ., concur.

189 Cal. 226

BARNES et al. v. FOLEY. (L. A. 7222.)

(Supreme Court of California. June 29, 1922.)

1. Appeal and error — 345(1)—Premature notice of motion for a new trial after verdict, but before findings, does not extend time for appeal.

Where the trial embraced several issues, some of which were tried by the court and some by a jury, a notice of intention to move for a new trial, served and filed after the verdict on the issues submitted to the jury, but before the decision on the issues tried by the court, is premature, and does not prolong the time for appeal, under Code Civ. Proc. § 939, giving 30 days after the termination of a motion for a new trial within which to appeal.

2. New trial — 153—Statute, requiring notice within 10 days after verdict, applies only where all issues are determined by a jury.

In the amendment of Code Civ. Proc. § 659, by the Act of 1915, the phrase "within ten days after verdict if the trial was by a jury" refers to cases where all the issues were submitted to the jury, and does not apply where a part of them were tried by the jury and the rest by the court.

In Bank.

Appeal from Superior Court, Ventura County; Merle J. Rogers, Judge.

Action by J. B. Barnes and others against J. T. Foley to enjoin trespass and to recover damages for trespass already committed. Judgment for the plaintiffs, and the defendant appeals. Appeal dismissed.

Walter E. Barry and Barry & McReynolds, all of Ventura, for appellant.

F. E. Borton, of Bakersfield, for respondents.

SHAW, C. J. The plaintiffs move the court to dismiss the appeal taken by the defendant

from the judgment in this action upon the ground that the appeal was not taken within the time allowed by law. The complaint states a cause of action to enjoin trespasses by the defendant upon land of the plaintiffs, and to recover damages caused by trespasses already committed. A trial by jury of the issues as to damages was demanded by the defendant. A jury was impaneled to try that issue, and on September 29, 1921, a verdict was returned thereon. The court proceeded with the trial of the cause of action for injunction, and on October 26, 1921, filed findings and rendered judgment granting the injunction and for the recovery of damages. The judgment was entered on that day. Notice of the judgment was served on the defendant on the following day, October 27, 1921.

[1] On October 8, 1921, which was after the rendition of the verdict, but before the filing of the findings and the entry of judgment thereon, the defendant filed a notice of intention to move for a new trial. On December 27, 1921, the court below made an order denying the motion for a new trial. The notice of appeal was filed on January 4, 1922, stating that the defendant appeals from the judgment rendered against him on October 26, 1921. Where the motion embraces several issues, some of which are tried by the court and some by a jury, a notice of intention to move for a new trial, served and filed after the verdict on the issues submitted to the jury, but before the decision on the issues tried by the court, is premature, and gives "to the court no power to act upon the motion which should thereafter be made under the notice." *Reclamation District v. Thisby*, 131 Cal. 574, 63 Pac. 918. See, also, *Bell v. Marsh*, 80 Cal. 414, 22 Pac. 170; *Warring v. Freear*, 64 Cal. 56, 28 Pac. 115; *Bates v. Gage*, 49 Cal. 126.

[2] The language of the amendment of 1915 to section 659 did not change this rule. The phrase "within ten days after verdict, if the trial was by jury," inserted by that amendment, refers to cases where all the issues joined in the action are submitted to a jury, and does not apply where only a part of such issues are tried by the jury. This proposition was elaborately discussed and determined by the District Court of Appeal in *San Joaquin, etc., Co. v. Stevinson*, 30 Cal. App. 405, 158 Pac. 768, and was approved by the Supreme Court by denying a petition for rehearing thereof.

The consequence is that the notice of intention in this case did not constitute a valid proceeding for new trial sufficient to prolong the time for appeal under the provisions of section 939, Code of Civil Procedure, giving 30 days' time after the termination of the motion for new trial within which to appeal. The appeal, taken more than 60 days after

October 26, 1921, the date of the entry of the judgment, was therefore too late.

The appeal is dismissed.

We concur: LENNON, J.; WILBUR, J.; LAWLOR, J.; SLOANE, J.; SHURTLEFF, J.; WASTE, J.

(186 Cal. 118)

STEIN v. LACASSIE. (S. F. 9544.)

(Supreme Court of California. June 12, 1922.)

1. Appeal and error §1002—Verdict on conflicting evidence not disturbed.

Where the evidence was conflicting as to many of the essential features of the case, and a verdict either way would find a substantial support therein, the Supreme Court cannot disturb the verdict because of the insufficiency of the evidence, even though it might conclude that the evidence preponderates against it.

2. Appeal and error §1031(1)—Verdict apparently against evidence requires careful scrutiny for error.

Where the evidence apparently preponderates against the verdict, it is the duty of the Supreme Court carefully to scrutinize the rulings and instructions of the trial court in matters of law, to determine whether any errors alleged to have occurred therein had prejudicial influence upon the verdict.

3. Trial §253(3)—Instruction defining lack of probable cause regardless of facts known held erroneous.

In an action for malicious prosecution, an instruction that, if the proceedings against plaintiff were instituted by defendant over a fixed and malicious determination of her own, and not from the advice of counsel, or that she did not communicate a fair statement of all facts known to her to the sheriff and district attorney, and that the district attorney did not advise her there was probable cause, such conduct would constitute lack of probable cause, was erroneous as excluding probable cause which defendant herself might have had, regardless of the advice of others, to institute the proceedings.

4. Trial §296(2)—Short erroneous instruction held not cured by long, complicated one.

A short, erroneous instruction, requiring the jury to find lack of probable cause, though facts known to defendant might have amounted to probable cause, was not cured by a later instruction reviewing the evidence from defendant's point of view, which was much involved in detail and concluded with a direction to find for defendant if they found the facts as therein stated.

5. Malicious prosecution §72(1)—Instruction on motive held erroneous.

Where the trial court had correctly instructed the jury that malicious prosecution involved both the elements of malice and want of probable cause, an instruction that the prosecution of a person with any other motive than

to bring the guilty person to justice is ~~in~~ law a malicious prosecution was erroneous as implying that the presence of another motive was sufficient to establish want of probable cause, as well as malice.

In Bank.

Appeal from Superior Court, Contra Costa County; R. H. Latimer, Judge.

Action for malicious prosecution by Lorenz Stein against Mary E. Lacassie. Judgment for plaintiff, and defendant appeals. Reversed.

Chas. E. Snook, and Snook & Brown, all of Oakland (F. P. Tuttle, of Oakland, of counsel), for appellant.

J. E. Rodgers and A. F. Bray, both of Martinez, for respondent.

RICHARDS, Justice pro tem. This is an appeal from a judgment in plaintiff's favor in an action to recover damages for alleged malicious prosecution. The cause was tried before a jury. The evidence in the case may be briefly summarized as follows: During the year 1918, and for some time prior thereto, the plaintiff and the defendant lived upon adjoining ranches near Walnut Creek, in the county of Contra Costa. Plaintiff was of German extraction, but was a naturalized citizen of the United States. The defendant's husband was of French extraction. She had herself never met the plaintiff, and the evidence is in dispute as to whether there had been prior instances of discord between the two families. On April 23, 1918, the dead body of a horse belonging to the defendant was found by her in an inclosure adjoining the land of the plaintiff. The animal had been last seen alive two days before and was then in good health. Upon the discovery of the death of the horse the defendant sent for a veterinary surgeon, who, on the following day, came to the defendant's premises and examined the body of the animal, cutting it open and finding the intestines punctured, and finding also other evidences of corrosive poisoning, he concluded that the death of the animal had been caused by phosphorus poisoning, and so informed the husband of the defendant, who, in turn, told her. In the colon of the animal the veterinarian also found a dark green substance similar to filaree or clover. On the following day the veterinarian informed Sheriff Veale and his son, who was his undersheriff, that the horse had been poisoned by phosphorus, and stated his reasons for this conclusion. The defendant and her husband tracked the animal to a point near the line fence of the plaintiff and noticed that certain strands of wire upon said fence were broken near the point where the tracks of the animal were to be seen.

On April 25, 1918, the undersheriff and a

deputy sheriff came to the defendant's premises and examined the dead animal and were informed by the defendant that the horse had been traced to a point near the line fence and had been poisoned with phosphorus, and that she thought that the plaintiff might have poisoned the horse. The two officials then made an examination of the carcass, which led them to believe and state that the horse had been poisoned with phosphorus. They also noticed the dark green substance in the colon of the animal, which had the appearance of chopped alfalfa. The officials then went over to the premises of the plaintiff, where they saw some alfalfa in a pig pen similar to that found in the stomach of the horse. They then interviewed the plaintiff, who made some conflicting statements as to his possession of phosphorus and also as to his knowledge of the fact that the horse of Lacassie was dead. During this interview with the plaintiff, the undersheriff told him that he believed he had poisoned Lacassie's horse with phosphorus, and upon his return to the Lacassie premises this official informed the defendant as to what he had found upon the plaintiff's premises and of the fact that he believed and had stated that the plaintiff had knowledge of the poisoning of the horse. The defendant, upon learning these facts, desired to have the plaintiff arrested, but the undersheriff informed her that it would be necessary for her to swear to a complaint and that she had better go to Martinez on the next day and confer with the district attorney and her own attorney regarding the matter. He also, on the same evening, informed the district attorney of his discoveries and belief. On the following day the sheriff, the undersheriff, and a deputy sheriff went to the Lacassie ranch, and on their way thither met the defendant and her husband coming to Martinez to swear to a complaint, but the undersheriff advised the defendant that she had better wait for a chemist's report before swearing to a complaint. On April 29, 1918, several samples from the body of the horse were submitted to a chemist, who, some three weeks later, made a report which was rather negative upon the question of the existence of alfalfa or of signs of phosphorus in the exhibit submitted to him as coming from the body of the dead animal. During the intervening period some correspondence passed between the undersheriff and the defendant, the latter complaining of the tardiness of the chemist's report, and after it arrived declined to swear to a complaint in the face of its negative finding.

On June 10, 1918, matters were brought to a crisis by the discovery of a cow of the defendant lying dead within the premises of the plaintiff, its death having been caused by violence inflicted upon it in some manner. Upon learning of the death of her cow the defendant again called in the veterinarian,

who examined its body. She also sent for the undersheriff, who looked over the body of the cow and interviewed the plaintiff as to his knowledge of the cause of its death, and after doing so advised the defendant to go to Martinez and lay the facts before the district attorney. She went to the county seat and had an interview with the district attorney, who offered to draw a complaint for her to sign. She had an angry dispute with the undersheriff over some of the facts in the case, and finally left the office of the district attorney without signing the complaint, but later returned and had a further interview with the district attorney, who told her that if she wanted to swear to a complaint he would draw it up, but it would be difficult to get a conviction. The complaint was finally drawn in the district attorney's office; whereupon the undersheriff, the defendant, and her husband went to the office of a justice of the peace, where the complaint was sworn to and filed, and a warrant for the arrest of the plaintiff upon the charge of poisoning the defendant's horse was issued. The plaintiff was arrested thereon and put to trial, when he was acquitted of the charge. Thereupon he commenced this action.

[1-3] The foregoing is merely a summary of certain salient facts of the case. There is much other evidence bearing upon the defendant's mental attitude toward the plaintiff herein and her good faith in instituting the proceedings against him. The evidence was conflicting as to many of the essential features of the case. It is one of those cases wherein the verdict of the jury either way would find substantial support in the evidence. This being so, it is not the province of this court to usurp the function of the jury in cases of this character. *Runo v. Williams*, 162 Cal. 449, 122 Pac. 1082. We cannot, therefore, uphold the appellant's contention that the evidence is insufficient to justify the verdict, even though we might be disposed to conclude from a review of the record that the evidence preponderates in the appellant's favor. In such a case, however, it becomes the duty of this court to carefully scrutinize the rulings and instructions of the trial court upon matters of law in order to determine whether any errors alleged to have occurred therein had a prejudicial influence upon the verdict. The trial court, at the plaintiff's request, gave the following instruction:

"You are instructed that if you find from the evidence in this case that the criminal proceedings against plaintiff were instituted by defendant over a fixed and malicious determination of her own, and not from the advice of counsel, or that she did not communicate a full, fair and true statement of all the facts known to her to the sheriff and the district attorney, and that the district attorney did not advise her there was probable cause for the arrest,

then such would constitute lack of probable cause."

[4] It would seem to require no argument to show that this instruction is erroneous, and is prejudicially so, since it might well be that the defendant herself might have had abundant cause for insisting upon and procuring the plaintiff's arrest upon the charge of having poisoned her horse, even though, in so doing, she was acting upon a fixed and malicious determination of her own and without the advice of counsel; and even though she had not communicated all of the facts known to her to the sheriff and district attorney, or made a full, fair, and true statement of the facts to these officials; and even though the district attorney had not advised her that there was probable cause for the plaintiff's arrest. Nor do we find that this error has been corrected in any other or later instruction. There is a later instruction in which the trial court makes a review of the evidence in the case from the defendant's point of view. It occupies several pages of the record, is much involved in detail, and concludes with the direction to the jury that, if they shall find all of its asserted facts to be true, they should find a verdict for the defendant. But this instruction cannot be held to have removed the sting of the former instruction wherein the court had already erroneously charged the jury that, upon a few facts clearly and tersely stated, they were bound to find that the defendant had acted without probable cause in bringing about the plaintiff's arrest.

[5] The trial court wandered further in the path of error in giving the following instruction:

"You are instructed that the prosecution of a person with any other motive than to bring the guilty person to justice is in law a malicious prosecution."

The chief vice of this instruction consists in its use of the term "malicious prosecution," since this term has in law a technical meaning, embracing the twofold elements of malice and want of probable cause. The court had already, in substance, charged the jury that both of these elements must be found by the jury to exist before it could render a verdict in the plaintiff's favor; yet, in the instruction last above quoted, the jury is told in plain terms that the prosecution of a person with any other motive than to bring the guilty person to justice is sufficient in itself to constitute, in point of law, a malicious prosecution; or, in other words, to furnish sufficient proof of both of the foregoing elements to justify a verdict in the plaintiff's favor. It cannot with reason be contended that instructions such as these, so obviously erroneous, and yet so tersely put as to be easily comprehensible by the jury, were not

prejudicial, or that the verdict of the jury, in a close case like this, would not be injuriously affected thereby. In the case of *Runo v. Williams*, supra, this court has stated:

"The law is clearly and definitely settled how a jury shall be instructed in the cases of this character. *Grant v. Moore*, 29 Cal. 644; *Harkrader v. Moore*, 44 Cal. 144; *Eastin v. Bank of Stockton*, 66 Cal. 123, 4 Pac. 1106, 56 Am. Rep. 77; *Fulton v. Onesti*, 66 Cal. 575, 6 Pac. 491; *Ball v. Rawles*, 93 Cal. 222, 28 Pac. 937, 27 Am. St. Rep. 174; *Smith v. Liverpool Ins. Co.*, 107 Cal. 433, 40 Pac. 540; *Scrivani v. Dondero*, 128 Cal. 31, 60 Pac. 463."

To this list of cases may be added the recent decisions of this court in *Burke v. Watts*, 204 Pac. 578, and *Michel v. Smith*, 205 Pac. 113.

Since this case must go back for a new trial, the parties and the court should have no difficulty whatever, in the light of the foregoing authorities, in formulating and giving to the jury clear and definite instructions governing their duties in considering their verdict.

The judgment is reversed.

We concur: SHAW, C. J.; WILBUR, J.; SLOANE, J.; LENNON, J.; LAWLOR, J.; SHURTLEFF, J.

189 Cal. 237

SILVA v. SILVA et al. (S. F. 9831.)

(Supreme Court of California. June 30, 1922.)

1. Husband and wife $\S$ 272(5)—Husband cannot avoid property settlement in absence of fraud or mutual mistake.

A husband cannot avoid property settlement with wife in the absence of a showing of fraud or mutual mistake.

2. Husband and wife $\S$ 272(5)—That wife realized on notes more than valuation placed thereon in making settlement not ground for setting aside of settlement.

Where husband, in making property settlement with wife, agreed to accept specified sum in cash, leaving the wife what was left, including certain notes, the mere fact that the wife realized on the notes more than it was thought that she would realize at the time the settlement was entered into was not ground for setting aside of the agreement in the absence of fraud or misrepresentation.

3. Husband and wife $\S$ 272(5)—Sums withdrawn from mutual bank accounts by wife without husband's consent held not ground for setting aside of property settlement.

Husband could not avoid a property settlement made with wife on the ground of withdrawals previously made by the wife from the mutual bank accounts without the husband's knowledge or consent, in the absence of a showing that the amount so withdrawn was

not used for community purposes or that the withdrawals were not considered by the parties in making the settlement.

In Bank.

Appeal from Superior Court, Alameda County; Fred V. Wood, Judge.

Action by Joseph Silva against Mary Ann Silva and another. Judgment for defendants, and plaintiff appeals. Affirmed.

James P. Montgomery, of Oakland (George F. Sharp, of Oakland, of counsel), for appellant.

F. L. De Freitas and John L. McVey, both of Oakland, for respondents.

SLOANE, J. Plaintiff brought this action for an accounting and to recover from defendants, his wife and stepson, money which he claimed was wrongfully and fraudulently withheld from him in a settlement previously had between plaintiff and his wife. Judgment was for defendants, and plaintiff appeals.

The trial court found that in the settlement referred to property affairs of the marital community were determined and adjusted by mutual agreement between the parties, and that the plaintiff had entered into such agreement voluntarily and with full knowledge of all the facts and uninfluenced by fraud or mistake, and that such settlement was final and conclusive as to plaintiff's rights.

The property consisted of bank accounts and certain notes and mortgages aggregating in value about \$9,000 or \$10,000. This property was the accumulation of the earnings of plaintiff and his wife during a period of 30 years of married life, mostly from the wages and earnings of plaintiff. The deposits of earnings were made in bank in the joint names of plaintiff and his wife, but, the plaintiff being constantly employed and unable to read or write, the management of the account was left to the wife and the defendant Manuel J. Silva, her son by a former marriage, and all deposits and withdrawals were made by the wife.

Some differences having arisen between the parties over the management of the property, the plaintiff demanded a division and employed a lawyer to represent him in effecting such settlement.

All the parties met at the lawyer's office. The plaintiff at that time, though without any definite knowledge or information on the subject, estimated the whole amount of deposits and loans at a value of \$12,000, and proposed an equal division. The wife objected to an equal division and threatened to obtain a divorce if she did not receive more than half. A basis of settlement was finally agreed to by which the plaintiff received as his share \$4,574.36 in money, and his wife received a small balance in money

and the notes and mortgages, amounting at their face value to \$4,700.

It does not appear either from the findings or the evidence at what actual valuation the notes were estimated in the settlement, or what amount of cash the wife received in addition to the notes, but the court finds that the share of the wife amounted to from \$150 to \$200 more than the \$4,574.36 received by plaintiff, which would make her portion of a valuation of \$4,724 or \$4,774. Plaintiff himself only claims that the wife's share exceeded his own by \$500.

There is testimony in the record that the plaintiff on the recommendation of his attorney agreed to making his wife's share from \$150 to \$200 more than his own, and it is a fair inference that the notes were put in at a figure which would give such result in the settlement. At their full face value it is claimed that Mrs. Silva received \$502.-64 excess. It is a reasonable assumption that in taking notes instead of money, with the risk attending upon converting them into cash, that they were estimated at something less than their face in the settlement, and there was testimony that the plaintiff expressed a preference for cash as his share in the division. At any rate, the plaintiff, with the counsel of his attorney who was present and advising him, accepted the \$4,574.26 in cash as his share, and turned over the balance of the property to his wife in full satisfaction of their respective claims. There can be no question from all the evidence in the case but that this division was intended to vest a separate property in each to the amount agreed upon.

[1] Plaintiff cannot go back of this settlement in the absence of a showing of fraud or mutual mistake. There are only two averments in his alleged cause of action which give any color to such a showing, and the findings, supported by the evidence, are against plaintiff on both of these. He claims that he was induced to make this settlement by the understanding that his wife was to receive only \$150 or \$200 more than he. That was not, however, the basis of the division. The division was made by plaintiff accepting \$4,574.26 in cash and turning over to his wife what was left, and it must be presumed that the notes were included on a valuation which brought their shares to the proportion agreed upon. All of the money and property was before them, and the final terms of settlement were that plaintiff took the agreed sum of money and his wife took what was left. There is nothing to indicate that it was not at the time, and in view of the values before them and the agreed excess in the wife's favor, a fair settlement.

[2] The finding by the trial court that the wife's share exceeded that of the plaintiff by only \$150 or \$200, even if not supported by the evidence, cannot affect the judgment, be-

cause the division was made upon a valuation fixed by the parties at the time the division was made, and the circumstance that Mrs. Silva realized \$200 or \$300 more than was estimated cannot defeat the settlement, in the absence of fraud or misrepresentation, and there is no evidence of any.

[3] The other point of appellant's contention is that prior to the date of the division Mrs. Silva had drawn from the mutual bank accounts sums aggregating \$2,872.06 without plaintiff's knowledge or consent, that plaintiff was ignorant as to the amount of the deposits, and that the settlement made with Mrs. Silva did not include or take into account any of these withdrawals, and it is the claim of plaintiff that the defendants had wrongfully and fraudulently appropriated these sums to their own use.

The bank books introduced in evidence disclose the fact that such withdrawals had been made from this mutual deposit account by Mrs. Silva from time to time as follows: January 10, 1908, \$100; February 12, 1908, \$422.06; July 29, 1910, \$1,100; March 13, 1913, \$600; October 1, 1913, \$650.

The settlement and division of property between plaintiff and his wife was on or about July 30, 1914. Plaintiff testifies that he had no knowledge or notice of the withdrawal of these items and received no part of the money. It is conceded that the handling of all the community earnings was during all the period covered by these transactions intrusted to the wife, who evidently paid therefrom the household expenses, deposited the savings, and drew upon the account in her own name. While there is no explicit evidence accounting for the disposition of the amounts checked out of this account, there is evidence that loans of money from the community funds were made from time to time, some of them corresponding closely with the dates of the larger withdrawal. There was, indeed, no source disclosed other than the community savings from which the several thousands of dollars represented by the notes which were allotted to Mrs. Silva in the settlement could have been derived. Mrs. Silva was legally the custodian and dispenser of these funds, and there is not the slightest evidence in the record of any appropriation or application of any money to other than community debts and investments, and there is no ground for presumption or inference of any such misappropriation.

The finding of the trial court is that it is not true that any of these amounts "were

withdrawn from deposit in the bank by either said defendant, Mary Ann Silva, or Manuel J. Silva, in fraud or wrong of plaintiff."

Moreover, it is not shown in evidence that all these items were not considered by the parties in the settlement. It is true that the plaintiff is unlettered and lacking in business acumen, and he testifies that the fact of these withdrawals was not known to him at the time the division was made, but he was at the time represented by a competent and trustworthy lawyer. This attorney, when asked on the trial if at the time of the settlement the plaintiff was informed as to the withdrawals from the bank account, answered:

"Not in detail, but I think the total amounts, whatever the books show, were known at the time. Of course, we went to the bank."

With the books and accounts before them it must be presumed that the agreement arrived at took into consideration all that was there disclosed.

Considering the apparent ignorance and incompetence of the plaintiff, we have not confined ourselves in reviewing this matter to the portions of the evidence set out in the synopsis of the briefs, but have carefully read the entire typewritten record on appeal, and have been unable to discover anything to indicate that the settlement between the parties was not the result of "open covenants openly arrived at."

Indeed, it is difficult to conceive how the community property, under the plaintiff's own testimony that the entire income of this couple during the 30 years of its accumulation, derived from plaintiff's meager earnings of but \$60 per month during most of the time, and after deducting their necessary household expenses, could have amounted to the respectable sum of \$10,000.

There is no ground for doubting that Mrs. Silva was a frugal and careful steward of the family affairs, and that the defendant Manuel Silva acted the part of a dutiful son to both his mother and stepfather.

It is an interesting circumstance that, in the face of the years of litigation that has attended these differences over property affairs, the plaintiff and Mrs. Silva have continued to live together in the same house as man and wife.

The judgment is affirmed.

We concur: SHAW, C. J.; WASTE, J.; LENNONY, J.; WILBUR, J.; LAWLOR, J.; SHURTLEFF, J.

189 Cal. 178

WAER v. WAER et al. (L. A. 6727.)

(Supreme Court of California. June 17, 1922.)

1. Evidence ☞597—Positive testimony of grantor he did not deliver deed supports finding against delivery.

Positive testimony by the grantor that, after executing the deed, he did not deliver it, but retained it and placed it in a drawer from which it was surreptitiously taken by one of the grantees, is not a mere general statement or assertion, and is sufficient to support a finding against delivery, notwithstanding conflicting evidence on the part of the grantees that it was delivered.

2. Appeal and error ☞1011(1)—Finding on conflicting evidence not set aside, though appellate court would have found otherwise.

A judgment may not be reversed for insufficiency of evidence, when the evidence is in conflict, though it may seem to be against the weight of the evidence, and the Supreme Court, if sitting in place of the trial judge, might have found the facts differently.

3. New trial ☞105—Impeaching evidence newly discovered does not require new trial.

In so far as the evidence set forth in an affidavit in support of a motion for a new trial merely narrated a statement of plaintiff inconsistent with his testimony at the trial, it was impeaching in its character and insufficient to require the granting of a new trial.

4. New trial ☞104(1)—Affidavit of new evidence as to declarations of plaintiff not inconsistent with testimony does not require new trial.

An affidavit setting forth newly discovered evidence which, except in so far as it consisted of statements by plaintiff inconsistent with his testimony, consisted of declarations by him corroborating his testimony, does not require the granting of a new trial.

5. New trial ☞105—Affidavit as to admission of party against interest is not impeaching.

An affidavit setting forth as newly discovered evidence an admission by plaintiff that he had deeded his property, is not merely impeaching evidence, since such an admission would be competent as a declaration against plaintiff's interest under Code Civ. Proc. § 1870, even though plaintiff had not been a witness in his own behalf.

6. Appeal and error ☞981—Sufficiency of evidence to require new trial is within trial court's discretion.

Even though the newly discovered evidence on which a motion for a new trial was based was not solely impeaching or cumulative as additional evidence of the same character to the same point, under Code Civ. Proc. § 1838, its efficacy to change the result is a question peculiarly addressed to the discretion of the trial court, and the exercise of that discretion will not be disturbed except in case of manifest abuse.

7. New trial ☞151—Affidavits as to newly discovered evidence can be controverted.

Not only is the introduction of counter affidavits proper upon the hearing of a motion for a new trial for newly discovered evidence, but the truth of the evidence itself, as well as the weight thereof and the credibility of the witnesses may be contested by such counter affidavits.

8. New trial ☞151—Denial for new evidence contradicted by controverting evidence held not abuse of discretion.

Where the affidavit in support of a motion for new trial, setting forth an admission by plaintiff contrary to his interest was denied by plaintiff's controverting affidavits, the trial court's decision in favor of the credibility of plaintiff's affidavit was not a manifest abuse of his discretion, so as to require reversal of his denial of the new trial.

In Bank.

Appeal from Superior Court, Los Angeles County; John W. Shenk, Judge.

Action to quiet title by Robert Waer against Charles R. Waer and others. Judgment for plaintiff, and defendants appeal. Affirmed.

Manning & Thompson, of Los Angeles, for appellants.

Walters & Anderson, of Los Angeles, Moore & Woods, of Whittier, Walters & Mauk, of Los Angeles, and A. Moore, of Whittier, for respondent.

LENNON, J. The plaintiff in this action sought and secured a judgment quieting his title as against the defendants to certain real property, and annulling a recorded deed thereto, which purported to convey title therein to the defendants and to have been made and delivered by plaintiff to the defendants. Briefly stated, the facts of the case are these: The plaintiff, an elderly widower with several children, contemplating matrimony, made and signed a deed, giving to his children, the defendants herein, the title to the property in suit, reserving, however, to himself a life estate therein.

Plaintiff admitted that he had made the deed in question, but testified, as a witness in his own behalf, that he did not at any time deliver the same to the defendants, or any of them, and that, after making the deed, he placed it in a bureau drawer in his home from which it was surreptitiously taken by one of the defendants and recorded without his knowledge and consent. The defendants, on the other hand, claimed, and one of them testified, that the plaintiff had delivered the deed to the defendants a short time after its making. The trial court found that the deed had never been delivered and the controversy here involves in part the question as to whether or not the evidence

adduced upon the whole case is sufficient to support this finding.

[1] Apparently the finding of the trial court was made and based upon the testimony of the plaintiff concerning the making of the deed, coupled with evidence of the circumstances preceding, attending, and following its making. The testimony of the plaintiff consists of much more than "mere general statements or assertions" and, taken as a whole, sufficiently supports the finding. Much may be said argumentatively against the persuasiveness of the plaintiff's testimony, but, after all has thus been said, there still remains a conflict in the evidence adduced upon the whole case, which cannot be dissipated by arguments which do no more than weigh the evidence upon which the findings in question rest, and assail the credibility of the witness giving such testimony.

[2] It is the well-settled and generally well-understood rule that a judgment may not be reversed for insufficiency of evidence when the evidence adduced upon the whole case is in conflict and that, upon appeal with the evidence in that situation, no inquiry may be made concerning the preponderance of the evidence. The fact that a judgment may seem to this court to be against the weight of the evidence and that this court, if sitting in the place of the trial judge, might have found the facts different, will not avail to obviate the application and operation of the rule. *Webster v. Lowe*, 177 Cal. 385, 170 Pac. 850; *Levi v. Chesley*, 178 Cal. 145, 172 Pac. 607; *Ross' Estate*, 171 Cal. 64, 151 Pac. 1138; *Lick v. Madden*, 36 Cal. 208, 213, 95 Am. Dec. 175; *Heinlen v. Heilbron*, 97 Cal. 101, 31 Pac. 838; *Meyer v. Great Western Ins. Co.*, 104 Cal. 381, 28 Pac. 82. In the face of a substantial conflict in the evidence, in the instant case, the trial court's finding of nondelivery of the deed in controversy will not be disturbed.

[3, 4] In support of a motion for a new trial grounded, in part, upon alleged newly discovered evidence, the defendants presented in evidence upon the hearing of the motion an affidavit of one Flora Smith, which alleged that in January, 1920, after the controversy over the deed had arisen, in a conversation with her concerning the loss of the deed, the plaintiff said that "it was taken out of his possession, that four or five days after the deed was executed he discovered the deed was gone, that Elva (meaning defendant Elva Luella Smith) had seen the deed and notified Charles Waer (one of the defendants) and they had concocted to steal it and had stolen it." It was an admitted fact in the case that the deed in question had been made and signed by plaintiff on or about May 10, 1919, and, upon the trial of the case, plaintiff testified that he had not discovered the loss of the deed until December, 1919, at which time he had made a search for the deed

and failed to find it. In so far as the affidavit immediately under consideration purported to narrate a statement of the plaintiff which in effect was contradictory of something he had testified to at the trial, it was impeaching in its character and, therefore, insufficient on appeal as the basis of review of a motion for a new trial, for it is the rule in this state that "newly discovered evidence which is merely * * * designed to contradict a witness is not of a character to warrant a new trial." *People v. Anthony*, 56 Cal. 397; *Chalmers v. Sheehy*, 132 Cal. 459, 64 Pac. 709, 84 Am. St. Rep. 62; *Hanton v. Pacific Electric Railway Co.*, 178 Cal. 616, 174 Pac. 61. Moreover, the affidavit in question, in addition to being impeaching in its nature, purported to embody evidence which had it been produced at the trial of the case would have had no probative force against the testimony of the plaintiff concerning the nondelivery of the deed, for the reason that it was in harmony with and corroborative of the plaintiff's testimony that the deed in question had been purloined from him and not by him or any one in his behalf delivered to the defendants. Upon the whole, therefore, the affidavit in question, standing alone, was valueless as a support for the motion for a new trial.

[5] In addition to the affidavit last mentioned, the defendants offered and there was received in evidence upon the hearing of the motion for a new trial the affidavit of one Caroline Boring, which averred that plaintiff, subsequent to the time of the alleged delivery of the deed to the defendants, told her "that he had deeded his home and property to his children but that he had a home there as long as he lived and a pension and that if she would marry him she could have a home there as long as she lived." This alleged newly discovered evidence embodied a direct admission of the plaintiff that he had "deeded" his home to his children and it would have been competent evidence in behalf of the defendants upon the original trial of the case, because it tended to show declarations of the plaintiff which were against his interest. It was obviously material to the paramount issue in the case and it was not solely impeaching within the meaning of the rule which prevents the granting of a new trial where the newly discovered evidence is merely cumulative and impeaching. It was not solely impeaching for it would have been admissible even if the plaintiff had not been a witness in his own behalf. *Code Civ. Proc.* § 1870; *Kenezleber v. Wahl*, 92 Cal. 202, 208, 28 Pac. 225.

[6-8] But conceding all this and that it was not cumulative for the reason that it is not "additional evidence of the same character to the same point" (*Code Civ. Proc.* § 1838), nevertheless it does not follow that, because the affidavit last in discussion did

not fail within the inhibition of the rule which ordinarily rejects newly discovered evidence, which is merely cumulative and impeaching, that the court below erred in refusing to grant the defendants a new trial. The question as to the efficacy of newly discovered evidence is peculiarly one which is addressed to the discretion of the trial court (*People v. Oxniam*, 170 Cal. 211, 215, 149 Pac. 165), and the exercise of this discretion will not be disturbed except in case of a manifest abuse (*People v. Sing Yow*, 145 Cal. 1, 78 Pac. 235; *People v. Feld*, 149 Cal. 464, 86 Pac. 1100). While the alleged newly discovered evidence, in the instant case, was competent and material and not solely impeaching and perhaps not cumulative and would probably have justified an order granting a new trial on the ground that such evidence was of sufficient importance as to render a different result likely on a retrial of the case, still the fact remains that the affidavit of Caroline Boring was contradicted by the counter affidavit of the plaintiff. Not only is the introduction of counter affidavits proper and permissible upon the hearing of a motion for a new trial, grounded upon newly discovered evidence (*People v. Rice*, 97 Cal. 459, 32 Pac. 531; *People v. Sing Yow*, 145 Cal. 1, 78 Pac. 235), but it is well settled that the truth of the evidence itself, or the truth of the facts as alleged, as well as the weight thereof and the credibility of the witnesses may be contested by counter affidavits (*People v. Vitro* [Cal. App.] 201 Pac. 610). The trial court in the instant case evidently balanced the affidavits one against the other and, deciding in favor of the credibility of the plaintiff's affidavit, denied the motion for a new trial. This being so, this court is not prepared to say that there was a manifest abuse of discretion on the part of the trial court in denying the motion for a new trial.

The judgment is affirmed.

We concur: SHAW, C. J.; LAWLOR, J.; WILBUR, J.; SHURTLEFF, J.; WASTE, J.; SLOANE, J.

(139 Cal. 153)

PEOPLE v. SAMA. (Cr. 2415.)

(Supreme Court of California. June 16, 1922.
Rehearing Denied July 13, 1922.)

1. Criminal law — Indeterminate sentence for attempted robbery is for maximum term of half of defendant's life.

Under Pen. Code, §§ 213, 671, the maximum penalty for robbery is imprisonment for life, and under section 664, a person convicted of attempted robbery may be sentenced for half the maximum sentence permitted for the completed offense, so that the maximum sentence for attempt to rob would be half of defend-

ant's natural life, and an indeterminate sentence imposed under Pen. Code, § 1168, as added by St. 1917, p. 665, can be sustained only as a sentence for the maximum punishment permitted.

2. Constitutional law — 80(2)—Criminal law — 1208(9)—Prison directors cannot be given power to fix the sentence.

In so far as Pen. Code, § 1168, as added by St. 1917, p. 665, authorizing indeterminate sentences, purports to vest in the state board of prison directors the power to fix the sentence, it is invalid as an invasion of the judicial powers, contrary to Const. art. 3, § 1.

3. Criminal law — 1208(9)—Indeterminate Sentence Law does not apply where maximum sentence is half of defendant's life.

Where the maximum sentence that could be imposed is half of the sentence for life, which is obviously impossible of ascertainment, the Indeterminate Sentence Law, which can be sustained only as an imposition of the maximum sentence, cannot apply.

4. Criminal law — 1208(3)—Court can fix term where maximum sentence is half of defendant's life and unenforceable.

Where the Indeterminate Sentence Law cannot apply because the maximum sentence would be half of defendant's life and unenforceable, but the imposition of the maximum sentence is not required, the court has authority, under Pen. Code, §§ 264, 664, 671, to sentence the defendant for a definite term of years.

5. Pardon — 2—Indeterminate Sentence Act did not impliedly repeal Parole Law.

The Indeterminate Sentence Act did not, in terms or by implication, repeal the provisions of the Parole Law, so that a defendant who cannot be sentenced under the Indeterminate Sentence Act may be paroled under the Parole Law after sentence for a definite term.

In Bank.

Appeal from Superior Court, Alameda County; George Samuels, Judge.

Joe Sama was convicted of attempt to commit robbery, and he appeals. Judgment reversed, and cause remanded, with instructions to impose proper sentence.

Rehearing denied; Sloan, J., not voting.

Milton W. Sevier, of San Francisco, and Geo. M. Naus and Chester H. Case, both of Oakland, for appellant.

U. S. Webb, Atty. Gen., and John H. Rioridan, Deputy Atty. Gen., for the People.

LAWLOR, J. Appellant was accused, by information filed on January 5, 1921, of the crime of attempt to commit robbery, to which he pleaded not guilty, and upon the trial was found "guilty of an attempt to commit robbery as charged in the information." The judgment purports to be rendered under the Indeterminate Sentence Law (St. 1917, p. 665), and provides that appellant "be con-

fined in the state prison of the state of California as prescribed by law." From that judgment appellant takes this appeal.

The only question presented on appeal is whether the judgment is invalid because under the sentence a definite maximum punishment was not in legal effect imposed. Appellant contends that it is void for uncertainty, because "It sentences appellant to be imprisoned for one-half of his life, and no one knows, or can know, before appellant's death, what one-half of his life will be." It is insisted the decisions are unanimous that an indeterminate sentence is really one for the maximum sentence; that the prison board in fixing the term at less than the maximum is merely exercising executive clemency; that the maximum sentence in this case is one-half of appellant's life; that such a sentence has always been held void for uncertainty; that, therefore, there is no valid penalty provided in this case, and the court cannot impose any punishment for the commission of the crime, and that appellant should be discharged. Respondent's contention is that there is a definite minimum term of six months; that when the minimum sentence has been served it becomes the duty of the state board of prison directors to determine what length of time appellant shall serve; that there is, therefore no time during which the penalty is vague or uncertain; that the maximum term of imprisonment for this crime was the same before the adoption of the Indeterminate Sentence Law as it is now, and that then the trial court had power to fix a term of imprisonment; that the Indeterminate Sentence Law has transferred this power to the said board; that the statement that an indeterminate sentence is a sentence for the maximum term is but a theory.

The Penal Code provides:

"Robbery is punishable by imprisonment in the state prison not less than one year." Section 213. "Every person who attempts to commit any crime, but fails, or is prevented or intercepted in the perpetration thereof, is punishable, where no provision is made by law for the punishment of such attempts, as follows: 1. If the offense so attempted is punishable by imprisonment in the state prison for five years, or more, * * * the person guilty of such attempt is punishable by imprisonment in the state prison, * * * for a term not exceeding one-half the longest term of imprisonment prescribed upon a conviction of the offense so attempted." Section 664. "Whenever any person is declared punishable for a crime by imprisonment in the state [prison] for a term not less than any specified number of years, and no limit to the duration of such imprisonment is declared, the court authorized to pronounce judgment upon such conviction may, in its discretion, sentence such offender to imprisonment during his natural life, or for any number of years not less than that prescribed." Section 671. From these statutory provisions it would appear that the longest term of imprisonment

for an attempt to commit robbery is one-half the natural life of the offender.

[1] The problem presented is, Does the Indeterminate Sentence Law have any applicability to this case? Section 1168 of the Penal Code, as added by St. 1917, p. 665, declares:

"Every person convicted of a public offense, for which public offense punishment by imprisonment in any reformatory or the state prison is now prescribed by law, if such convicted person shall not be placed on probation, a new trial granted, or imposing of sentence suspended, shall be sentenced to be confined in the state prison, but the court in imposing such sentence shall not fix the term or duration of the period of imprisonment."

In the case of *In re Lee*, 177 Cal. 690, 171 Pac. 958, the prisoner was granted relief on habeas corpus from a purported indeterminate sentence of from 1 to 10 years' imprisonment for the crime of manslaughter, upon the ground that section 1168 was *ex post facto* as to him. In discussing the constitutionality of section 1168 generally, the court declared:

"It has uniformly been held that the indeterminate sentence is in legal effect a sentence for the maximum term. It is on this basis that such sentences have been held to be certain and definite, and therefore not void for uncertainty. [Citing cases.] In answering the claim that the authority vested by the Indeterminate Sentence Law in the board of prison directors is a delegation of either legislative or judicial powers to an executive body, it is pointed out that the legislative function is filled by providing the sentence which is to be imposed by the judicial branch upon the determination of the guilt of the offender. This is done by the enactment of the Indeterminate Sentence Law. The judicial branch of the government is intrusted with the function of determining the guilt of the individual and of imposing the sentence provided by law for the offense of which the individual has been found guilty. The actual carrying out of the sentence and the application of the various provisions for ameliorating the same are administrative in character and properly exercised by an administrative body."

[2] This being the settled law, it follows that the sentence imposed in the case at bar is one for the maximum term prescribed by law, which, as already indicated, would be for one-half of appellant's life. It also follows from *In re Lee*, *supra*, that the function which the state board of prison directors would perform in determining what term of years appellant must serve is no part of the actual fixing of the sentence itself, and that if it were so regarded it would be the exercise of a judicial function by an executive board, and void under section 1, article 3, of the Constitution. The Legislature has no authority to vest this judicial power in the state board of prison directors, and in so far as

section 1168 of the Penal Code purports to do so it is in violation of that section. Hence, in determining whether or not this sentence is valid the test is the term of imprisonment called for by the judgment—one-half of appellant's life—and not the term of years which would be fixed by the state board of prison directors at the expiration of the minimum term.

[3] In *People v. Burns*, 138 Cal. 159, 69 Pac. 16, 70 Pac. 1087, 60 L. R. A. 270, the defendant was convicted of an attempt to commit robbery, and admitted having suffered the two previous convictions of felony alleged in the information. In that case it was held that, under subdivision 1 of section 666 of the Penal Code, the court might, for the offense there in question, sentence the defendant to any term of imprisonment between the minimum of 10 years and life. Discussing a sentence of imprisonment for one-half the defendant's life, the court said:

"What the actual life of a particular person would be, and what would be the half of it, cannot be known; and if one-half of the life of the appellant were the only punishment prescribed for the crime of which he was convicted, such punishment would be too vague and indefinite to be possible of enforcement, and no judgment could be rendered against him."

Since a sentence for half a life would be invalid, authority to sentence appellant must be found apart from section 1168. This view of that section does not mean that it may not operate in cases where it is applicable, for it is not necessary that the provision, to be uniform in its application, shall apply universally. It is sufficient that the law bear equally, in its burdens and benefits, upon persons in the same category, and this depends upon the facts that characterize the offense. *People v. Judge of the Twelfth District*, 17 Cal. 549, 554.

It follows that section 1168 of the Penal Code makes no provision for an indeterminate sentence in the case of a conviction of an attempt to commit robbery, and for that reason the sections of the Penal Code providing for the sentencing of persons applicable before its adoption remain in full force and effect.

[4] In the case of *People v. Gardner*, 98 Cal. 127, 32 Pac. 880, the defendant was sentenced to serve a term of 5 years in the

penitentiary for an attempt to commit rape. Under sections 264, 664, and 671, the maximum punishment for that offense was not more than one-half of the defendant's natural life, but the maximum was not required. The sentence of 5 years was upheld on the grounds that, inasmuch as a defendant convicted of the complete crime of rape might, under section 671, be imprisoned for the term of his natural life or for any term not less than the minimum, the court had power to impose either the maximum punishment, or any term of years between the minimum and the maximum; that for an attempt to commit rape the sentence, under sections 664 and 671, might be one-half of the defendant's life, or any term of years less than that period; that whether a sentence for a term of years were regarded as longer or shorter than one for the defendant's life, imprisonment for a term of years would be less than one-half the maximum term which might be imposed, and would be proper under sections 664 and 671. This reasoning was adopted in *People v. Burns*, supra. There is no difference in the punishment between the case at bar and *People v. Gardner*, supra, save in the minimum. It follows from the latter case that the trial court had authority to sentence appellant for a definite term of years.

[5] As section 1168 has no application, the state board of prison directors is without authority under that section to determine the length of time appellant shall be confined. We are not to be understood as intimating that appellant, while undergoing punishment, may not apply for, nor the state board of prison directors have authority to grant, such relief as was afforded before the adoption of section 1168. In this connection it may be remarked that neither section 1168 nor any other provision has in terms or by implication repealed the provisions of the "Parole Law." St. 1913, p. 1048, as amended by St. 1915, p. 981.

The judgment is reversed, and the cause remanded, with instructions to the superior court to render a judgment sentencing appellant to imprisonment in the state prison for such a term of years as, in its opinion, would be a just and fair punishment.

We concur: SHAW, C. J.; WILBUR, J.; LENNON, J.; SHURTLEFF, J.; WASTE, J.

188 Cal. 783

SPAULDING v. DESMOND et al.
(S. F. 10057.)

(Supreme Court of California. May 26, 1922.
Rehearing Denied June 23, 1922.)

1. Mandamus ⇨77(1)—Mandamus is proper remedy to compel city clerk to file oath of office of city tax collector.

Mandamus is the proper proceeding to compel a city clerk to file an official oath of office of a city tax collector.

2. Municipal corporations ⇨48(2)—Charter adopted by city, approved by Legislature, is organic law of city.

Under Const. art. 11, § 8, a charter adopted by the qualified voters of a city and approved by the Legislature by concurrent resolution becomes the organic law of the city, and supersedes an existing charter and all laws inconsistent with the charter so adopted.

3. Municipal corporations ⇨48(2)—Charter of city passed by concurrent resolution of Legislature and enrolled is conclusive as to form of charter adopted.

Under Const. art. 11, § 8, providing that a charter adopted by a Legislature of qualified voters of a city and approved by concurrent resolution of the Legislature shall become the organic law of the city and that one copy shall be filed with the secretary of state and that thereafter the courts shall take judicial notice of the provisions of the charter, a charter adopted by the city of Sacramento and approved by concurrent resolution of the Legislature, enrolled and authenticated by the officers thereof, and filed in the office of the secretary of state, is conclusive as to the form of charter adopted.

4. Statutes ⇨286—Act signed, enrolled, and filed constitutes a record which is conclusive evidence of its passage.

Where an act has been passed by the Legislature, signed by the proper officers of the senate and assembly, approved by the Governor and properly enrolled and authenticated, and filed in the office of the secretary of state, it constitutes a record which is conclusive evidence of its passage and of its terms and provisions, and neither the journals of either house nor the bill as originally introduced, nor any of the amendments thereof, nor parol evidence can be received to show that it did not become a law in accordance with the prescribed forms or as so enrolled.

5. Evidence ⇨1—"Judicial knowledge" defined.

"Judicial knowledge" is not reached by the use of evidence; it is a matter pertaining to the judicial function, and its existence, like that of an admission, stipulation, or rule of presumption, dispenses with evidence as to the point covered.

6. Evidence ⇨31—No judicial notice taken of city charter not authenticated by officers of either house thereof.

Under Const. art. 11, § 8, providing that the courts shall take judicial notice of the

provisions of a charter of a city adopted by a majority of the qualified voters and passed by concurrent resolution of both houses of the Legislature and filed in the office of the secretary of state, no judicial notice can be taken of a charter of a city authenticated by the mayor and the city clerk of the city, but not authenticated by officers of either house of the Legislature.

7. Municipal corporations ⇨48(2)—Charter of city of Sacramento filed in office of secretary of state held to supersede former charter and laws inconsistent therewith.

Under Const. art. 11, § 8, providing that a charter, adopted by a majority of the qualified voters of a city and passed by concurrent resolution of both houses of the Legislature and filed in the office of the secretary of state, shall be the organic law of the city, the charter of the city of Sacramento so adopted and so approved and filed in the office of the secretary of state January 24, 1921, is the existing and valid charter of that city, superseding the charter of 1911 and all laws inconsistent with the provisions of the charter so adopted and so filed.

On Rehearing.

8. Evidence ⇨31—Courts must take judicial notice of city charter ratified by people of city and approved by concurrent resolution of Legislature and filed with secretary of state.

Under Const. art. 11, § 8, declaring that, when a city charter is ratified by the people of the city and approved by concurrent resolution of the Legislature, one copy thereof shall be filed with the secretary of state, one with the recorder of the county in which the city is located, and one in the archives of the city, and that thereafter the courts shall take judicial notice of the provisions of the charter, the courts must take judicial notice of the charter, a copy of which is so filed.

9. Evidence ⇨328—Only competent evidence as to form of city charter ratified by people is copy attached to or included in concurrent resolution of the Legislature and copies filed as directed.

Under Const. art. 11, § 8, providing that, when a city charter is ratified by the people of the city and approved by concurrent resolution of the Legislature, one copy of the charter so ratified and so approved shall be filed with the secretary of state, one with the recorder of the county in which the city is located, and one in the archives of the city, and that the courts must take judicial notice thereof, the only competent evidence of the contents of the charter is either the copy attached to or included in the copy of the concurrent resolution and the copies filed as specified in the Constitution, and, in case of conflict between the copies so filed and the copy attached to the concurrent resolution, the latter prevails.

10. Constitutional law ⇨68(1)—Remedy for mistake in enacting charter of municipal government is for Legislature.

Where a city charter is adopted under Const. art. 11, § 8, providing that a charter ratified by the people of a city and adopted

by concurrent resolution of the Legislature shall become the organic law of the city, if by mistake the charter adopted by the Legislature is different from the one ratified by the people, the question of correcting the error is one for the Legislature, since the matter of the formation and government of such municipal corporation is political and does not determine private rights nor involve due process of law, so as to bring the question of the mistake in adopting the charter within the jurisdiction of the courts.

In Bank.

Application by L. H. Spaulding for writ of mandate, to be directed to M. J. Desmond, as Clerk of the City of Sacramento, and the City of Sacramento. Writ denied.

R. Platnauer, of Sacramento, for petitioner.

R. L. Shinn and Devlin & Devlin, all of Sacramento, for respondents.

SHURTLEFF, J. This is an original application for the issuance of a writ of mandamus directed to Harry G. Denton, who has been regularly substituted as a defendant in the place and stead of M. J. Desmond, deceased, directing the said Denton, as clerk of the city of Sacramento, to file the oath of plaintiff as the alleged city collector of said city. Plaintiff bases his right to have such oath filed upon the provisions of the charter of said city, known and hereinafter referred to as the charter of 1911 (Statutes 1911, Extra Session, p. 305), which provided for a city commission in which was vested the power of appointing a city collector, and which charter plaintiff contends is still in force. It would, we think, conduce to a better understanding of the questions arising upon this application to state at this point that, on November 30, 1920, the electors of said city of Sacramento ratified a new charter, hereinafter designated as the charter of 1920, which provided for a municipal governing body termed the city council, and which charter, if legally adopted, became operative on June 30, 1921, with the one exception that, for the sole purpose of the election of said city council, the members of which were the only officers under said charter to be elected by the people, it should go into effect immediately after its approval by the Legislature, which approval, it is claimed by defendants, was accorded on January 20, 1921. Stats. 1921, p. 1919.

The petition, in substance, alleges: That, at all the times in it mentioned, the city of Sacramento was a municipal corporation of the state of California, organized and existing under the laws of said state, governed in accordance with the provisions of a charter adopted and approved by the Legislature in 1911, in the manner provided by the Constitution. That the defendant M. J. Desmond

from July, 1913, up to the time of his death on December 27, 1921, was the duly appointed, qualified, and acting city clerk of said city. That, on the 15th day of November, 1921, which, it will be noted, was after the charter of 1920, if valid, became fully operative, the said commission of said city of Sacramento, which derived its authority as previously stated, if any it had for such act, from the charter of 1911, appointed the plaintiff city collector of said city, and that, in compliance with the provisions of an ordinance of said city, adopted in January, 1919, he executed his bond as such collector, with sufficient sureties to said city in the penal sum required, which bond was approved and filed with the auditor of said city. That, on the 18th of November, 1921, and after such approval of said bond, plaintiff, as such city collector, regularly subscribed and took his official oath in writing, and presented it to M. J. Desmond, the then clerk of the city of Sacramento, as such clerk, and demanded that it be filed, which demand was refused. That the reason assigned by said Desmond for such refusal was that the charter of 1911 was superseded and abrogated by the charter of 1920, and that there was no longer a city collector or any law creating such an office. That, on the 30th day of November, 1920, the qualified electors of said city ratified a proposed charter for the government of said city, framed as provided by section 8 of article 11 of the Constitution of California. That the last-mentioned charter was never submitted to the Legislature of the state of California for its approval or rejection, and was never approved by the Legislature. That the Legislature, at its session in 1921, by concurrent resolution, passed by a majority of the members elected to each house thereof, approved what purported to be a copy of the charter of 1920 as ratified, but which in truth and in fact was not a complete copy thereof.

The city makes two appearances, one by answer of the city commission, admitting all the allegations of the petition, and the other through or by the city council, which demurred and answered at the same time. We have therefore separate appearances of the alleged governing bodies created respectively by the charter of 1911 and the charter of 1920. It is not necessary to give any consideration to the answer of the city commission, for it raises no issues in that it concedes the correctness of plaintiff's contentions. We will therefore confine the discussion to the petition and pleadings of the city council, and it will be understood, unless otherwise stated, that the use of the term defendants refers to the city thus appearing and the defendant Denton.

The demurrer alleges, first, that the petition does not state facts sufficient to consti-

tute a cause of action, or a cause "for the issuance of a writ of mandamus"; and, second, that it appears upon the face of the petition that the only possible cause of action stated therein is one in favor of the people of the state of California, which must be made the subject of a proceeding by the state in quo warranto. The answer of the defendants, in substance, avers: That the charter of 1911 was superseded by the charter of 1920, and that, ever since the 20th day of January, 1921, the last-named charter has been and is the organic law of said city; that, on November 18, 1921, a copy of the charter of 1920, so ratified and approved, was filed respectively with the secretary of state of the state of California, the county recorder of the county of Sacramento, and in the archives of said city of Sacramento. That said M. J. Desmond was the city clerk of the city of Sacramento under said charter of 1911, from July, 1913, the exact date not appearing in any of the pleadings, until the 30th day of June, 1921, upon which latter date the charter of 1911 ceased to have any operative effect. That, upon said last-mentioned date, the said M. J. Desmond voluntarily surrendered his office as city clerk under the charter of 1911, and ever since the 30th day of June, 1921, neither he nor either of his successors has been city clerk of the city of Sacramento under said charter of 1911. That on said 30th day of June, 1921, said M. J. Desmond was elected city clerk of said city by the city council of said city, pursuant to, and charged with the duties provided in, the charter of 1920, and that thereupon he duly qualified as such city clerk under said charter of 1920, and that ever since said 30th day of June, 1921, he, or a successor to him, of whom the defendant Denton was one, has been the duly appointed, qualified, and acting city clerk of the city of Sacramento, with the duties provided for in the said charter of 1920. That the ordinance, pursuant to which plaintiff alleges that he filed his bond and took his office, is not and has not been in effect at any time since June 30, 1921, and that since said date there has not been any such office as city collector of said city. The answer further denies that the charter of 1920 was never submitted to the Legislature for its approval or rejection, but avers that it was so submitted, and, by concurrent resolution passed by each house of the Legislature, was, on January 20, 1921, approved, and that the charter so approved by the Legislature was the same charter ratified by the qualified electors of said city of Sacramento on November 30, 1920. The answer admits the averments of the petition touching the oath by plaintiff as city collector, his attempt to file the same with the city clerk, the latter's refusal to make such filing, and the reasons assigned for such refusal. It is alleged as

a separate defense that there is another action, in the nature of quo warranto, pending between the same parties and involving the same subject-matter, but, in view of the conclusions which follow, it is not necessary for us to consider this special defense, and we express no opinion concerning it. To the defendant's answer, plaintiff demurs upon the ground of its insufficiency. Inasmuch as the questions, the decision of which is in our opinion determinative of this controversy, are raised by the petition and answer as well as by the demurrers, we will not separately consider the latter pleadings, but dispose of the matter upon its merits.

The record shows that an enrolled copy of the concurrent resolution, approving the charter of 1920, authenticated by the proper officers of the senate and assembly, was filed in the office of the secretary of state on January 24, 1921.

[1] What we regard as the controlling questions raised by the pleadings are: First, do the facts alleged in the petition support a proceeding in mandamus? And, second, is the charter of 1920 the organic law of the city of Sacramento, and, if so, can we, in this proceeding, question the verity or validity of the enrolled copy thereof filed with the secretary of state? The first of these propositions must be answered in the affirmative. The plaintiff is not, as contended by defendants, attempting in this application to try the title to his alleged office or to have himself judicially declared to be the city collector of the city of Sacramento, but, as already stated, is asking for an order directing the defendant, as city clerk, to file his official oath as such city collector, which he claims is essential in order for him to be fully clothed with official authority. That this is the proper proceeding to accomplish such result, if he is legally entitled to have such oath filed, and it is the duty of the city clerk, under the law, to file it, does not admit of doubt, for it is well settled in this state that mandamus is proper to compel the performance of a duty especially enjoined by law. *Kelly v. Edwards*, 69 Cal. 460-462. 11 Pac. 1; *Peck v. Board of Supervisors of Los Angeles Co.*, 90 Cal. 384, 27 Pac. 301; *Bannerman v. Boyle*, 160 Cal. 203, 116 Pac. 732; *Fox v. Workman*, 6 Cal. App. 633, 92 Pac. 742; *Code Civ. Proc.*, § 1085.

[2] We pass to the discussion of the second and more important question. The provision of the Constitution with which we are directly concerned is the following:

"If a majority of the qualified voters voting thereon at such general or special election shall vote in favor of such proposed charter, it shall be deemed to be ratified, and shall be submitted to the Legislature, if then in session, or at the next regular or special session of the Legislature. The Legislature shall by concurrent resolution approve or reject such charter as a whole, without power of alteration or

amendment; and if approved by a majority of the members elected to each house it shall become the organic law of such city or city and county, and supersede any existing charter and all laws inconsistent therewith. One copy of the charter so ratified and approved shall be filed with the Secretary of State, one with the recorder of the county in which such city is located, and one in the archives of the city; *and thereafter the courts shall take judicial notice of the provisions of such charter.*" Article 11, § 8. (Italics ours.)

In speaking of this provision and the legal status of a charter approved thereunder, this court, in *Brooks v. Fischer*, 79 Cal. 173-176, 21 Pac. 652, 653 (4 L. R. A. 429), said:

"It provides: 1. For submission [of the ratified charter] to the Legislature for its approval or rejection. 2. That if approved by a majority vote of the members elected to each house, it shall become the charter of said city. This does not in terms require any action on the part of the governor, but expressly provides that, immediately upon its being approved by a majority of the members of the two houses of the Legislature, it shall become the charter of the city. * * * It seems to us that this language is so plain and unequivocal that it cannot call for a construction by this court. It is enough that the Constitution has so provided."

Again, in a more recent case, addressing itself to the same subject, this court used the following language:

"It is now expressly provided that the charter may be approved by concurrent resolution, and that then such charter 'shall become the organic law thereof'—that is, it is a special mode for the enactment of a law by the Legislature. It is clear that it is made a law by the Legislature, and becomes a law by this expression of the sovereign will of the state. It prevails and has force as a law of the state, and is not made a law by the people of the municipality by virtue of authority delegated to them. It is proposed by the municipality, and is accepted and passed into a law by the Legislature or rejected, as it shall see fit." *Ex parte Sparks*, 120 Cal. 395-399, 52 Pac. 715, 716.

[3-5] It is, therefore, settled that it is the charter adopted by the Legislature which becomes the organic law of the city by which it was ratified and submitted for approval. The correctness of this proposition is not contested by any of the parties to this proceeding, but plaintiff affirms that he can impeach the validity of the charter filed with the secretary of state, or either of the other depositaries designated in the Constitution, by showing, through the means of comparison or otherwise, that it is not a correct copy of the charter ratified by the electors; and the defendants assert that they have the right to prove by the journal of the respective branches of the Legislature that, in fact the charter adopted was the one ratified, and that they are not precluded by the

filed copy. But in our opinion neither of these contentions can be sustained. It has long been the law of this state that, where an act has been passed by the Legislature, signed by the proper officers of the senate and assembly, approved by the Governor and properly enrolled and authenticated, and filed in the office of the secretary of state, it constitutes a record which is conclusive evidence of its passage and of its terms and provisions, and that neither the journals of either house, nor the bill as originally introduced, nor any of the amendments thereof, nor parol evidence, can be received in order to show that it did not become a law in accordance with the prescribed forms or as so enrolled. *Sherman v. Story*, 30 Cal. 253, 89 Am. Dec. 93; *County of Yolo v. Colgan*, 132 Cal. 265, 64 Pac. 403, 84 Am. St. Rep. 41. While, so far as the briefs and our research disclose, it has never been held that this rule applies to an enrolled and authenticated copy of a concurrent resolution filed with the secretary of state, we can see no reason, resting upon principle, why it is not applicable here. That it is controlling finds support in that portion of the Constitution quoted, which affirms that, when the charter is filed as directed, the courts shall take judicial notice of its provisions. We think this mandate, reinforced by the foregoing rule, precludes us in this hearing from going behind the enrolled and filed charter.

"Judicial knowledge [notice] is not reached by the use of evidence; it is a matter pertaining to the judicial function and its existence, like that of an admission, stipulation, or rule of presumption, dispenses with evidence as to the point covered." 18 Cyc. § 850.

The Constitution goes even further than the quoted text and, in effect, declares that, when the controversy involves a provision of the charter, the courts shall determine it from what appears in the copy filed with the secretary of state or with the other depositaries mentioned in the Constitution. It would practically nullify this provision of the Constitution to construe it as meaning that the courts must take judicial notice of the contents of the filed copy, except where the issue is that such copy is invalid because not an exact reproduction of the charter as ratified by the electors and approved by the Legislature. Taking judicial notice of the contents of the charter is taking notice of such contents as a whole—as a completed document—as well as of some specific part thereof. The wisdom and purpose of this requirement of the Constitution are manifest. It is essential, commercially and otherwise, that there exist some established memorial, some authoritative and permanent record of the charter, which is conclusive and unimpeachable, at least against an attack such as the one made here, and to

which those desiring to be advised of its terms may with security and confidence resort. Were it otherwise, a municipal government would be constantly exposed to the possibility of having its organic law assailed upon the ground that the enrolled and filed copy of the concurrent resolution approving it is defective by reason of the asserted omission therefrom of some portion of the ratified and approved charter.

Sherman v. Story, *supra*, although decided under the Constitution of 1849, contains language in point here. We quote the following from the opinion (30 Cal. 278, 89 Am. Dec. 93):

"There is nothing in the Constitution * * * that requires or authorizes us to *avoid, correct or in any way modify*, by aid of the Journals, the acts of the Legislature properly enrolled, authenticated and deposited with the secretary of state as records of the act. * * * Much less is there any authority for resorting to the bill as originally introduced, * * * or to parol evidence for the purpose of impeaching the record. * * * The question, then, whether an important public law, upon which the rights of all our citizens depend or may depend was ever passed, is to rest, through all time, upon equivocal memoranda upon amendment tags and the frail recollection and veracity of man." (Italics ours.)

And this question the court there answers emphatically in the negative. County of Yolo v. Colgan, *supra*, decides that the change from the old to the new Constitution did not abrogate or affect the rule that the record of the authenticated and enrolled statute in the office of the secretary of state cannot be impeached by evidence of any fact outside of such record.

The late Chief Justice Beatty, speaking for the Supreme Court of Nevada, of which court he was then a member, used these words:

"How is a court to be satisfied as to the existence and terms of a statute? Is it bound by the statute-roll, or can it look beyond the record? And if so, how far can the investigation be extended? * * * Whoever engages in any transaction the validity or construction of which depends upon statutory provisions, whoever holds or acquires any sort of property, or right, the title or enjoyment of which may be affected by the operation of any law, is bound to take notice, at his peril, what the law is. And it is not enough for him to know what the law is after a court of last resort has made an investigation and determined what part of the statute-roll is to stand and what part to fall, but he must know in advance of litigation, and govern his conduct accordingly. If there is any record or document outside of the statute-roll to which a court will resort for the purpose of testing the validity of an enrolled law, he must not overlook it. If a court will hear oral testimony to impeach the record, he must be able to conjecture in advance what the testimony will be, and what weight will be allowed to it. Considering the exigency of this

rule it is easy to perceive of what extreme importance it is that there should be some high, authentic and unquestionable record to which not only courts and public officers, but private citizens, may resort, and, by a simple inspection, determine for themselves with infallible certainty what are the statutes of the state, and what are their terms." Nevada v. Swift, 10 Nev. 176-182.

[6] As before noted, defendants in their answer aver, that on November 18, 1921, a copy of the charter of 1920, as ratified and approved, was filed in the office of the secretary of state, and, while the demurrer to the answer would ordinarily admit the truth of this averment, we treat it as denied in obedience to the rule that the averments of the answer are deemed denied. The answer sets forth a copy of the charter, which it avers was filed on November 18, 1921, as aforesaid, but it is not authenticated by the officers of either house of the Legislature, but by the mayor and city clerk of the city of Sacramento. We know of no law authorizing the filing of this document, so attested, and we regard it as of no potency whatever. Clearly, it is not a record of which this court can take judicial notice, or a certified copy of which would be admissible here. As we have said, it is the copy attested by the proper officers of the respective legislative bodies approving the charter, filed with the secretary of state, and no other, of which the courts take judicial notice, which, in this instance, is the one so filed on January 24, 1921.

[7] Our conclusion is that, in this inquiry, we are precluded from going behind the said copy of the charter of 1920, which was filed in the office of the secretary of state on January 24, 1921, and that, as so filed, it is the existing and valid charter of the city of Sacramento, superseding the charter of 1911 and all laws inconsistent with the provisions of said charter of 1920. It follows, therefore, and we so hold, that there is no such office as city collector of the city of Sacramento, and that plaintiff has failed to establish his right to have his oath as such alleged city collector filed in the records of said city as demanded by him or otherwise.

In view of what precedes, it is unnecessary to consider the additional points urged in the briefs.

The application for a writ of mandate is denied.

We concur: SHAW, C. J.; LENNON, J.; WILBUR, J.; SLOANE, J.; LAWLOR, J.; RICHARDS, Justice, pro tem.

On Rehearing.

SHAW, C. J. The respondent has filed a petition asking the court to modify in certain particulars the opinion hereinbefore rendered,

[8, 9] Upon further consideration of the matter, we are satisfied that the modification should be made. The Constitution (art. 11, § 8) declares that, when a city charter ratified by the people of the city has been submitted to the Legislature and has been approved by concurrent resolution, "one copy of the charter so ratified and approved shall be filed with the secretary of state, one with the recorder of the county in which such city is located, and one in the archives of the city; and thereafter the courts shall take judicial notice of the provisions of such charter." The natural meaning of this language is that the courts must take judicial notice of the charter, the copy of which is so filed. We have held, and we adhere to that opinion, that the doctrine of the decision in *Sherman v. Story*, 30 Cal. 253, 89 Am. Dec. 93, and *Yolo County v. Colgan*, 132 Cal. 266, 64 Pac. 403, 84 Am. St. Rep. 41, is applicable to city charters approved by the Legislature, certified and filed with the secretary of state, as fully as it is to statutes enacted by the Legislature, and enrolled, authenticated, and filed with the secretary of state. Under that doctrine the only competent evidence of the contents of such charter is either the copy attached to or included in the concurrent resolution, if any copy was so attached or included, and the copies so filed, as specified in the part of the Constitution above quoted. In case of a conflict between the copies so filed, and the copy, if any, attached to the concurrent resolution, the latter would prevail. No judicial proceeding has been provided in which the inquiry whether or not such copy is a true copy can be made or in which the question can be determined, or in which a mistake, if one was made, can be corrected. The imperative reasons upon which that doctrine rests are clearly and forcibly set forth in the two decisions cited, and need not be repeated here.

[10] The petitioner suggests that under this doctrine it would be within the physical power of the Legislature, if it were disposed to act in bad faith, to impose upon a city a charter for its government wholly different from the one which the people of the city had ratified. One answer to this objection is that the courts will not impute bad faith to the legislative department of the state. Another is that, even assuming that the same result might be caused by a mistake, the

matter of the formation and government of such municipal corporations is political; that it does not determine private rights nor involve due process of law (*People v. Ontario*, 148 Cal. 634, 84 Pac. 205; *People v. Cal. Fish Co.*, 166 Cal. 606, 138 Pac. 79), and that the remedy, if any is desired, is to be provided by the Legislature. In view of the fact that during the 72 years of the existence of this state, in the vast mass of laws enacted, no instance of such bad faith, nor any serious mistake, has occurred, the necessity for a remedy does not seem urgent. The possibilities of dangers from such occurrences are inconceivably less detrimental to the public good than would be the difficulties produced by the doctrine that extrinsic evidence could be given to show an error in the official record of general or local laws and that no one could be assured that he was acting in accordance with law at any time, because he could not foresee that some other person would not be able to discover and prove an error which had eluded his own search.

The decision in *People v. Gunn*, 85 Cal. 238, 24 Pac. 718, as we understand it, is not contrary to the above. It holds that, in a quo warranto proceeding the validity of such charter may be disputed, not by showing that the copies thereof officially filed as aforesaid are erroneous, but by showing that the election at which it was ratified by the people of the city was not lawfully held, and that point was put upon the ground that such ratification was a condition precedent to the power of the Legislature to approve the charter, one for which the Legislature was not responsible, and one into which it could not inquire, and, hence, that it was a judicial question for the courts to determine. If there is anything in that decision that is contrary to the doctrine of *Sherman v. Story* it must be deemed to have been overruled by the decision in *Yolo County v. Colgan*, *supra*.

Anything in the opinion hereinbefore rendered suggesting that the accuracy of such copies might be disputable in some other proceeding and leaving that question open is to be considered as withdrawn.

The application by the petitioner for a rehearing is denied.

We concur: WILBUR, J.; LAWLOR, J.; LENNON, J.; SLOANE, J.; WASTE, J.

189 Cal. 183

BARRY v. HANDLIN et al. (Sac. 3172.)

(Supreme Court of California. June 20, 1922.)

1. Partnership ⇐21—Contract for admission as partner could not be terminated by defendants without creating liability for damages.

Under a contract between defendants, who furnished money for a business, and plaintiff, who was employed for two years at a certain salary, with a provision that he should be admitted as a partner when one-third of the profits reached a certain amount, *held*, that plaintiff was to have one-third of the profits, subject only to the contingency that he remain in the employment of the firm, and that his rights could not be terminated by the defendants without creating a liability for damages.

2. Partnership ⇐21—Employee wrongfully deprived of right under contract to become partner in business entitled to damages suffered.

One employed by others forming a partnership, with the provision that he be made a partner when the profits reached a certain amount, was entitled to such damages as he could show he suffered by reason of being wrongfully deprived of his prospective interest in the profits of the business, where his employers wrongfully terminated the relation without cause.

In Bank.

Appeal from Superior Court, Sacramento County; Charles O. Busick, Judge.

Action by W. E. Barry against L. F. Handlin and another. Judgment for defendants, and plaintiff appeals. Reversed.

Ralph H. Lewis, of Sacramento, for appellant.

Chas. A. Bliss and Thomas B. Leeper, both of Sacramento, for respondents.

WILBUR, J. Plaintiff brought this action to recover the sum of \$13,500 damages for a breach of contract. Defendants had judgment on demurrer, and the plaintiff appeals. The breached contract is an exhibit to the complaint. It is an agreement by Barry, Handlin, and Barton to form a copartnership. Handlin and Barton were to advance the sum of \$10,000 for the purchase of a wall paper business, and were to constitute the copartnership until the plaintiff under the terms of the contract had secured an equal interest therein as a copartner. The plaintiff was to be manager of the business, and receive \$150 per month, and to be credited with a third interest in the profits as hereafter stated. This third interest in the profits was to be carried on the books as the "Barry reserve fund." It was provided that when this fund amounted to \$3,333.33 one-half of this fund should be paid to Handlin and one-half to Barton, and thereupon the part-

nership should be composed of Barton, Handlin, and Barry. The contract was entered into on the 2d day of June, 1919, and on the 4th day of October, 1919, the plaintiff was discharged, and his further participation in the business was prevented by the defendants. Plaintiff alleges that at the time of his discharge the profits of the business amounted to \$8,000. The defendants demurred to plaintiff's complaint generally, and for lack of jurisdiction. The defendants' contention is, in effect, that plaintiff's employment was to continue for two years; that unless at the end of that term the Barry reserve fund then amounted to \$3,333.33 or more plaintiff was not entitled to enter into the copartnership or to any part of the profits; that if, in the meantime, for any reason plaintiff ceased his connection with the business he was not entitled to any part of the profits; and upon this hypothesis they claim the only injury sustained by reason of his discharge is the sum of one month's salary accruing between the date of discharge and the date when plaintiff secured other employment, and that this amount (\$150) was not sufficient to give the superior court jurisdiction.

It will be observed that at the date of the discharge one-third of the profits amounted to \$2,166.66, and that, if the profits had been continued for another month at that rate, one-third of the profits would have been \$3,333.33. The contract provided:

"7. When said Barry reserve fund shall have amounted to thirty-three hundred thirty-three and one-third dollars (\$3,333 $\frac{1}{3}$), one-half thereof shall be paid to the party of the first part and one-half thereof to the party of the second part, and thereupon and thereafter the party of the third part shall be let into and become an equal partner with the parties of the first and second parts in said business, provided he shall have continued in the employ of said partnership as hereinabove provided, and shall have during said time, in all matters and things, promoted and worked for the best interests of said partnership, and in all other particulars complied with his obligations and duties under this agreement."

It is clear that Barry's third interest in the copartnership was to begin as soon as the profits amounted to \$10,000, unless there are other provisions of the contract modifying paragraph 7. Paragraph 5 of the contract with relation to the profits is as follows:

"5. Upon the 1st day of January of each year after the signing of this agreement an inventory of said business shall be taken, and balance shall be struck, and the net profit of the previous year shall be ascertained and determined, and thereupon said profit shall be disposed of as follows:

"(a) One-third thereof shall be paid to the party of the first part.

"(b) One-third thereof shall be paid to the plaintiff of the second part.

"(c) One-third thereof shall be put in a fund to be known as 'Barry reserve fund'; said reserve fund shall be carried on said books as cash on hand, but the same may be used by said partnership for the purpose of carrying on said business, discounting bills, etc., provided, however, that before a balance shall be struck for the succeeding year said reserve fund shall be restored and be intact at the time of ascertaining the profit for such year."

Paragraph 3 is as follows:

"3. The party of the third part shall be employed by said partnership at a salary of one hundred and fifty dollars (\$150) per month, beginning with the 1st day of June, 1919, and shall give his entire time and attention, and his best energy and efforts in promoting the welfare of said business and the interests of said partnership; and agrees to continue in such employment for a period of two years, and thereafter until this agreement has been fully carried out, and has become an equal partner in said business enterprise as hereinafter provided."

It is not necessary for us to determine whether if the profits had continued at the rate of \$2,000 per month for another month the plaintiff would have been entitled to his partnership interest on November 4th or would have been compelled to have waited until the first of the next January, when the inventory was to be taken, subject to the postponement of his partnership interest in the event that during the period of November 4, 1919, to January 1, 1920, there were losses instead of profits. It is sufficiently clear from the paragraphs quoted that the plaintiff suffered a substantial damage by reason of the loss of his contingent interest in the profits of the business, and that if his dismissal was wrongful he was entitled to such damages.

[1, 2] The defendants claim that section 9 deprives plaintiff of any interest in the profits or in the Barry reserve fund in the event that his employment is terminated from any cause, even though such termination may have been wholly without his fault and wrongful on their part. We do not think that the contract is reasonably susceptible of such construction. There was a definite agreement that the plaintiff was to be employed for two years at \$150 per month. It was also clear that he was to have one-third of the profits, subject only to the contingency that he remain in the employment of the company, and that such profits amount in the aggregate to \$10,000. It is clearly not contemplated that the plaintiff should be penalized for the wrongful conduct of the defendants. That is to say, the termination of the employment referred to in subdivision 9 of the contract which terminates plaintiff's right in the profits must be caused by the fault of the plain-

tiff or by agreement. It is not a reasonable construction of the contract to hold that it was agreed that the defendants reserved the right to discharge the plaintiff at their whim at any time, and that this discharge might occur the day before an inventory is taken, which inventory would disclose that the plaintiff is then entitled to a third interest in the partnership. Plaintiff was entitled to such damages as he could show he suffered by reason of being wrongfully deprived of his prospective interest in the profits of the business. He alleges his damages at \$15,000, and asks judgment for this amount, and this brings the case within the jurisdiction of the superior court. The demurrer should have been overruled.

The judgment is reversed, with instructions to the trial court to overrule the demurrer to the complaint.

We concur: SHAW, C. J.; LENNON, J.; SLOANE, J.; LAWLOR, J.; SHURTLEFF, J.; RICHARDS, Justice pro tem.

(189 Cal. 228)

VAN HOOSEAR v. RAILROAD COMMISSION OF CALIFORNIA. (S. F. 10076.)

(Supreme Court of California. June 30, 1922.
Rehearing Denied July 27, 1922.)

1. Contempt $\S$ 24 — Jurisdiction to punish rests on ability of accused to comply with order.

It is essential to the jurisdiction to punish for contempt for disobeying the order of the court that the party charged shall have been able to comply with such order, unless he has voluntarily and contumaciously disabled himself.

2. Contempt $\S$ 63(4) — Adjudication must show power of guilty party to perform order.

Adjudication of contempt for failure to perform an act directed by the court is void as a basis for the imposition of punishment, unless it appears therefrom that it is within the power of the guilty person to perform the act.

3. Public service commissions $\S$ 19(4) — Lack of frankness in dealing with tribunal is not disregard affording basis for contempt proceedings.

That a party fails to act with frankness in dealing with the Railroad Commission, as in appearing at hearings concerning public utilities involved in certain properties without disclosing that he was not their owner, is not a contumacious disabling of himself from complying with the Commission's order such as to render him punishable for contempt.

4. Prohibition $\S$ 11 — Does not lie to correct errors of tribunals having jurisdiction.

Prohibition does not lie to prevent a subordinate court from deciding erroneously or from enforcing an erroneous judgment in a case over which it has jurisdiction, and in such cases the superior court will leave the party ag-

grieved to his ordinary remedies, such as writ of error or certiorari.

5. Prohibition — 28—Record will be examined to ascertain petitioner's ability to obey order of the Railroad Commission in proceeding to restrain enforcement of judgment of contempt.

An application for writ of prohibition to restrain the Railroad Commission from enforcing its judgment of contempt, bringing up a complete record, will be treated as application for writ of review, and the court will determine jurisdictional facts and give the relief that the record warrants, notwithstanding the Public Utilities Act limits all review of the Commission's rulings to writ of certiorari, and where the evidence shows petitioner's inability to obey the order upon which the contempt is founded, as where the Commission had not adjudicated the extent of his control over a water system regarding which its order was issued, relief from the judgment of contempt will be granted.

In Bank.

Application for writ of prohibition by William S. Van Hoosear, petitioner, prayed to be directed against the Railroad Commission of the State of California, respondent, to prevent the enforcement of a judgment of commitment for contempt. Order convicting petitioner of contempt annulled.

H. S. Craig, of Oakland, for petitioner.

Hugh Gordon and William W. Clary, both of San Francisco, for respondent.

SLOANE, J. This is a proceeding to prohibit the enforcement of a judgment committing the petitioner for contempt in disobeying an order of the State Railroad Commission.

In proceedings duly had the Railroad Commission determined on December 23, 1919, by the decision of said Commission, that the petitioner, William S. Van Hoosear, was in the control of a certain public utility water system within this state, consisting of a flowing spring and pipe line therefrom, used and operated for the purpose of supplying water for domestic and other purposes to several consumers; that without authority of law he had discontinued such service, and it was by the Commission adjudged as follows:

"It is hereby ordered that said William S. Van Hoosear be and he is hereby directed to re-establish the public utility service of water to his consumers in Castro Valley within (5) five days of the date of this order and to continue such public utility service at the rates herein found to be the legal rates in effect.

"It is hereby ordered that William S. Van Hoosear be and he is hereby directed to file the above rates with this commission within 10 days of the date of this order."

This proceeding and order of the Railroad Commission was afterwards before this

court on a writ of review, and on December 22, 1920, an opinion and order was filed therein, affirming the order and decision of the Commission. 194 Pac. 1003.

The foregoing order of the Railroad Commission, thus approved and affirmed, is the basis for the contempt proceedings now before us. Van Hoosear, the petitioner here, was cited for contempt for failing and refusing to comply with the order to restore the water service.

Proceedings in due form were had before the Commission, and petitioner was found guilty of contempt for disobeying the order of the Commission, and on the 1st of December, 1921, it was adjudged by the Railroad Commission that he be punished therefor by paying a fine of \$250, and in default thereof that he be imprisoned in the county jail for 30 days.

Petitioner seeks to restrain the enforcement of this judgment on the ground that the Railroad Commission has exceeded its jurisdiction in imposing this penalty.

The facts in the case are practically undisputed, and we will proceed to consider such issues as are presented which are essential to determining petitioner's right to the relief demanded without reference to the manner or order in which they are pleaded.

That the Railroad Commission has jurisdiction to punish for contempt is sufficiently manifest. Const., art. 12, § 22; Public Utilities Act (St. [Ex. Sess.] 1911, pp. 48, 62) §§ 54, 81; Pacific Telephone, etc., Co. v. Eshelman, 166 Cal. 640, 650, 137 Pac. 1119, 50 L. R. A. (N. S.) 652, Ann. Cas. 1915C, 822. The jurisdiction of the Railroad Commission in this matter is sustained on the face of the record so far as concerns the validity of the order which petitioner is charged with disobeying, and the right of the Commission to enforce it, and the citation and proceedings for contempt were regularly had and conducted.

So far as we are able to discover, the only question of jurisdiction to punish petitioner arises upon the sufficiency of the record to show that petitioner was legally able to comply with the order at the time the citation for contempt was issued. By his verified answer to the affidavit and citation for contempt, petitioner alleged that he had not been the owner of said water system, or the land on which it was situated, since the month of June, 1910. That on that date he had conveyed all of this property to his wife, Margaret P. Van Hoosear, and that she had ever since continued as the sole owner in possession of the same to the 15th day of November, 1919, at which date she sold and transferred said real property, with the springs located thereon, to one F. J. Lewis, who had ever since been the owner thereof.

The Public Utility Act under which the

Railroad Commission obtained control of water service utilities was not in existence at the time of the alleged conveyance of this property to petitioner's wife, and petitioner was not, according to his answer, the owner thereof at the time the water service was discontinued or at the time the order of December 23, 1919, to re-establish such service was made, or during any of the proceedings culminating in the judgment for contempt. In short, if the deeds pleaded in the answer herein are recognized as valid transfers of title, the petitioner at no time covered by the proceedings shown in this record was the owner of this water system.

In this connection it may be said that the evidence produced before the Commission in the contempt proceedings, without dispute, bears out the allegations of the answer as to the transfers of this property, and there seems to be no ground to question that Margaret P. Van Hoosear, and later, F. J. Lewis, and not the petitioner here, were, at all times covered by claim of jurisdiction by the Railroad Commission, the legal owners of the property constituting the alleged water system. So far as the rights of Mrs. Van Hoosear and C. F. Lewis are concerned, it is apparent that they are not affected by any of the proceedings before or on behalf of the Railroad Commission, as neither of them was at any time made a party thereto.

Regarding the effect of the judgment and order of December 23, 1919, as fixing the status of this property as a public utility water system as to petitioner, William S. Van Hoosear, there can be no doubt. He appeared in the proceedings, submitted himself to the jurisdiction of the Commission, and at no time prior to the citation for contempt in any way disclaimed ownership and control of the property.

Nothing has occurred since the judgment of December 23, 1919, so far as disclosed, to alter the situation as regards the petitioner. There was available at that time the same defense to the order requiring him to resume the water service, as that interposed to the judgment in contempt for disobeying that order.

It may be noted, however, that in the judgment directing a resumption of the water service there was no adjudication of the nature and extent of petitioner's interest in or control over the water system. And we know of nothing to estop him from showing as an excuse for failing to obey the commissioner's order that he had no legal rights in the premises that would permit him to resume the operation of the system, which the former decision of the Railroad Commission showed that he had discontinued and abandoned.

As already indicated, it appears beyond dispute that the petitioner at no time covered by the proceedings of the Railroad Com-

mission had any title or ownership of the physical properties constituting the water system. The title was in his wife, and pending the proceedings she conveyed her title to C. F. Lewis. This she could do without permission from the Railroad Commission, as she was at no time a party to the proceedings taken by the Commission. After the sale of the premises to Lewis the record before us shows without controversy that the latter took possession of the land and the springs, and that petitioner no longer had any right, interest, or possession under which he could obey the order to resume the operation of the water system. He testified that upon the transfer of this property by his wife to Lewis there was no reservation of any kind relating to the water, and that he thereafter had or exercised no rights of ownership or control therein. Whatever control he may have reserved or exercised while his wife owned the premises was terminated on the sale to Lewis. This testimony, as well as the presumptions arising from transfer of title, were not disputed. Under this state of facts it is clear that at the time the contempt was charged the petitioner here was without right or power to obey the order of the Railroad Commission to resume the distribution of water.

[1, 2] It is essential to the jurisdiction to punish for contempt for disobeying the order of a court that the party charged shall have been able to comply with such order, unless he has voluntarily and contumaciously disabled himself from complying. *Ex parte Cohen*, 6 Cal. 318; *Galland v. Galland*, 44 Cal. 475, 13 Am. Rep. 167; *Ex parte Silvia*, 123 Cal. 293, 55 Pac. 988, 69 Am. St. Rep. 58; *Ex parte Todd*, 119 Cal. 57, 50 Pac. 1071. And an order "adjudging one guilty of contempt for failure to perform an act directed by the court is void as a basis for the imposition of punishment, unless it appears therefrom that it is within the power of such person to perform the act" (*Bakeman v. Superior Court*, 37 Cal. App. 785, 174 Pac. 911), and a mere recital in the order that obedience thereto is willfully refused is not sufficient. *In re Cowden*, 139 Cal. 244, 73 Pac. 156.

[3] In the present case the petitioner cannot be held to have contumaciously disabled himself to obey the order of the Commission, unless he can be held responsible for the act of his wife in disposing of the property, and there is no evidence to support such a conclusion. It may be true that he did not act with frankness or fairness to the Commission in failing to disclose before the original order was made that this property had been conveyed to Lewis, but that is another matter. He is not charged with having contumaciously put it out of his power to obey the order of the Commission.

In Egilbert v. Superior Court, 6 Cal. App.

190, 91 Pac. 748, on petition for writ of review of an order committing for contempt of court, the petitioner had been ordered to produce certain books of a corporation of which he was secretary. He had resigned as such secretary before the order had been served on him. In the absence of a showing that such resignation was brought about to avoid compliance with the order, the court was held without jurisdiction to punish for contempt. As Justice Chipman says in the opinion:

"The fact that Egilbert withheld from the court the fact of his resignation on May 20th, and allowed the court to grant the writ under the impression that Egilbert was then the secretary, is not the ground on which the contempt judgment is based. That judgment rested on his failure and refusal to produce the books of the company."

[4] A more serious question presented on the consideration of this petition is whether prohibition is the proper remedy. Prohibition is directed only to the jurisdiction of the court or tribunal to act in the premises, rather than to the question as to whether it has acted in the proper exercise of its jurisdiction. In the present case the judicial function of the Railroad Commission had terminated. Its judgment of commitment had been made, and it is only sought here to restrain the ministerial act of enforcing the penalty.

Moreover, there is room for contention that the judgment on its face shows jurisdiction. As heretofore stated, the only ground for attacking the judgment of the Commission is on the question of the ability of the petitioner to comply with the order on which the contempt is based. The finding of the Commission in the contempt proceeding is that at all times in said finding specified petitioner was the owner of this water system, and that during said time he operated and managed said system for compensation. If this finding can be construed as including the period covered by the contempt proceedings, as it was apparently intended to do, it is, in effect, a finding that petitioner was at the time able to comply with the order of the Commission. This was one of the facts which the Commission had jurisdiction to try, and it is contended that as against a writ of prohibition its finding is conclusive. The general rule applicable to prohibition is thus stated in *High on Extraordinary Remedies*, § 772:

The writ of prohibition "is never allowed to usurp the functions of a writ of error or certiorari, and it is never employed as a process for the correction of errors of inferior tribunals. And the courts will not permit the writ of prohibition, which proceeds upon the ground of an excess of jurisdiction, to take the place of or be confounded with a writ of error, which proceeds upon the ground of error in the exercise of jurisdiction which is conceded.

"The proper functions of a prohibition being to check the usurpation by inferior tribunals, and to confine them within the limits prescribed for their operation by law, it does not lie to prevent a subordinate court from deciding erroneously, or from enforcing an erroneous judgment in a case in which it has a right to adjudicate. In all cases, therefore, where the inferior court has jurisdiction of the matter in controversy, the superior court will refuse to interfere by prohibition, and will leave the party aggrieved to pursue the ordinary remedies for the correction of errors, such as the writ of error or certiorari."

This court has sustained this rule in recent decisions in denying prohibition to restrain a superior court from granting letters of administration, upon a proffered showing that the decedent was not a resident of the state, or that there was no property of the decedent within the jurisdiction. *Dungan v. Superior Court*, 149 Cal. 102, 84 Pac. 767, 117 Am. St. Rep. 119. Similar rulings have been made denying prohibition where a complaint fails to state a cause of action, or where the evidence is alleged to be insufficient to sustain a judgment. *Brush v. Smith*, 141 Cal. 469, 75 Pac. 55; *Lange v. Superior Court*, 11 Cal. App. 1, 103 Pac. 908. These, however, were cases where there was a remedy by appeal. In a contempt proceeding there is no remedy by appeal, and unless the jurisdiction can be attacked by a showing that there is no evidence to support the judgment it would appear that the defendant is without remedy, unless it can be provided under a writ of review.

There is also the question as to the authority of this court to restrain the action of the Railroad Commission by prohibition, even in the matter of contempt proceedings, in the light of the general limitation by the Public Utilities Act of all review of the rulings of the Commission to the writ of certiorari.

[5] We do not deem it necessary, however, to attempt to solve these doubts as to the application of prohibition to this matter, as we are satisfied that the record before us presents a case for consideration as under application for a writ of review. The petition was made in time, and a complete record has been brought up on this hearing, including a transcript of the evidence. Under these circumstances, although the petition may have demanded the wrong relief, there is no reason why, with the facts before us, this court should not give such relief as the record so presented warrants. *Johnson v. Polhemus*, 99 Cal. 240, 244, 33 Pac. 908; *Zellerbach v. Allenberg*, 99 Cal. 57, 68, 33 Pac. 786; *Code Civ. Proc.* § 580.

That under a writ of review the evidence of facts upon which the lower court or tribunal depended for its jurisdiction may be considered, and its judgment set aside if juris-

diction is without support in the evidence, is beyond dispute.

In *McClatchy v. Superior Court*, 119 Cal. 413, at page 418, 51 Pac. 696, 698 (39 L. R. A. 691) it is said:

"While the writ of certiorari is not a writ of error, 'it is nevertheless,' as suggested in *Schwarz v. Superior Court*, 111 Cal. 112, 'a means by which the power of the court in the premises can be inquired into; and for this purpose the review extends, not only to the whole of the record of the court below, but even to the evidence itself, when necessary to determine the jurisdictional fact.' If, then, by looking at the evidence we can see that the court exceeded its power, we have a right to examine the evidence for that purpose."

To the same effect: *Great Western Power Co. v. Pillsbury*, 170 Cal. 180, 149 Pac. 35; *Federal Construction Co. v. Graham*, 33 Cal. App. Dec. 698.¹

As already pointed out, the evidence showing petitioner's inability to obey the order of the Commission stands without conflict.

The order convicting petitioner of contempt was therefore in excess of the jurisdiction of the Railroad Commission, and must be annulled. It is so ordered.

We concur: SHAW, C. J.; LENNON, J.; WASTE, J.; WILBUR, J.; SHURTFLEFF, J.

58 Cal. App. 95

PEOPLE v. SAFASR. (Cr. 628.)

(District Court of Appeal, Third District, California. June 5, 1922.)

Criminal law — 1182—No brief being filed, no error appearing in record, and counsel failing to appear for argument, conviction affirmed.

Where no brief was filed on behalf of an appellant, convicted of receiving stolen goods, his counsel failed to appear at the time set for oral argument, and an examination of the record disclosed no error, the case will be affirmed.

Appeal from Superior Court, Sacramento County; Malcolm C. Glenn, Judge.

John Safasr was convicted of receiving stolen goods, and he appeals. Affirmed.

S. Luke Howe, James F. Gaffney, and J. R. Connelly, all of Sacramento, for appellant.

U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

FINCH, P. J. The defendant was convicted of the crime of receiving stolen property, and appeals from the judgment and from

the order denying his motion for a new trial. No brief has been filed in behalf of appellant, and his counsel failed to appear at the time set for oral argument. An examination of the record on appeal discloses no error. The judgment and order are affirmed.

We concur: HART, J.; BURNETT, J.

57 Cal. App. 645
PEOPLE v. LAINO. (Cr. 625.)

(District Court of Appeal, Third District, California. May 10, 1922.)

Insurance — 31—Amendment penalizing secreting of insured property inapplicable to acts of secreting, committed before amendment's effective date.

Pen. Code, § 548, penalizing the destruction of insured property to defraud the insurer, was amended by St. 1921, p. 99, to penalize also the secreting and disposing of such property with such intent. *Held* that conviction of secreting and disposing could not be sustained, where the only act committed in the county of prosecution was the removal, before the amendment's effective date, of insured property from accused's dwelling in that county to F. county, and the property thereafter remained in F. county, and, after the destruction by fire of the dwelling, proofs of loss, including the removed property, were made in F. county.

Appeal from Superior Court, Madera County; Stanley J. Murray, Judge.

James L. Laino was convicted of secreting and disposing of insured property with intent to defraud the insurer, and he appeals. Reversed.

Collins & Collins, of Fresno, and H. I. Maxim, and J. J. Coghlan, both of Madera, for appellant.

U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

FINCH, P. J. The defendant was convicted of the crime of secreting and disposing of insured property with intent to defraud the insurer thereof. From the judgment of conviction and the order denying his motion for a new trial he prosecutes this appeal.

The indictment alleges that the crime was committed on or about July 19, 1921, in Madera county. The evidence shows that, prior to the 19th day of July, 1921, the defendant removed certain insured personal property from his residence in Madera county to the city of Fresno, in Fresno county, where it remained until December 28, 1921, when it was taken into custody by the officers of Madera county. The defendant's dwelling house, from which the property had been removed, together with the contents thereof, was destroyed by fire July 19, 1921. In his

¹Hearing granted by Supreme Court, and case later disposed of in that court according to stipulation of parties.

proofs of loss the defendant seems to have included the property which he had removed as stated. These proofs were made in Fresno.

The defendant was prosecuted under section 548 of the Penal Code. At the time of the alleged offense that section made it criminal to burn, injure, or destroy insured property with intent to defraud the insurer thereof. That section was amended in 1921 (Stats. 1921, p. 99), effective July 29, 1921, making it a crime to burn, injure, destroy, secrete, abandon, or dispose of insured property with intent to defraud the insurer. From the foregoing statement it is apparent that no element of the crime charged was committed in Madera county after the amendment went into effect. At the hearing on appeal, the respondent did not contest this proposition, but submitted the matter without argument on behalf of the people. Of whatever crime the defendant may be guilty, it is plain that he did not commit the offense charged in Madera county.

The judgment and order are reversed.

We concur: HART, J.; BURNETT, J.

44 Cal. App. 69

CALIFORNIA CANNERIES CO. v. GREAT WESTERN LUMBER CO.

(District Court of Appeal, First District, Division 1, California. Dec. 2, 1919.)

Appeal and error ⚡832(4)—**Rehearing confined to matters presented when case was submitted.**

A rehearing will not be granted to consider matters omitted from briefs or arguments when the case was submitted.

On petition for rehearing. Petition denied.

For former opinion, see 185 Pac. 1008.

PER CURIAM. In submitting this case for decision, appellant presented and argued but a single point raised by its demurrer to respondent's complaint, to wit, that the complaint was insufficient by failure to allege performance of a condition precedent. We considered that objection and decided it correctly. In its petition for a rehearing, other objections to the complaint and to the sufficiency of the findings are called to our attention for the first time. A rehearing will not be granted to consider points not presented in the briefs or arguments upon which the case was submitted for decision. *Kellogg v. Cochran*, 87 Cal. 192, 200, 25 Pac. 677, 12 L. R. A. 104; *Flores v. Stone*, 21 Cal. App. 105, 111, 131 Pac. 348, 351, 352.

A petition to have the cause heard in the

Supreme Court, after judgment in the District Court of Appeal, was denied by the Supreme Court on January 2, 1920.

All the Justices concurred.

58 Cal. App. 103

PEOPLE v. HEUSERS. (Cr. 619.)

(District Court of Appeal, Third District, California. June 6, 1922.)

1. Criminal law ⚡37—**One selling intoxicating liquor to detective by mere request and payment of price not intrapped.**

One induced to make an unlawful sale of intoxicating liquor to a detective by the latter's mere request therefor and payment of the price was not intrapped.

2. Criminal law ⚡507(4)—**Detectives buying intoxicating liquor not seller's accomplices within rule requiring corroboration of testimony.**

Detectives testifying as to the sale and delivery of intoxicating liquor to one of them at his request were not accomplices of the seller so as to require that their testimony be corroborated.

3. Intoxicating liquors ⚡146(3)—**Seller securing liquor from his own stock not purchaser's agent.**

One securing liquor, which he delivered to another by whom it had been ordered and paid for, not from a third person, but from his own stock, held not the purchaser's agent.

4. Criminal law ⚡37—**That sale was made at request of detectives employed by district attorney officials held no defense.**

In a prosecution for selling liquor in no-license territory, it is no defense that the purchase was made at the instance or request of persons employed by the district attorney, sheriff, or other officials to discover illegal sellers, if defendant was ready, able, and willing to make the sale.

5. Criminal law ⚡814(3) — **Instruction to which there was no applicable evidence properly refused.**

In a prosecution for unlawfully selling intoxicating liquor in no-license territory, the court properly refused to instruct that it is not a crime to purchase liquor in such territory, where there was no evidence to which such instruction was applicable.

Appeal from Superior Court, Glenn County; H. C. Bell, Judge.

J. H. Heusers was convicted of unlawfully selling liquor in no-license territory, and he appeals. Affirmed.

W. T. Belieu and R. L. Clifton, both of Willows, for appellant.

U. S. Webb, Atty. Gen., and J. Chas. Jones, Deputy Atty. Gen., for the People.

FINCH, P. J. The defendant was convicted of unlawfully selling intoxicating liquor in no-license territory in violation of the Wyllie Law and prosecutes this appeal from the judgment of conviction and the order denying his motion for a new trial.

The principal witnesses against the defendant were two detectives who were in the employ of an organization known as the State Law and Enforcement League. They were operating in Glenn county, at the request of the sheriff and district attorney thereof, for the purpose of securing evidence of violations of law. One of the detectives sought to purchase liquor from the defendant at a point on one of the streets, and defendant agreed to furnish the same. Thereupon the detective paid the defendant the price of the liquor to be furnished, and it was agreed that the liquor would be delivered on the opposite side of the street. The defendant then left, and the other detective shadowed him until the liquor was delivered at the appointed place. The defendant went directly to his home, where he remained from 20 to 30 minutes, and thence to the appointed meeting place and delivered the liquor. Both detectives testified as to the fact of delivery. An analysis of the liquor showed its alcoholic content to be 22 per cent. The defendant denied that he knew the detectives or sold or furnished the liquor.

[1] It is urged that the defendant was trapped into the commission of the offense. The defendant was in no wise induced to make the unlawful sale except by the mere request for the liquor and payment of the price thereof. This court has decided adversely to appellant's contention in *People v. Barkdoll*, 36 Cal. App. 25, 171 Pac. 440, and *People v. Tomasovich*, 206 Pac. 119.

[2] It is contended that the detectives were accomplices, and that therefore a conviction upon their uncorroborated testimony cannot be sustained. It is clear that they were not accomplices. *People v. Bunkers*, 2 Cal. App. 197, 84 Pac. 364, 370; *People v. Keseling*, 35 Cal. App. 501, 170 Pac. 627.

[3] It is next contended that the defendant was the mere agent of the detective, in securing the liquor. It appears from the evidence that the defendant took the liquor from his own home and delivered it to the purchaser. There is no intimation in the evidence that the defendant secured the liquor from a third person after he had agreed to furnish it and had been paid therefor. He denied that he furnished it at all. Not only is there an entire absence of proof of agency, but the only reasonable inference from the evidence is that the defendant procured the liquor from his own stock.

[4] The defendant requested instructions in accordance with the foregoing contentions here made, but the court refused them, and instructed the jury that "it is no defense for

the defendant to show, if he has shown such, that the purchase was made at the instance or request of persons employed by the district attorney, sheriff, or other officials to find out illegal sellers of intoxicating liquor, if you believe from the evidence that the defendant was ready, able and willing to make the sale." In this there was no error.

[5] The court refused to instruct the jury that it is not a crime to purchase liquor in no-license territory. There was no evidence to which the proposed instruction is applicable.

The court fully and correctly instructed the jury on all questions of law applicable to the case, and the record is free from error.

The judgment and order are affirmed.

We concur: HART, J.; BURNETT, J.

(57 Cal. App. 643)

WATKINS v. McCARTNEY et al.
(Civ. 3903.)

(District Court of Appeal, Second District, Division 1, California. May 10, 1922. Hearing Denied by Supreme Court July 6, 1922.)

1. Landlord and tenant $\S$ 25(5)—Tenant is not relieved of obligations by his failure to sign lease.

Where a tenant enters into possession under the terms of a written lease, he accepts the instrument, in the absence of other controlling evidence, and his failure to sign does not affect his obligation.

2. Landlord and tenant $\S$ 115(1), 116(5)—Lease construed as waiving the statutory 30 days' notice while preserving monthly rental.

A lease providing that property is let "at monthly rental," and containing at the end a disconnected clause reading "60 days' notice," is a demise from month to month, but waiving the statutory 30 days' notice and providing for termination upon 60 days' notice, especially as to a lessor, who now contending for 30 days' notice, had, after refusing an amendment to 90 days, proposed the instrument containing the 60-day clause.

Appeal from Superior Court, Los Angeles County; E. A. Luce, Judge.

Action of unlawful detainer by Henry Watkins against Dorothy A. McCartney and E. J. McCartney, her husband. Judgment for plaintiff, and defendants appeal. Reversed.

Hearing denied; WILBUR, J., dissenting.

Howard Prowse, of Los Angeles, for appellants.

Samuel J. Crawford, of Ocean Park, for respondent.

SHAW, J. Action in unlawful detainer. Plaintiff had judgment, from which defendants appeal.

As alleged in the complaint, plaintiff, on September 1, 1920, upon an oral agreement for a monthly tenancy, let the premises in question to defendants at a rental of \$35 a month, under which defendants took possession thereof. On January 11, 1921, plaintiff served upon defendants a notice that said lease would be terminated and defendants required to surrender and quit possession of the premises at the expiration of the month commencing February 1, 1921, and thereafter, on March 3d, served a three-day notice requiring them to vacate the premises.

By their answer defendants alleged that on October 2, 1920, plaintiff executed and delivered to defendant Dorothy A. McCartney a document reading as follows:

"2659 Ocean Front, Ocean Park, Calif.

"10/2/20.

"It is agreed that Dorothy A. McCartney may keep my property, No. 2711 Ocean Front, Ocean Park, at monthly rental of \$35.00 per month, and forty dollars for July and August until a *bona fide* sale is made sixty days' notice.

"Received of Dorothy A. McCartney \$35.00. rent in full to November 1st, 20.

"[Signed] Henry Watkins"

—under which defendant Dorothy A. McCartney entered into possession of the premises and at all times occupied the same, and further alleged that it was understood and agreed that said lease should not be terminated by plaintiff, except upon 60 days' notice thereof given to said lessee.

[1] The court found that plaintiff signed and delivered the above-quoted agreement, but that the same was not signed by defendants or either of them, from which, as a conclusion of law, it found that the tenancy was terminated by the written notice of less than 60 days so served upon defendants by plaintiff. In so doing we think the court erred. Since defendant Dorothy A. McCartney entered into possession under the terms of the instrument, her obligation was not affected by her failure to sign the same. Where a lease recites that the lessee is to pay a certain sum as rent for the premises, his acceptance of the lease makes him a direct obligor or promisor to pay the rent during his occupation thereof, although he has not signed or executed the instrument. *Jones on Landlord and Tenant*, § 77; *Chandler v. Hart*, 161 Cal. 405, 119 Pac. 516, Ann. Cas. 1913B, 1094; 1 *Underhill on Landlord and Tenant*, § 232.

[2] As we construe the instrument, it constituted a lease made by plaintiff to defendant Dorothy A. McCartney from month to month, subject, however, to termination, not by the giving of the statutory notice of 30 days, which plaintiff expressly waived, but, as provided in the agreement, to be terminated upon 60 days' notice thereof given to her; and, as stated, this provision for 60 days'

notice was none the less effectual because of her failure to sign the document. Some effect must be given to the term "sixty days' notice," and we think it could only have reference to notice terminating the lease. Not only does this fact appear from the instrument itself, but it is made apparent from the circumstances under which the instrument was executed, to wit, the fact that she had previously occupied the premises under a like informal instrument that provided for 30 days' notice, and upon plaintiff refusing to sign an instrument providing for 90 days' notice to quit, the one in question was prepared, providing for 60 days' notice, which he executed. Under the terms of the writing, the term of the lease, while from month to month, could only be terminated by a notice of 60 days, which was not given.

Our decision renders it unnecessary to discuss other points made by appellants.

The judgment is reversed.

We concur: CONREY, P. J.; JAMES, J.

57 Cal. App. 749

WRIGHT v. SUPERIOR COURT OF LOS ANGELES COUNTY. (Civ. 3845.)

(District Court of Appeal, Second District, Division 2, California. May 22, 1922.)

1. Justices of the peace ⇨ 140—Statute as to time of appeal not modified by statute as to notice of rendition of judgment.

Code Civ. Proc. § 974, providing that parties dissatisfied with the judgment rendered in a civil action in justice's court may appeal therefrom to the superior court at any time within 30 days after rendition of judgment, was not affected by section 893, providing that notice of rendition of judgment must be given parties in writing, signed by justice; the judgment being rendered at time it is entered in judgment docket.

2. Justices of the peace ⇨ 155(1)—Failure to file moratorium affidavit does not affect question of time of filing appeal.

The fact that no moratorium affidavit was filed in an action in the justice court in no way affects the question of whether the appeal to the superior court was prosecuted in time.

Application for writ of prohibition by Warren E. Wright against the Superior Court of Los Angeles County to prevent further proceedings on appeal from a justice's court. Writ granted.

Holcomb & Holcomb, of Los Angeles, for petitioner.

David R. Faries and John R. Berryman, Jr., both of Los Angeles, for respondent.

WORKS, J. This is an application for a writ of prohibition. Petitioner was plaintiff

in an action pending in the justice court and procured judgment against defendant therein. More than 30 days after the justice had tried the cause, and had made the entry in his docket, "Judgment for plaintiff" for a certain amount and costs, defendant in the action filed his notice of appeal from the judgment. Respondent court denied a motion to dismiss the appeal. Petitioner, contending that the motion should have been granted, seeks now to prohibit respondent from proceeding further with the action. An alternative writ of prohibition was issued upon the filing of the petition, and the present question is whether the writ shall be made peremptory.

[1] Section 974, Code of Civil Procedure, as it stood when the justice made the above-mentioned entry in his docket and when the notice of appeal by the defendant from the judgment of the justice was filed, provided that "any party dissatisfied with a judgment rendered in a civil action in a police or justice's court, may appeal therefrom to the superior court of the county, at any time within thirty days after the rendition of the judgment," and it was decided in *Thomson v. Superior Court*, 161 Cal. 329, 119 Pac. 98, that a judgment is "rendered" in an action in a justice court when the justice makes entry in his docket of the fact that judgment has gone for one party or the other. Respondent contends, however, that section 893, Code of Civil Procedure, as it was amended after the decision in *Thomson v. Superior Court*, changed the law as before that amendment it had stood in section 974; in other words, that the amended section 893 operated to amend 974. The matter in section 893 which is supposed to have worked this change in the law is embraced in the sentence, "Notice of the rendition of judgment must be given to the parties to the action in writing signed by the justice;" the statement being followed by language directing how the notice is to be given. The contention of respondent is that, under the amended section 893, a judgment is not rendered by a justice until he has given the notice required by the sentence which we have quoted. This contention, surely, finds its refutation in the sentence itself. A justice is required by it to give notice "of the rendition of judgment"; that is, he is to give notice of a past and completed transaction. It is as if the Legislature had required him to give notice "that he has rendered judgment." We are satisfied that the notice of appeal was filed too late.

[2] Respondent alleges in his answer to the petition that no moratorium affidavit was filed in the action in the justice court, and contends in his brief, as if the contention could affect the question now before us, that the justice had no jurisdiction to render

judgment without the filing of such an affidavit. The failure to file the affidavit could in no way affect the question whether the appeal to respondent court was prosecuted in time.

A peremptory writ of prohibition will issue as prayed.

We concur; FINLAYSON, P. J.; CRAIG, J.

(57 Cal. App. 606)

PEOPLE v. CHEW JUEY. (Cr. 1032.)

(District Court of Appeal, First District, Division 2, California. May 5, 1922. Hearing Denied by Supreme Court, July 3, 1922.)

1. Homicide ☞250—Evidence held sufficient to sustain conviction.

In a trial for murder, *held*, the evidence was sufficient to support conviction.

2. Criminal law ☞742(1)—Credibility of witnesses for jury.

In a trial for murder resulting from a Chinese tong war, the credibility of witnesses who belonged to the same tong as deceased, accused belonging to a hostile tong, and whose testimony appeared to be memorized, was for the jury.

3. Criminal law ☞1160—Credibility of witnesses for trial judge in passing on motion for new trial.

In a trial for murder resulting from a Chinese tong war, the credibility of witnesses who belonged to the same tong as deceased, accused belonging to a hostile tong, and whose testimony appeared to be memorized, was for the trial judge, in passing upon a motion for a new trial.

4. Criminal law ☞1156(3)—Denial of motion for new trial not disturbed, where evidence would have warranted granting of motion but was merely cumulative.

Denial by the trial court of a motion for new trial, based on evidence which was not available at the trial, will not be disturbed as an abuse of discretion, where the evidence was merely cumulative but would have warranted the granting of a new trial.

5. Criminal law ☞1172(2)—Instruction to disregard testimony that witness for prosecution had been indicted for criminal conspiracy improper but not prejudicial.

Under Code Civ. Proc. § 2051, providing that a witness may not be impeached by evidence of particular wrongful acts except that it may be shown that he had been convicted of felony, an instruction that in weighing the testimony of a witness for the prosecution in a trial for murder, evidence tending to show that the witness had been indicted for conspiracy to commit a murder growing out of the same tong war from which the homicide in question resulted should be disregarded was improper although not so prejudicial to accused as to require reversal, this testimony being admissible to show the interest of the witness in the prosecution of accused.

6. Criminal law $\Rightarrow$ 811(5)—Trial court should not instruct jury as to testimony of particular witness.

The trial court should not single out a particular witness and instruct the jury as to how to weigh his testimony.

Appeal from Superior Court, City and County of San Francisco; Harold Louderback, Judge.

Chew Juey, alias Mock Jung Toy, was convicted of murder in the first degree, and he appeals. Affirmed.

Frank J. Hennessy and Thos. A. Keogh, both of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and John H. Rioridan, Deputy Atty. Gen., for the People.

NOURSE, J. Appellant was convicted of the crime of murder in the first degree, and the penalty of life imprisonment was imposed. Thereafter he moved for a new trial and for an arrest of judgment, both of which motions were denied. He appeals from the final judgment of conviction and the order denying his motion for a new trial.

[1] Appellant attacks the judgment upon the ground that the verdict is not sustained by the evidence. The case against appellant rests upon the testimony of the two Chinese witnesses, Yee Young and Wong Kai. From the testimony of these witnesses it appears that three or four Chinese entered a gambling room where the deceased was playing dominoes, one of whom shot the deceased while standing behind him. This assailant then fled from the room. The deceased followed his assailant into the hallway, shooting at him as he ran, and then fell to the floor. Three other Chinese were wounded. The appellant, it was said, approached the deceased as he was lying upon the floor and emptied his revolver into his body. Yee Young testified that he thereupon followed the appellant out into Grant avenue and had him in sight until he pointed him out to the officer who made the arrest.

[2, 3] It is the contention on the part of the appellant that the shooting was the result of a tong war in which the deceased and the two Chinese witnesses who testified against the appellant were members of one tong and the appellant was a member of another tong. For this reason it is argued that the testimony of these two witnesses should not be believed, and particular attention is drawn to the fact that their testimony is so closely identical that it bears evidence of having been memorized by them for the purpose of the trial. But these are matters which, even in a case of this nature, must be left to the judgment of the trial jury and to the discretion of the trial judge, who had this same question before him in passing upon the motion for a new trial.

[4] It is further argued that appellant's motion for a new trial should have been granted upon the showing that Lum Yap Wan, one of the Chinese who had been wounded at the time, was not available at the time of the trial but had thereafter made his affidavit to the effect that he had witnessed the shooting of Go Foin; that two shots were fired into his body by a Chinese wearing an army overcoat who was not the appellant in this case; that thereafter Go Foin started to run after his assailant when he was attacked by another Chinese named Leong Tong, who shoved Go Foin over in the hallway and then fired at least two shots into his body; and that Chew Juey was not either of the men who participated in the shooting. Though the evidence which appellant proposed to present through this witness would have been sufficient to warrant the granting of a new trial if the trial court had made the order, it is merely cumulative and would not justify our saying that the trial court abused its discretion in denying the motion.

[5, 6] Criticism is made of the instruction of the trial court to the effect that, in weighing the testimony given by the witness Yee Young, the jury should disregard any of the testimony tending to show that he had been indicted by the grand jury for criminal conspiracy. The subject-matter of the instruction was the question of impeachment of witnesses. Section 2051 of the Code of Civil Procedure provides that a witness may not be impeached by evidence of particular wrongful acts, except that it may be shown that he had been convicted of felony. The testimony relating to Yee Young's indictment was introduced for the purpose of showing that he was a member of a certain Chinese tong which had been having some trouble with the tong of which appellant was a member and that the witness had been charged with a conspiracy to commit a murder growing out of this tong war. The testimony was admitted without objection from the prosecution and was admissible for the purpose of showing the interest of the witness in the prosecution of the appellant. As a general rule it is not advisable for the trial court to single out a particular witness and to instruct the jury in any manner as to how it may weigh the testimony of that witness, but we do not believe that the instruction under consideration is so prejudicial to the interests of the appellant as to require a reversal of the judgment.

Other points raised do not require consideration.

Judgment affirmed.

We concur: **LANGDON, P. J.; STURTEVANT, J.**

57 Cal. App. 670

WELLS v. DIAS et al. (Civ. 4213.)

(District Court of Appeal, First District, Division 1, California. May 16, 1922. Hearing Denied by Supreme Court July 13, 1922.)

1. Easements ⚡5—Adverse user, to give title, must be hostile, under claim of right, communicated to the owner of the land.

A right of way by prescription over land can only be created by user, which is neither expressly nor impliedly licensed and permissive, and such user must be adverse and hostile, and under a claim of right communicated to the owner of the land.

2. Easements ⚡36(1)—Twenty years' adverse user without objection held to raise presumption of claim of right.

Where evidence showed a road had been in existence 45 years, and had been used by plaintiff and his predecessors in interest for over 20 years, openly, continuously, and without hindrance from any source, it is presumed that the user was under a claim of right and adverse to the owner, and such presumption, in the absence of evidence to the contrary, is sufficient to establish a prescriptive right of way.

3. Easements ⚡61(9½)—Adverse user under claim of right held for court or jury.

In suit by landowner against another landowner to enjoin defendants from interfering with the use of a right of way over their land, the question as to whether previous use of the way was under claim of right, or as a mere matter of neighborly accommodation, was one for the court or jury to determine.

4. Easements ⚡10(1)—Use of way with public does not prevent presumption of grant arising.

In suit by landowner against another landowner to enjoin interference with the right of way over defendants' land, the fact that the public in general used the same way with plaintiff did not prevent the presumption of a grant arising from more than 10 years' adverse user by plaintiff.

5. Appeal and error ⚡1050(1)—Admission of evidence to show right of way by necessity held, if error, not prejudicial.

In suit by landowner against another landowner to enjoin interference with a right of way over defendants' land, in which plaintiff claimed the right of way by prescription, admitting evidence to show a right of way by necessity, which in no manner could have controlled any finding made in the case, or changed the result, was, if error, not prejudicial.

6. Easements ⚡36(3)—Presence of gate over way held not to affect finding of acquisition of way by prescription.

In action by landowner against another landowner to enjoin interference with a way over defendants' land, in which plaintiff claimed a right of way by prescription, the fact that, when defendants' land was inclosed, gates were placed across the way to prevent cattle from destroying crops, and that such gates did not interfere with plaintiff's use of the way, did not

affect a finding that plaintiff had acquired a way by prescription.

Appeal from Superior Court, Fresno County; S. L. Strother, Judge.

Suit by C. P. Wells against M. A. Dias and another. From a judgment for plaintiff, defendants appeal. Affirmed.

Frank Kauke, of Fresno, and H. R. Crozier, of Sanger, for appellants.

Thomas F. Lopez, of Fresno, for respondent.

TYLER, P. J. This action was brought to enjoin defendants from interfering with the use and enjoyment of an alleged right of way over the lands of defendants. Plaintiff claimed that the right of way has been used openly and adversely by him and his grantor and by others as a means of ingress and egress to his lands for wagons, teams, and vehicles, for more than 10 years prior to the filing of the complaint. Defendant denied that plaintiff had any such right of way or other interest in the lands, and by cross-complaint alleged that he was the sole owner thereof, and prayed that his title be quieted as against the plaintiff, whom he seeks to enjoin from further trespassing upon the property. Trial was had before the court sitting without a jury. Plaintiff had judgment, and defendant appeals.

From the record it appears that one Manuel Valenzuela, some 25 years ago, procured title to the land upon which the easement is claimed, partly by homesteading and partly by purchase. Valenzuela conveyed to one Merz, who in turn sold to defendant about 2 years prior to the filing of this complaint. Situated on the property in question is a road. This road is known as the Jacalitos Creek road, and it runs in a northerly and southerly direction through the lower foothills of the Coast Range mountains some distance out from the city of Coalinga in Fresno county. The road follows Jacalitos creek, which creek flows through and over the property of defendant, and enables plaintiff and others who live in the immediate neighborhood to reach Coalinga and the plains below, which lie east of the Coast Range mountains. Plaintiff's property and residence is located in a southerly direction from, and a short distance above, defendant's lands.

In July, 1920, defendant laid a pipe line across the road, making it more or less impassable, and prevented plaintiff from using the same. The present suit followed. The trial court found that for more than 20 years last past the road in question existed and still exists, and that it has been used during all of said time by plaintiff and his predecessors in interest for the purpose of going to and from their property. It further found that for more than 10 years plaintiff

and his predecessors have used the road uninterruptedly, openly, notoriously, continuously, and adversely to the rights of defendant and his predecessors in interest, and with their full knowledge, and without asking or receiving permission from any one, and without objection, and that plaintiff by such use had acquired a right by prescription to the claimed easement. The sole question here presented is whether or not the evidence supports the finding that plaintiff acquired by prescription a right of way over and through the lands in question.

[1, 2] Such a right can only be created by user, which is neither expressly or impliedly licensed or permissive, and such user must be adverse and hostile and under a claim of right communicated to the owner of the land. Where, however, the user is continuous, or openly and notoriously adverse to the owner, it creates a presumptive knowledge in him that the person using the land is doing so under a claim of right. Here the evidence shows without conflict that the road in question has always been in existence, or at least so since 1877, and has been used by plaintiff and his predecessors in interest for over 20 years, openly, continuously, and without hindrance from any source. In such a case it is to be presumed that the use of the easement was under a claim of right and adverse to the owner, and such presumption, in the absence of evidence to the contrary, is sufficient to establish a prescriptive right of way. *Yuba Consolidated Goldfields v. Hilton*, 16 Cal. App. 228, 116 Pac. 712, 715.

[3] Appellant, while conceding the user, contends that the evidence merely shows that the road was used by plaintiff in common with the public in general by way of neighborly accommodation, and that plaintiff never communicated to defendant any claim of right to travel over the land. The question as to whether the use was under claim of right or as a mere matter of neighborly accommodation is one for the court or jury to determine as a fact in the light of the relations between the parties and all the surrounding circumstances. *Humphreys v. Blasingame*, 104 Cal. 40, 37 Pac. 804; *Fleming v. Howard*, 150 Cal. 28, 87 Pac. 908; *Conaway v. Toogood*, 172 Cal. 706, 158 Pac. 200. The findings upon this subject will not, therefore, be disturbed.

[4] Further claim is made that no presumption of grant of right of way could arise where there is evidence to show that the way was used in common with the public. We see no merit in this contention. The user on the part of plaintiff was in no manner impaired by the enjoyment of a like right in others. Whatever may have been the nature of their use, the claimed easement of plaintiff was not based thereon, nor dependent for its enjoyment upon this fact. The evidence

upon this subject shows that the use enjoyed by plaintiff and his predecessors was had under such circumstances as would indicate to the owner of the land that such use was claimed by them as of right, and that it was not regarded by the parties as a mere privilege revocable at the pleasure of the owner of the soil, and it is sufficient to warrant and support the findings. *Tarpey v. Veith*, 22 Cal. App. 289, 292, 134 Pac. 367.

[5, 6] Complaint is made of the admission of evidence on the part of plaintiff tending to show a right of way by necessity rather than by prescription. Conceding the admission of this evidence to have been erroneous, it is without prejudice, as it in no manner could have controlled any finding or changed the result of the case. *Humphreys v. Blasingame*, 104 Cal. 40, 37 Pac. 804. Nor does the fact that the evidence shows that the road was barred by gates which were required to be opened and closed in passing over the land, affect the finding that plaintiff had acquired a prescriptive use. *Bolger v. Foss*, 65 Cal. 250, 3 Pac. 871; *Jones on Easements*, § 279. The evidence upon this subject merely showed that, when fences were first erected upon the property, gates were placed thereon to prevent cattle from destroying the crops, and that they in no manner interfered with plaintiff's enjoyment of the easement.

From what we have said, it follows that the judgment should be, and it is, hereby affirmed.

We concur: KERRIGAN, J.; KNIGHT, Justice pro tem.

57 Cal. App. 611 DERN v. DEIN. (Civ. 4071.)

(District Court of Appeal, First District, Division 2, California. May 5, 1922. Rehearing Denied May 31, 1922. Hearing Denied by Supreme Court July 3, 1922.)

1. Appeal and error $\hookrightarrow$ 1024(5)—On conflicting evidence as to entering satisfaction of judgment refusal to set it aside affirmed.

On appeal from an order denying a motion to set aside satisfaction of a judgment, evidence held to present a sufficient conflict to require the appellate court to support the order of the trial court denying the motion to set aside the satisfaction of judgment.

2. Judgment $\hookrightarrow$ 898(1)—That satisfaction is entered without consideration does not require court to set it aside on motion.

Under Code Civ. Proc. § 675, relating to methods of satisfying a judgment, and providing that when a judgment is satisfied in fact otherwise than upon execution a party or attorney must give such acknowledgment or make such indorsement, where a party entered a satisfaction on a judgment without consideration, the court was not required on motion to set the satisfaction aside.

Appeal from Superior Court, City and County of San Francisco; Edmund P. Morgan, Judge.

Action by John Dern against E. A. Dein. From an order denying plaintiff's motion to set aside satisfaction of a judgment for plaintiff, plaintiff appeals. Affirmed.

Hearing denied; WILBUR, J., dissenting.

Geo. D. Collins, Jr., of San Francisco, for appellant.

Goldman, Nye & Surr and Douglas A. Nye, all of San Francisco, and Morgan V. Spicer, of Berkeley, for respondent.

NOURSE, J. This is an appeal from an order of the superior court denying plaintiff's motion to vacate and set aside the satisfaction of judgment which had theretofore been duly executed and filed in the action. The appeal is presented upon a bill of exceptions, which contains merely the affidavits which were presented to the trial court at the hearing upon the motion, a copy of the original judgment in the action, and a copy of the satisfaction of that judgment. There is also added to the transcript a copy of the judgment roll made up after the trial of the original action in 1914, a copy of the minute order denying plaintiff's motion to vacate the satisfaction of said judgment, and a copy of the notice of appeal from said order. The record does not contain either the motion which was the basis of this order or the notice thereof, and we are unable to ascertain from the record the grounds upon which the motion was made. We are informed in the briefs that the motion was based upon the grounds that satisfaction was made without consideration, that it was untrue in point of fact and that it was made merely for the purpose of releasing a certain lien of the judgment to assist the respondent in procuring a renewal of a loan which he had upon a piece of property covered by the judgment lien. If these were the grounds and the only grounds upon which the motion was made, they all present questions of fact which the trial court was called upon to determine. From the affidavits which are included in the bill of exceptions it appears that to some extent at least there was a conflict between the parties as to these facts. In support of the judgment, of course, we are bound to conclude that the trial court resolved these questions of fact against the appellant.

[1] It is urged by appellant, however, that there is no conflict on the fact that the satisfaction was executed without consideration, and that no part of the judgment was paid at the time when the satisfaction was executed. The facts are that appellant, who is the uncle of respondent, had recovered a judgment on default, and that this judgment had become a lien upon a piece of property

which the respondent owned. This property was subject to a prior lien evidenced by a deed of trust to a bank for a loan of money advanced to respondent. The time had come when this deed must either be renewed or foreclosed. If renewed it would become a second lien to the lien of appellant's judgment. When confronted with this situation the respondent sought his uncle, and persuaded him to file and record a satisfaction of the judgment in order that he might renew the lien due the bank. The satisfaction was executed by the appellant, and personally recorded by him upon the promise of respondent that notwithstanding the entry of the satisfaction of judgment he would make payments on the judgment when he was able to do so. It is not alleged that the satisfaction was procured by fraud, misrepresentation, or undue influence on the part of respondent. So far as appears, it was executed willingly, and the affidavits submitted by respondent allege that it was executed after appellant had been fully and fairly advised of its true legal effect. It also appears that some time after the satisfaction was executed the respondent paid the sum of \$65 upon the judgment.

[2] In view of these facts, we cannot say that there is no conflict in the evidence presented; but, even if it were true that the satisfaction was entered without consideration, we do not understand that that fact alone requires the court on motion to set the satisfaction aside. The law does not invite litigation or encourage it to be continued, and a judgment creditor may terminate it by filing a satisfaction in the manner prescribed in section 675, Code of Civil Procedure.

Order affirmed.

We concur: LANGDON, P. J.; STURTEVANT, J.

58 Cal. App. 19

BOGMUDA v. YOUNG, Superior Court Judge.
(Civ. 2495.)

(District Court of Appeal, Third District, California. May 27, 1922. Hearing Denied by Supreme Court July 24, 1922.)

1. Courts  **12(5)—Jurisdictional fact of defendant's residence need not appear in records.**

Proof that defendant resides in the judicial township of suit is jurisdictional, but it is not required that the fact of such residence shall appear in the complaint or judgment or any records in the case.

2. Certiorari  **66—Presumption of sufficiency of evidence to support decision of superior court on jurisdictional question indulged.**

Upon appeal from the decision of the justice's court upon the question of jurisdiction of the person, the superior court has jurisdiction of that question, and, upon application for cer-

tiorari to review the superior court, it must be presumed there was evidence to support its judgment, even if the sufficiency of the evidence could be questioned in such proceeding.

3. Justices of the peace §84(4), 161(3)—
Statutory grounds for dismissal for lack of jurisdiction not available after general appearance.

By entering general appearance in the justice's or superior court, defendant waives his right to question jurisdiction, under Code Civ. Proc. § 890, subd. 4, as amended in 1905, providing for a dismissal "when the action is brought in the wrong county, or township, or city."

4. Certiorari §28(2)—Does not lie to review decision of superior court on appeal from justice's court on jurisdictional question.

The decision of the superior court upon the question of jurisdiction of the person, brought up on appeal from the justice's court, given in regular pursuance of its authority, is final, and will not be reviewed by certiorari, notwithstanding Code Civ. Proc. § 832, providing that certain actions must be tried "in the township or city in which the defendant resides."

Petition by Pete Bogmuda for certiorari, against D. M. Young, as Judge of the Superior Court of the County of San Joaquin, State of California, respondent, to review the proceedings of the superior court, wherein F. D. Hart was plaintiff and petitioner was defendant on an appeal from justice's court, in an action for services rendered. Writ denied.

G. C. Allen and A. H. Carpenter, both of Stockton, for petitioner.

FINCH, P. J. Petitioner asks this court to review the proceedings in the superior court of San Joaquin county in a cause wherein F. D. Hart was plaintiff and petitioner was defendant.

It is alleged that Hart brought an action against petitioner in Stockton township, and in the complaint therein averred:

"That within two years last past said plaintiff rendered labor to said defendant, at the latter's special instance and request, in the agreed value of \$325; that upon said amount the sum of \$100 has been paid, leaving due the sum of \$225, no part of which has been paid"; that summons was duly issued and served upon petitioner; "that thereafter, in obedience to said summons, and not voluntarily," the petitioner demurred to the complaint on the grounds "that the court has no jurisdiction either of the person of the defendant or the subject-matter of the action," and that the "complaint does not state facts sufficient to constitute a cause of action"; that the court overruled the demurrer, and the defendant answered, alleging "that the court has no jurisdiction of the person of the defendant or of the subject-matter of the action for the reason that the defendant is not, and never was, a resident of the said Stockton

township, and the alleged contract to pay for the said pretended work and labor specified in said complaint, was not made in said Stockton township nor to be performed therein," denying the allegations of the complaint, and pleading a settlement and payment of the alleged indebtedness; that "at the trial of said cause in the justice's court the defendant called the attention of the justice to the fact that it had no jurisdiction of the subject-matter of the action or of the person of the defendant, and objected to the justice's court determining any question but that of jurisdiction; the justice's court then and there overruled the defendant's objection * * * and rendered judgment against the defendant"; that the defendant appealed from such judgment "upon questions of both law and fact"; that in the superior court "the defendant * * * called the attention of said court to the fact that neither the justice's court nor the said superior court had jurisdiction of the subject-matter of the action or of the person of the defendant, and then and there objected to the court determining any question but that of jurisdiction, but the defendant, as the judge of the said superior court, overruled the defendant's said objection and rendered judgment against said defendant"; that "neither the said justice's court nor the said superior court had jurisdiction in said case of the subject-matter of the action or of the person of the defendant, for the reason that it does not appear on the face of the complaint, or in the judgments entered therein, or in any of the records of said case, that either the said justice's court * * * or the said superior court * * * had jurisdiction of the subject-matter of the action * * * or jurisdiction of the person of the defendant."

[1, 2] Proof that a defendant resides in the judicial township in which he is sued is jurisdictional, but it is not required that the fact of such residence shall "appear on the face of the complaint, or in the judgment entered therein, or in any of the records" in the case. *Jolley v. Foltz*, 34 Cal. 321. See, also, *In re Williams*, 102 Cal. 70, 36 Pac. 407, 41 Am. St. Rep. 163. By his answer the defendant tendered the issue that his residence was not in Stockton township. By his appeal he asked the superior court to decide that issue. The court certainly had jurisdiction to determine the question thus raised. It does not appear from the petition that the court decided the question against petitioner's contention on insufficient evidence or without an opportunity to prove his place of residence. It must be presumed that there was evidence to support the judgment, even if the sufficiency of the evidence could be inquired into in this proceeding.

[3] Petitioner relies on the case of *Holbrook v. Superior Court*, 106 Cal. 539, 39 Pac. 936, in support of his contention that the defense of want of jurisdiction can be raised by answer. At the time that case was decided section 890, subd. 4, of the Code of Civil Procedure provided for the dismissal

of an action "when it is objected at the trial, and appears by the evidence, that the action is brought in the wrong county, or township, or city." In 1905 subdivision 4 was amended to provide for a dismissal "when the action is brought in the wrong county, or township, or city," and it is silent as to the manner in which the question may be raised. In *Vance v. Superior Court* (Cal. App.) 191 Pac. 945, where the facts were similar to those here, the court said:

"By his general appearance in the justice's and superior court petitioner waived his right to raise the question of jurisdiction"—citing *Olcese v. Justice's Court*, 156 Cal. 82, 103 Pac. 317, and *American Law Book Co. v. Superior Court*, 164 Cal. 327.

[4] See, also, *Roberts v. Police Court of City and County of San Francisco* (Cal. Sup.) 195 Pac. 1053. The provision of section 832 of the Code of Civil Procedure to the effect that actions such as that here involved must be commenced and tried "in the township or city in which the defendant resides" relates to the jurisdiction over the person of the defendant. *Ohio Southern R. Co. v. Morey*, 47 Ohio St. 207, 24 N. E. 269, 7 L. R. A. 701. This proceeding is sought to review the action of the superior court, not that of the justice's court.

"This court has never recognized the right of a petitioner to a writ of certiorari to review the judgment of a justice's court after appeal taken and determined in the superior court." *Olcese v. Justice's Court*, supra.

"By its appeal to the superior court the petitioner submitted the question of want of jurisdiction of its person to the superior court and * * * the tribunal to which the appeal was thus prosecuted had the right to decide that question incorrectly as well as correctly." *American Law Book Co. v. Superior Court*, supra.

"If such tribunal has regularly pursued its authority, our inquiry stops." *Matter of Hughes*, 159 Cal. 360, 363, 113 Pac. 684, 686.

It does not appear from the petition herein that the superior court did not regularly pursue its authority.

The petition is denied.

We concur: HART, J.; BURNETT, J.

57 Cal. App. 651

GOEBEL v. GREGG et al. (Civ. 3884.)

(District Court of Appeal, Second District, Division 1, California. May 12, 1922.)

4. Fraudulent conveyances —57(1)—Deed of gift valid if grantor not indebted.

"A deed of gift is valid if the grantor was not indebted at the time he made it, or if he had other means outside of the property conveyed with which to pay his indebtedness.

2. Fraudulent conveyances —69(1)—With intent to defraud subsequent creditor is void as to such creditor.

A deed of gift, which is fraudulent in its inception and made with intent of grantor to defraud a future creditor, is as to such person void.

3. Fraudulent conveyances —69(1)—Conveyance by debtor knowing creditor dealt with him relying on ownership of property, annulled.

Where a debtor secretly and without knowledge of one with whom he contracts indebtedness transfers his property without consideration, knowing that the creditor in dealing with him relied upon his ownership, it constitutes actual fraud, and upon showing such facts the transfer may be annulled.

4. Fraudulent conveyances —263(1)—Creditor's not negating creditor's notice of debtor's gift of his property, before extending credit, held insufficient.

Where a deed of gift of realty from a father to his daughter was made on October 3d, in an action to set aside the deed as in fraud of creditor who provided necessities to the donor's wife, a complaint, not alleging that plaintiff was without knowledge of the transfer of October 3d, or that he was induced to furnish the goods in reliance on the fact and belief that the donor was still the owner of the property, and not alleging that the deed was not duly filed for record, etc., was insufficient, as it did not show that plaintiff was defrauded by the donor's act in giving the property to his daughter prior to the time the indebtedness was contracted.

5. Pleading —254 — After second amended complaint filed, no abuse of discretion in sustaining demurrer without leave to further plead.

Where the plaintiff failed after filing three complaints in an effort to state a cause of action, there was no abuse of discretion in sustaining the demurrer to the second amended complaint without leave to file a further complaint.

Appeal from Superior Court, Los Angeles County, Charles S. Burnell, Judge.

Action to annul certain debts on the ground of fraud, by Henry O. Goebel against Chenle Lee Gregg and others. From judgment for defendants, plaintiff appeals. Affirmed.

Rohe, Yakey & Devin, of Los Angeles, for appellant.

Ticknor & Carter & Webster, of Pasadena, and S. L. Carpenter, of Los Angeles, for respondents.

SHAW, J. Plaintiff appeals from a judgment entered for defendants following an order of court sustaining a general demurrer to the second amended complaint, without leave to further amend.

The purpose of the action was, upon the ground of fraud, to obtain a decree setting aside and annulling certain deeds of conveyance whereby defendant Boswell transferred to his daughter, Chenie Lee Gregg, certain real estate, which by her was conveyed to defendant Smith, and have the same adjudged to be subject to execution upon a judgment theretofore rendered in favor of plaintiff and against Boswell.

As appears from the complaint, the wife of defendant Boswell, owing to his cruel treatment of her, was, on the 12th day of October, 1918, compelled to leave the home which they jointly occupied, and commencing on said October 12, 1918, and continuing up to the time of her death, which occurred on January 26, 1920, plaintiff, at the special instance and request of Boswell, provided her with food, shelter, and other necessities of life, for which on May 25, 1920, he obtained a judgment against Boswell in the sum of \$2,234.60. An execution issued thereon was returned nulla bona. It further appears that nine days before the making of the contract upon which the judgment was founded, to wit, on October 3, 1918, Boswell, without money consideration, conveyed the property in question to his daughter, who, on May 29, 1920, with her husband, and likewise without consideration, conveyed the same to defendant Smith. The material allegations upon which plaintiff relies in pleading the facts constituting the fraud are that the conveyance so made by Boswell, and that of the Greggs to Smith, was "made for the purpose of cheating and defrauding the creditors of the defendant Boswell, particularly the plaintiff, and preventing the plaintiff from recovering for the necessities of life" furnished by plaintiff to the wife of Boswell at the latter's request; that at the time of making said transfers and up to the time of filing the complaint, Boswell was and is insolvent, and the "transfers were made by the defendant Boswell in contemplation of such insolvency, and with the express intention of depriving the plaintiff of recovering from defendant Boswell on account of the agreement which he proposed making with the plaintiff on said 12th day of October, 1918."

[1-3] The chief question in the case is as to whether the transfer was void as to plaintiff, who was a subsequent creditor of Boswell. It is a general rule that a deed of gift is valid if the grantor was not indebted at the time he made it, or if he had other means outside of the property conveyed with which to pay his indebtedness. A man's property is his own, and he has a right to give it away if he so desires, and this right cannot be questioned by other than creditors existing at the time, and not then if he has other means with which to meet his obligations. To this rule, however, there is the

well-recognized exception that a deed of gift which is fraudulent in its inception and made with intent to enable the grantor to defraud a future creditor, is as to such person void. *Bush & Mallett Co. v. Helbing*, 134 Cal. 676, 66 Pac. 967. This exception is based upon the fact that if the debtor secretly and without the knowledge of one with whom he contracts an indebtedness transfers his property without consideration, knowing that the creditor in dealing with him relies upon his ownership thereof, it constitutes actual fraud, and upon a showing of such facts such transfer may be annulled. On the contrary, if the deed of transfer so made is placed of record so as to constitute constructive notice, or the subsequent creditor has actual knowledge of the transfer, it cannot be said that in extending the credit he was deceived or in any way misled by the act of which he complains.

[4] Measured by the rule so stated, and disregarding objections upon the ground that the allegations hereinbefore quoted are mere conclusions, the complaint is barren of facts showing that plaintiff, when he made the contract with Boswell on October 12th, was without knowledge of the transfer so made on October 3d, or that he was induced so to do in reliance upon the fact or belief that Boswell was owner of the property. It is not alleged in the complaint that the transfer was secretly made, nor that the deed was not immediately upon its execution filed for record; nor is it alleged that plaintiff was without knowledge of the making thereof, nor that in making his contract he believed or had any reason to believe that Boswell was owner of the property. Indeed, from aught that appears to the contrary, the deed to defendant Chenie Lee Gregg was duly filed for record immediately upon its execution, of which fact and the fact of the transfer so made by Boswell, plaintiff was fully advised, and with actual knowledge thereof, and knowing that Boswell, as he had a right to do, had given the property to his daughter, deliberately made the contract out of which the indebtedness arose. Hence it cannot be said that he was defrauded by the act of Boswell in giving the property to his daughter prior to the time when the indebtedness was incurred. *Schell v. Gamble*, 153 Cal. 448, 95 Pac. 870; *Marple v. Jackson*, 184 Cal. 411, 193 Pac. 940; 12 R. C. L. p. 497.

[5] Having failed after filing three complaints in an effort to state a cause of action, it was no abuse of discretion on the part of the court to sustain the demurrer to the second amended complaint without leave to file a further complaint. Moreover, plaintiff did not apply to the court for leave to file a third amended complaint, or offer any amendment covering the particulars wherein the complaint was held insufficient (*Burling v. Newlands*, 112 Cal. 476, 44 Pac.

810), for the reason that presumably he could not do so.

The judgment is affirmed.

We concur: CONREY, P. J.; JAMES, J.

58 Cal. App. 66

FOWLER v. LANE MORTGAGE CO.
(Civ. 3816.)

(District Court of Appeal, Second District, Division 1, California. June 1, 1922.)

1. Execution — 272(2)—Possession of tenant is notice to purchaser of unrecorded lease.

A purchaser at a sale under execution, who knew that at the time the lands were occupied by a person other than the record owner, is charged with knowledge of facts sufficient to put him on inquiry which, if pursued, would have revealed that the person in possession was the tenant of the lessee under an unrecorded lease, the rent on which had been paid in advance, so that the purchaser is not entitled to recover the rents during the time for redemption from the lessee under Code Civ. Proc. § 700, which protects only purchasers in good faith; that is, under Civ. Code § 1214, those without notice, actual or constructive, of the rights of the lessee.

2. Execution — 272(1)—Purchaser with notice not entitled to rent paid debtor before lien attached to land.

Though the purchaser at sale under foreclosure of a recorded mortgage can recover from the lessee rent during the period for redemption, though such rent had been paid in advance because the lessee was charged with notice of the lien of the mortgage, the purchaser at a sale under execution has not such right, where the lease and advance payment were made before the judgment became a lien upon the land.

Appeal from Superior Court, Los Angeles County; Frederick W. Houser, Judge.

Action by George J. Fowler against the Lane Mortgage Company, a corporation. Judgment for plaintiff, and defendant appeals. Reversed.

E. A. Lane, of Los Angeles, for appellant.
Burton E. Hales, of Redlands, for respondent.

SHAW, J. Basing his right so to do upon the provisions of section 707, Code of Civil Procedure, plaintiff as the purchaser of a tract of land at judicial sale, brought this action to recover from defendant as tenant for the use and occupation of the same during the period fixed for the redemption thereof. He had judgment, from which defendant has appealed.

The complaint contains two counts, in one of which it is alleged that defendant as tenant was in possession and control of the

land; and in the other, that O. T. Sutton farmed the same under an agreement to pay defendant for the use thereof a part of the crop, the value of which so paid was \$1,965.47.

It appears from the pleadings, stipulation of facts and meager evidence offered that on April 1, 1917, and at all times thereafter referred to, George L. Cooper was the owner of record of tract 58, township 13 south, range 15 east, S. B. M., in Imperial county, subject to a deed of trust whereby the same was conveyed to Los Angeles Trust & Savings Bank to secure the payment of a loan made to him by Lane Mortgage Company: that on said date he executed a lease of said property to defendant, the term of which, as expressed therein, was to continue until such loan should be paid, and for which the lessee in good faith paid a full and adequate rental in advance for the entire term. The lease was not recorded. On January 22, 1918, George J. Fowler and his coplaintiffs, in an action based upon a demand that arose after the execution of the lease and brought in the superior court of San Bernardino county, obtained a money judgment against Cooper upon which an execution was issued to the sheriff of Imperial county under and by virtue of which he levied upon all interest of Cooper in the land in question, and on the 4th day of June, 1918, sold the same to plaintiff, George J. Fowler, to whom on said date he issued a certificate of purchase, a duplicate of which was filed for record on August 7, 1918. No redemption was made of the property within the year allowed therefor, during all of which time and prior thereto it was in the open and actual possession and occupancy of one O. T. Sutton as a subtenant of defendant to whom, between June 4 and August 1, 1919, he paid as rent for the use thereof, for the year immediately following date of sale to plaintiff, the sum of \$1,965.47.

If plaintiff is entitled to recover the value of the use and occupation of the property, then, upon the allegations of the complaint, it is immaterial whether defendant was in the actual occupation thereof, or farmed it through its subtenant, from whom it received the rents and profits.

[1] Section 700, Code of Civil Procedure, provides that—

“Upon a sale of real property, the purchaser is substituted to and acquires all the right, title, interest, and claim of the judgment debtor thereto on the date of the levy of the execution thereon, where such judgment is not a lien upon such property.”

In this case the judgment was not a lien upon the property and, under the section quoted, the right, title, and interest of Cooper was such only as he had in the property

upon the date of the levy, which rights were subject to the lease for which he had in advance received adequate payment. Defendant's lease, however, as found by the court, was for a term exceeding one year, and not recorded, by reason of which facts it was void as to plaintiff, whose certificate of purchase was recorded on August 7th, provided the purchase was made in good faith; that is, without notice, actual or constructive, of the rights of defendant under the unrecorded lease. Section 1214, Civ. Code. The court so found. Appellant challenges the finding for want of sufficient evidence to support it. Whether or not the contention is warranted depends upon the circumstances the existence of which as stipulated are:

"That Sutton was openly in the actual, exclusive possession as subtenant of defendant of all the land at and for more than one month prior to all times referred to in the amended complaint as and claiming as tenant under the lease from defendant referred to in the answer, and farming said land and paying the rent therefor to the defendant."

That an unrecorded deed is valid as between the parties and as against subsequent purchasers having notice thereof, and that the possession of the grantee of such unrecorded deed is notice of his title and claim to a subsequent purchaser, admits of no controversy. *Beattie v. Crewdson*, 124 Cal. 577, 57 Pac. 463. As clearly stated in *Pell v. McElroy*, 36 Cal. 268, and quoted with approval in *Scheerer v. Cuddy*, 85 Cal. 270, 24 Pac. 713:

"The fact of open, notorious, and exclusive possession and occupation of lands by a stranger to a vendor's title, as of record, at the time of a purchase from and conveyance by such a vendor out of possession, is sufficient to put such purchaser upon inquiry as to the legal and equitable rights of the party so in possession, and such vendee is presumed to have purchased and taken a conveyance from the vendor with full notice of all the legal and equitable rights in the premises of such party in possession and in subordination to these rights, and this presumption is only to be overcome or rebutted by clear and explicit proof on the part of such purchaser, or those claiming under him, of diligent, unavailing effort by the vendee to discover or obtain actual notice of any legal or equitable right * * * in behalf of the party in possession."

[2] We think the same principle is applicable to the possession of land under an unrecorded lease for a term of years. *Peasley v. McFadden*, 68 Cal. 611, 10 Pac. 179; *Dutton v. Warschauer*, 21 Cal. 609, 82 Am. Dec. 765. The admitted actual and open possession of the land by Sutton, as tenant of defendant, was sufficient to put plaintiff, in dealing with the property, upon inquiry as to the rights of his landlord, and he is chargeable with notice of all facts which he might have ascertained had he pursued the inquiry with proper diligence. *O'Rourke v. O'Connor*, 39 Cal. 442. There is neither pleading nor evidence tending to show an excuse for failure to make the inquiry, or that if made it would have been unavailing, and hence plaintiff is presumed to have had knowledge, at the time of the purchase, of the fact of defendant's leasehold interest in the property covering the period of redemption from the sale so made. Since prior to the levy of the execution defendant had paid Cooper for the use and occupation of the property, of which fact plaintiff, under the circumstances, must be deemed to have had notice, he could not be a purchaser in good faith. Upon no equitable principle could defendant's property be subjected to the payment of Cooper's debt. *Webster v. Cook*, 38 Cal. 423. Where a leasehold is acquired subsequent to the execution and record of a mortgage, the lessee, since chargeable with constructive notice thereof, takes the property subject to the same, and if a sale is had under a decree of foreclosure the purchaser, as provided by section 707, Code of Civil Procedure, is, as against the lessee, entitled to the rents during the period of redemption, even though paid in advance to the owner. This for the reason that the rights of the mortgagee, of which both the lessee and lessor have notice, could not be impaired by the subsequent acts of the parties. *U. S. Mortg. Co. v. Willis*, 41 Or. 481, 69 Pac. 266; *Harris v. Foster*, 97 Cal. 292, 32 Pac. 246, 33 Am. St. Rep. 187. Such facts, however, are not involved in this case.

Our conclusion renders it unnecessary to discuss other grounds upon which a reversal is urged.

The judgment is reversed.

We concur: CONREY, P. J.; JAMES, J.

57 Cal. App. 762

DABNEY et al. v. KEY et al. (Civ. 4222.)

(District Court of Appeal, First District, Division 2, California. May 22, 1922.)

1. Pleading $\S$ 364(5)—Allegation payment was made through agent is probative fact properly stricken.

In an action for specific performance, an allegation in the complaint that the consideration paid for the execution of the contract was paid to defendants through an agent of plaintiffs was an allegation of a probative fact, not necessary to the sufficiency of the pleading, and was properly stricken out.

2. Pleading $\S$ 364(3)—Allegation held properly stricken as redundant.

In a complaint for specific performance of a contract to give an oil lease, which alleged that defendants refused to perform their agreement, and ever since have failed and refused to do so, an allegation, immediately following, that defendants repudiated their agreement and declared they were not bound by it and would not perform it, was clearly redundant, and it was not error to strike it out.

3. Specific performance $\S$ 32(3)—Agreement to execute oil lease which lessee could surrender will not be enforced.

An agreement by defendants to give plaintiffs an oil lease by the terms of which plaintiffs were required to drill a well on the premises and to make certain payments to defendant, but which gave plaintiffs the right to surrender the lease without liability for failure to drill the well, did not create a mutual obligation, so that the agreement of defendants to execute the lease will not be specifically enforced at the suit of the plaintiffs.

Appeal from Superior Court, Los Angeles County; L. H. Valentine, Judge.

Action for specific performance by Joseph B. Dabney and others against Thomas B. Key and others. Judgment for defendants, when plaintiffs declined to amend after demurrer to the complaint was sustained, and plaintiffs appeal. Affirmed.

Robert M. Pease, of Los Angeles, for appellants.

Adolph B. Rosenfield, of Long Beach, for respondents.

STURTEVANT, J. The plaintiffs commenced an action against the defendants to enforce a specific contract to make a lease of certain lands for the purpose of developing oil wells thereon. To the amended complaint the defendants interposed a demurrer and a motion to strike. The motion was granted in part and denied in part. On July 14, 1921, the demurrer was sustained, and the plaintiffs were given 10 days to amend. They did not amend, and on August 16 an order was made awarding judgment in favor of the defendants for their costs. The plain-

tiffs have appealed from the judgment and have brought up the judgment roll.

[1] The motion to strike contained eight different assignments. It was granted as to assignments 5 and 7 and was denied as to the others. The whole of the amended complaint clearly shows that it was the theory of the plaintiffs that if a lease were made the same would run to J. P. Dabney as lessee, and that the negotiations were carried on, at least in part, by Clifford R. Dabney acting as the agent for J. B. Dabney. Paragraph III alleged:

"That at the time of the execution of said agreement to lease said J. B. Dabney, by and through said Clifford R. Dabney, paid to the defendants, and they still retain the sum of twenty-five (\$25) dollars as consideration for the said agreement to lease."

Acting on assignment No. 5 the court struck out the words, "by and through said Clifford R. Dabney." The expression was but a probative fact, not necessary to the sufficiency of the pleading, and was properly stricken out.

[2] In paragraph IV, among other things, the plaintiffs had pleaded:

"That the defendants then failed and refused to perform their said agreement to lease, and refused to execute to the plaintiffs, or either of them, any lease of said premises, and ever since have so failed and refused. [That defendants then repudiated their said agreement to lease, and declared to plaintiffs that the defendants were not bound by the same and would not perform.] That the plaintiffs and each of them duly performed all the conditions of said agreement to lease on the part of them or either of them to be performed, and that the plaintiffs and either of them since the time of said tender and offer always have and has been ready and willing to execute the said lease." (Brackets ours.)

Under assignment No. 7 the court struck out the sentence inclosed in brackets. The sentence was clearly redundant, and the court committed no error in striking it out. In the amended complaint the plaintiffs pleaded:

That the defendants are the owners of a certain tract of land in Los Angeles county. That on the 14th day of February, 1921, the defendants agreed in writing to execute a lease, "to contain the following terms and conditions: (1) Drilling to be started on or before six months from and after the date thereof; (2) rent to be \$10 per acre per month payable monthly in advance during said term of six months unless drilling is started sooner, in which event, rent is to cease; (3) royalty to be the one-sixth part of all oil or gas obtained, saved and sold on or from said lands; (4) the said lease to be in other particulars the same as any usual and customary oil lease."

That plaintiffs paid \$25 for the option. That on the 16th day of March, 1921, they

tendered to the defendants a written lease which is set forth as an exhibit; that the defendants refused and now refuse to execute the lease so tendered and presented. They also plead:

"That as to the defendants the consideration for said lease (namely, the sum of \$25 cash and of \$10 per acre per month, rental therein specified and the royalties, to be paid by the lessee therein to the lessor, and the other terms and covenants of said lease), was and is just, reasonable and adequate."

They further allege that the defendants threaten to develop or cause to be developed said lands for oil and gas to the injury of the plaintiffs, etc. The respondents interposed a demurrer which, among other things, pleaded that the amended complaint did not state facts sufficient to constitute a cause of action. The respondents support the order sustaining the demurrer on several different grounds. Because of the view which we take of the case it will not be necessary to consider but one of those grounds.

[3] The respondents contend that the form of lease which was presented to the defendants and which the defendants declined to execute was not a mutual obligation; that in the lease as so drawn the plaintiffs did not bind themselves to drill, but on the other hand reserved the right to surrender the lease at such time as they might see fit, whereas, the same paper purported to bind the owners of the land "for the term of twenty years from date hereof and as long thereafter as oil, gas, asphaltum or kindred substances are produced in paying quantities thereon, unless sooner terminated as herein provided." The obligation resting on the appellants is quoted and set forth by the appellants in their brief as follows:

"4. The drilling requirements of this lease shall be as follows:

"4a. Within six (6) months from date of this lease, lessee is to commence drilling operations on said premises, and will diligently prosecute the same with reasonable diligence and without interruption for a period of more than thirty (30) consecutive days at any time, Sundays, and holidays excepted, unless such delays are excused as hereinafter provided, to a depth of 3,000 feet, unless oil is found in paying quantities at a lesser depth."

"4e. Lessee may surrender this lease before or after the commencement of drilling, without liability for failure to commence or continue operations; but upon such surrender lessee shall execute to lessors and record a quitclaim deed to said premises. Cancellation and termination of lease shall be the only remedy for failure to commence or continue operations."

In the case of *Sturgis v. Galindo*, 59 Cal. 28, 43 Am. Rep. 239, the Supreme Court was considering a case in specific performance. The instrument before the court purported to

be a contract of sale of lands supposed to be valuable as a coal mine. The purported contract contained a surrender clause as follows:

If defendant's assignors "should at any time before the expiration of the time hereinbefore fixed for the completion of this contract, to wit, the 14th day of December, A. D. 1867, become satisfied that it was useless to further prospect said lands agreed to be conveyed for coal, then upon giving thirty days' notice to said party of the first part, in writing, of their intention to abandon said contract, then and thereafter this agreement shall be void, and of no binding force or effect between the said parties or either of them."

The trial court had entered a judgment specifically enforcing the contract. The Supreme Court reversed that judgment and in doing so said:

"It is, moreover, perfectly clear that a specific performance of the contract could not have been performed at the suit of Pacheco; for besides the difficulty of enforcing the performance of personal services, the agreement contained the express stipulation that if, at any time prior to the period fixed for the completion of the contract, Bromley and Jones should become satisfied that it was useless further to prospect the land, they should have the right, upon giving thirty days' notice to Pacheco of their intention so to do, to abandon the contract. 'It is a general principle,' says Mr. Fry at section 286 of his work on Specific Performance, 'that when, from personal incapacity, the nature of the contract, or any other cause, a contract is incapable of being enforced against one party, that party is equally incapable of enforcing it specifically against the other, though its execution in the latter way might, in itself, be free from difficulty attending its execution in the former.'"

It is not claimed by the appellants that the *Sturgis* Case has been overruled, but the appellants ask this court at this time to lay down a different rule so far as oil leases are concerned. In their brief they contend as follows:

"Anomalous as it may seem at first, this apparent one-sidedness is the only fair structure for such a contract. And, the oil lease being the basis of the California oil world, it follows that if this oil industry, if this tremendous young industry which has been the very life and salvation of our great Southwest these past three strenuous years, if this industry is to survive and is to continue to function and expand, it must be granted or confirmed the power to enforce and protect with all the vigor of our laws and judicial system these contracts which are its very foundation and strength and its only opportunity for service in fields as yet undiscovered."

However desirable some other rule might be as applicable to this specific line of cases it would seem that such an argument should

be addressed to the Legislature and not to the courts.

We find no error in the record. The judgment is affirmed.

We concur; LANGDON, P. J.; NOURSE, J.

58 Cal. App. 100

DAVIS v. DAVIS. (Civ. 4266.)

(District Court of Appeal, First District, Division 1, California. June 5, 1922. Hearing Denied by Supreme Court Aug. 3, 1922.)

1. Divorce — 184(10)—Trial court's determination of issue of guilt of acts producing grievous mental suffering not disturbed except for abuse of discretion.

The trial court's finding upon the issue of defendant's guilt of acts producing grievous mental suffering will not be disturbed unless the evidence is so slight as to indicate abuse of discretion.

2. Divorce — 150(2) — Findings that allegations are untrue not too general to support judgment for defendant.

Findings in a divorce suit that plaintiff's allegations are untrue are not too general on allegations of specific instances of cruelty to support a judgment for defendant.

3. Divorce — 150(2)—Findings as to property rights unnecessary where divorce denied.

Where plaintiff wife was denied a divorce, no findings on the existence or character of the parties' property rights were necessary.

Appeal from Superior Court, City and County of San Francisco; E. P. Shortall, Judge.

Action by Lulu S. Davis against M. William Davis. Judgment for defendant, and plaintiff appeals. Affirmed.

Thomas R. White and William P. Hubbard, both of San Francisco, for appellant. Bert Schlesinger and Timothy Healy, both of San Francisco, for respondent.

TYLER, P. J. This is an appeal by plaintiff from a judgment in an action for divorce brought by her on the ground of extreme cruelty.

Plaintiff, in support of her appeal, claims that the findings are insufficient to support the judgment, and that they are not justified by the evidence, which, she claims, is more than ample and sufficient to entitle her to a decree of divorce on the ground of defendant's extreme cruelty.

Complaint is also made that the trial court erred in refusing to permit plaintiff to introduce evidence as to the value and extent of property held by defendant, or to make a finding as to its community or separate character.

Plaintiff, by her complaint, alleges that she and defendant intermarried in the year 1907, and that there is issue of said marriage two minor children.

The extreme cruelty alleged is infliction upon plaintiff of grievous mental suffering due to the acts of defendant from time to time during the marriage relation, and particularly during the years 1918 and 1919. In this behalf it is in substance charged that defendant, without cause, complained of years of misery in consequence of his marital relation with plaintiff; that he threatened her with divorce proceedings, absented himself from home without plaintiff's consent, and frequently exhibited a violent display of temper, and without justification or excuse and in the presence of others abused, belittled and annoyed her. Other allegations are to the effect that defendant at different times struck plaintiff. The sum of \$500 per month is alleged to be a reasonable amount for the support of herself and children, and \$2,500 a reasonable attorney's fee. These sums are prayed for, together with the dissolution of the marriage.

Defendant by answer denied all the allegations of plaintiff's complaint. The record consists of 700 or more pages, and the evidence shows many acts of alleged cruelty on the part of defendant, most all of which were denied by him, and he on his own behalf introduced evidence to prove his kindness and solicitude for plaintiff during their married life. Defendant also introduced evidence of acts of cruelty on the part of plaintiff. The record also shows that subsequent to the acts complained of by plaintiff as causing her grievous mental suffering she requested defendant to return to her and resume their marital relations.

The trial court found plaintiff's allegations to be untrue and denied her a divorce, but granted her an allowance of the sum of \$350 per month for the support of herself and minor children and \$1,250 as attorney's fees.

[1] The case presents a sharp conflict of evidence, and is one clearly falling within the so-called "conflict of evidence" rule, and this court cannot disturb the finding of the trial court. Whether or not one has been guilty of acts producing grievous mental suffering upon an innocent party is a question of fact to be determined from all the circumstances, keeping in view the intelligence, refinement, and delicacy of sentiment of the complaining party, and no inflexible rule as to what probative facts shall exist in order to justify a finding of the ultimate fact of its existence can be laid down. This is a question for the trial court to determine from all the circumstances, and its conclusion will not be disturbed unless the evidence is so slight as to indicate an abuse of discretion on the part of the trial court. No such abuse here appears. *MacDonald v. Mac-*

Donald, 155 Cal. 665, 102 Pac. 927, 25 L. R. A. (N. S.) 45; Avery v. Avery, 148 Cal. 239, 244, 82 Pac. 967; Lewis v. Lewis, 167 Cal. 733, 141 Pac. 367, 52 L. R. A. (N. S.) 675; Dee v. Dee, 34 Cal. App. 659, 168 Pac. 588.

[2] The contention that the findings are so general upon the allegations of specific instances of cruelty alleged as to be insufficient to support the judgment is without merit. Had more specific findings been asked for or had, they would of necessity have been in plaintiff's favor. *Gale v. Bradbury*, 116 Cal. 39, 40, 47 Pac. 778.

[3] Equally untenable is the objection that the court committed error in failing to make findings upon the existence of the property rights of the parties or of its character. Plaintiff having been denied a divorce, this issue became immaterial, and a finding upon the question was therefore unnecessary. *Smith v. Dubost*, 148 Cal. 622, 624, 84 Pac. 38.

For the reasons given, the judgment is affirmed.

We concur: PREWETT, Justice pro tem.; RICHARDS, J.

(57 Cal. App. 703)

MCCARTY v. WILSON. (Civ. 4217.)

(District Court of Appeal, First District, Division 2, California. May 19, 1922.)

Appeal and error ⇨ 1099(4)—**Decision on prior appeal that contract of purchase was enforceable against defendant held law of the case.**

In an action by an executor against one who purchased land from the deceased, a decision in a prior appeal that a contract between the deceased and the purchaser was enforceable regardless of an oral agreement that deceased would sell and deliver to defendant a good and sufficient title, free and clear of all incumbrances, and that the purchaser should pay a certain sum in cash, and should be given certain credit for the balance of the purchase price, is conclusive on subsequent appeal as to purchaser's claim that under the oral agreement attending the execution of the contract of sale the executor was not entitled to specific performance.

Appeal from Superior Court, Los Angeles County; Albert Lee Stephens, Judge.

Action by Alva R. McCarty, executor of the last will and testament of Anna R. McCarty, deceased, against Philip L. Wilson. From a judgment for plaintiff, defendant appeals. Affirmed.

Lloyd Miller and Philip Wilson, both of Los Angeles, for appellant.

Charles L. Allison, of San Bernardino, and Meserve & Meserve, of Los Angeles, for respondent.

LANGDON, P. J. This is an appeal by the defendant from a judgment against him for

\$33,023, together with interest from February 10, 1912. This amount represents the balance due upon the purchase price of land belonging to the estate of Anna E. McCarty, deceased, and which had been sold to defendant upon an order of court made and entered in the course of probate proceedings.

The record presented upon appeal is lengthy, and it would serve no useful purpose to discuss the facts in detail, because the matter has been considered twice by our Supreme Court. Upon the first trial of the cause, judgment was given for the defendant, and this judgment was affirmed by the District Court of Appeal. A hearing was granted by our Supreme Court, and said judgment in favor of defendant was reversed. Thereupon the defendant and present appellant petitioned the Supreme Court for a rehearing of said matter, and a supplemental opinion was filed in answer to this petition, which did not, however, change the effect of the opinion. *McCarty v. Wilson*, 184 Cal. 194, 193 Pac. 578. Thereafter a second trial was had, resulting in a judgment for the plaintiff from which this appeal is taken. The facts found by the trial court upon the present record present precisely the same questions of law as those passed upon by the Supreme Court upon the former appeal.

Appellant concedes that many of the matters relied upon by him for a defense in the first trial are settled against him by the opinion of the Supreme Court upon the former appeal. One point, however, he contends was not passed upon in the former appeal, and upon that point he relies for a reversal of the judgment. His position is stated by him as follows:

"The only question involved on this appeal is whether respondent under the circumstances attending the execution of the contract of sale is entitled to the aid of a court of equity."

Upon the former appeal the Supreme Court passed upon the order of sale made by the probate court and held it to be valid; it also passed upon the right of the executor, as such, to enforce a specific performance of the contract for the sale and purchase of the land.

The record contains a finding as follows:

"It is also orally understood and agreed by and between the said parties that the said plaintiff, as such executor, would sell and deliver to the defendant, a good and sufficient title to the said premises free and clear of all incumbrances, and that the defendant would buy the said premises from the said plaintiff and should pay to the said plaintiff the sum of \$11,000 in cash, and should be extended certain credit for the balance of the purchase price."

It is upon this finding that appellant's contention upon this appeal is based. He maintains that, as the executor did not disclose to

the probate court the terms of this oral agreement, he was guilty of a fraud upon the court and upon the defendant. He calls attention to the finding that the defendant relied upon this oral contract as a consideration for entering into the contract for the purchase of the land, and that defendant relied upon the promise of plaintiff that he would present to the probate court a true and correct return and account of the said sale, showing all the terms and conditions thereof, and would procure a confirmation thereof, and it was because of this reliance that the defendant failed to be present at the hearing when the order of sale was made and failed to make objection to the confirmation of such sale as a sale for cash. These various matters, he contends, raise such inequity in the conduct of the plaintiff that he should be denied relief by a court of equity.

This contract, made between the parties outside of court and not embodied in the order of court for a sale of the property, was considered by the Supreme Court in reaching its conclusion upon the former appeal. The opinion filed therein (184 Cal. at page 199 thereof, 193 Pac. 578) refers to the same, stating that, even though the court were to assume that such contract was with McCarty, as executor, instead of individually, nevertheless its provisions regarding good and sufficient title are not violated by the facts appearing in the record, and such provisions do not furnish a ground for a refusal on the part of the defendant to perform his contract to purchase the land. Other provisions of said agreement are discussed in said opinion of the Supreme Court, indicating that the same was fully considered, and its effect, if any, upon the rights of the parties hereto, under the facts in evidence, could not have been overlooked.

Appellant contends that the opinion of the Supreme Court does not indicate that that court had in mind, specifically, the objection now made by appellant; i. e., that this contract between the parties raised certain inequitable features in the case which would defeat specific performance, and therefore that question is open for discussion upon this appeal. We think the entire matter is foreclosed by the decision of the Supreme Court. That decision held that this contract relied upon by appellant, and the facts surrounding it, constitute no bar to a decree against defendant for specific performance. This defeats appellant's claim, regardless of the nature of the argument upon which he may proceed. This is a sufficient answer to the point made upon appeal, but, if it is any satisfaction to the appellant to know beyond a doubt that the Supreme Court of this state has considered the precise argument he now makes in support of his general contention, it may not be amiss for us to add that an examination of the record presented to the

Supreme Court upon the former appeal reveals that the attorney who at that time represented the present appellant contended in an elaborate brief that this unfulfilled agreement between the parties raised an insurmountable obstacle to affording to plaintiff the remedy of specific performance of the contract for the sale and purchase of the land.

The judgment is affirmed.

We concur: STURTEVANT, J.; NOURSE, J.

57 Cal. App. 638

**McGUIRE v. ALUMINUM PRODUCTS CO.
OF THE PACIFIC COAST. (Civ. 4199.)**

(District Court of Appeal, First District, Division 1, California. May 8, 1922.)

1. Appeal and error ⇐1010(1)—Finding supported by sufficient evidence not disturbed.

In an action by a factor for damages for breach of a contract to fill orders for goods solicited by him, *held*, there being sufficient evidence to support a finding of the amount of unfilled orders which was less than claimed by plaintiff, the finding could not be disturbed on appeal.

2. Factors ⇐66—In action by factor for breach of contract, proof of amounts paid as commissions warranted under plea of payment.

In an action by a factor for damages for breach of a contract to fill orders for goods solicited by him, *held* that under a plea of payment, proof and a finding as to the amounts paid plaintiff by defendant on commissions due him under the contract were warranted.

3. Factors ⇐66—Evidence sufficient to support finding of amount of commissions paid factor under contract.

In an action by a factor for damages for breach of a contract to fill orders for goods solicited by him, *held* the evidence was sufficient to support a finding of the amounts paid plaintiff by defendant as commissions due him under the contract.

4. Factors ⇐45—Cannot recover payments to salesmen or traveling or stationery expenses under contract to pay commission on sales.

Under a contract whereby a manufacturer agreed to pay a factor a commission of 25 per cent. on sales made by him, the factor may not recover sums paid by him to his salesmen or for his traveling expenses and stationery.

5. Factors ⇐45—Cannot recover expenses incurred in trying to persuade principal not to breach contract.

Under a contract whereby a manufacturer agreed to fill orders solicited by a factor and to pay him 25 per cent. on his sales, the factor cannot recover expenses incurred in trying to persuade the manufacturer not to breach the agreement to fill orders, as such expenses are not the natural and proximate result of such breach.

6. Factors ↪44—May not recover commission on goods returned through no fault of principal.

Under a contract agreeing to pay a factor a commission for goods sold, he was not entitled to a commission on goods sold which were returned to his principal, where their return was not caused by any act or omission of the latter.

Appeal from Superior Court, Alameda County; Stanley A. Smith, Judge.

Action by Elmer E. McGuire against the Aluminum Products Company of the Pacific Coast, a corporation. From a judgment for plaintiff for less than demanded, he appeals. Affirmed.

Charles L. Brown, of El Centro, and Albert E. Carter, of Oakland, for appellant.

Breed & Burpee, of Oakland, for respondent.

TYLER, P. J. This is an action to recover damages for breach of contract. In substance the complaint alleges that on the 5th day of March, 1919, plaintiff and defendants entered into an agreement in writing by which the Aluminum Products Company agreed to manufacture and ship certain articles of aluminum ware and cause the same to be transported for the purpose of filling orders to be solicited by plaintiff; that by the terms of said contract plaintiff was to receive a commission of 25 per cent. on sales effected through his personal efforts. It is recited that the parties entered upon the performance of their agreement, and that plaintiff thereafter secured orders in the sum of \$17,871.01, which defendant, in violation of its contract, failed to fill, thereby depriving plaintiff of his commission, amounting to the sum of \$4,467.50. As flowing from this alleged breach of contract plaintiff claims special damages in the sum of \$3,809.22. In support of his claim for special damages plaintiff alleges:

(1) That he was in Chicago, engaged in the fulfillment of his contract when he discovered defendant's neglect and failure to perform its contract, and that in consequence he was required to return to Oakland, where the factory of defendant company is situate, where he was compelled to remain from June 20, 1919, to July 10, 1919, in an effort to induce defendant to make deliveries, and by reason thereof was required to expend for railroad fare, hotel bills, and other expense the sum of \$756.10.

(2) That during this period plaintiff had a number of salesmen working for him in different parts of the country, selling goods under the contract; that in consequence of defendant's breach in not filling such orders, plaintiff was required to lose the time of four

salesmen for the period of two weeks, thereby causing plaintiff to suffer a loss of \$2,-442.24.

(3) That on September 15, 1919, because of defendant's breach, plaintiff was again required to go to Oakland and incur additional expense and suffer additional loss occasioned by the delay of defendant in making deliveries, in the sum of \$240.

(4) That certain post cards, order blanks, booklets, etc., prepared by plaintiff and furnished to defendant, were not used, thereby damaging plaintiff in the further sum of \$216.

(5) That on account of such breach of contract certain goods shipped were returned to the factory, and the commission thereon was by defendant charged back to plaintiff, and this item of damages is alleged to amount to the sum of \$154.98.

Defendant denied the securing of the orders as alleged by plaintiff, and also denied all special damage, and set up payment on account of demands of plaintiff, in the sum of \$1,818.30.

[1-4] After trial the court found against plaintiff on every item claimed as special damage, but found that defendant had failed to fill accepted orders in the sum of \$8,662.95, upon which plaintiff was entitled to a commission of 25 per cent., or the sum of \$2,165.73; that defendant had paid on account thereof, as alleged in its answer, the sum of \$1,818.30, leaving a balance due to plaintiff in the sum of \$347.42, for which sum plaintiff was given judgment. Plaintiff appeals from such judgment, and as grounds for reversal contends that the evidence does not support the finding that the unfilled orders were limited to the sum of \$8,662.95, it being claimed that the evidence establishes plaintiff's allegation that the total amount of orders procured and not filled amounted to the sum of \$17,870.01. The only evidence to support the issue of the total amount of orders taken and not filled is found in the testimony of plaintiff himself. A bill of particulars was demanded by defendant, which was ordered furnished by the court. In conformity therewith a statement was produced by plaintiff of the amount of his alleged sales, but there was testimony showing that many of the items contained therein were erroneous. Upon this subject there was a conflict of testimony. There was, however, sufficient evidence to support the finding of the trial court as to the amount of orders procured, and under the well-established rule this determination cannot be disturbed on appeal. Appellant further claims that there is no pleading to justify or evidence to support the finding as to the portion of the amount found by the trial court to have been paid to him on account. The record does not support

this contention. Defendant, by amended answer, pleaded payment, and there is testimony to show that plaintiff was paid all the commissions to which the court found him to be entitled. Upon the question of special damage the finding of the court as to the first four claims above enumerated is as follows:

"The court makes no finding thereon for the reason that such averments, and each of them, are immaterial and surplus averments in said complaint and any finding thereon would be a finding upon an immaterial issue, and for the further reason that no evidence was introduced at the trial in support of such averments."

[5] These alleged claims for special damages are all based upon the one breach of the contract. The contract, however, nowhere provides that defendant was to pay any sums by way of commissions or expenses, in excess of the 25 per cent. on the price list. This was the sole compensation which plaintiff was to receive. Whatever arrangements he made with his salesmen or whatever sums he expended for his traveling expenses and stationery was a matter that concerned him alone. Under such circumstances expenses incurred in an endeavor to persuade a defendant to perform his contract are not the natural and proximate result of the act complained of. We are of the opinion, therefore, that the trial court rightfully concluded that these items were duplicated claims, as the commission provided for covered them.

[6] Upon the fifth item of special damage, which is based upon the alleged fact that certain goods were delivered, then shipped back to the factory and the commission thereon originally credited was charged back against plaintiff's account, the court found upon sufficient evidence that the return of the goods was not caused by any act or omission upon the part of the defendant, for which reason plaintiff was entitled to no commission thereon.

No other questions are presented.

For the reasons given the judgment is affirmed.

We concur: KERRIGAN, J.; KNIGHT, Justice pro tem.

57 Cal. App. 655

TITLE INS. & TRUST CO. v. PFENNING-HAUSEN et al. (Civ. 3707.)

(District Court of Appeal, Second District, Division 1, California. May 12, 1922.)

1. Mortgages ⚡549 — Notice of foreclosure sale to tenant of mortgaged property is necessary to render him liable for rent to purchaser at sale.

Under Code Civ. Proc. § 707, by which purchaser on a judicial sale of mortgaged property is entitled to the rents and profits thereof until redemption, and Civ. Code, § 1111, provid-

ing that no tenant who, before notice of the grant, has paid rent to grantor, shall suffer damage thereby, notice of the sale must have been had by the tenant of the mortgaged property to render him liable to such purchaser for the rent.

2. Evidence, ⚡89—Presumption that sheriff recorded certificate of judicial sale is overcome by proof that tenants were without notice of sale.

The presumption under Code Civ. Proc. § 1963, subd. 15, that the sheriff on selling real estate at a judicial sale has not only issued a certificate of sale to the purchaser, but has filed a duplicate thereof for record in the county recorder's office as required by section 700a, so as to constitute constructive notice to tenants of the property of the transfer of the title, is disputable, and is overcome by evidence that such tenants were without notice of the sale, in which case they are justified under Civ. Code, § 1111, in paying the rent to their lessor for the remainder of the term.

3. Mortgages ⚡548—Recordation of deed is constructive notice to tenants of purchaser's acquisition of title.

The filing of a sheriff's deed to property for record is constructive notice to tenants of sale of land under mortgage foreclosure, and the acquisition of title by the purchaser so that they are liable to such purchaser for use and occupation for the remainder of their term.

4. Appeal and error ⚡931(1)—Findings construed most strongly in support of judgment.

Findings must be construed most strongly in support of the judgment.

5. Appeal and error ⚡417(2)—Inclusion of party for whom plaintiff bid in the property at foreclosure sale as appellant in notice of appeal held erroneous as against defendants in action for rent.

On appeal from a judgment for defendants in an action for rent by the purchasers at a foreclosure sale, one not a party to the action for whom the court found that plaintiff bid in the property and held it for his use and benefit was improperly included as appellant in the notice of appeal; plaintiff being the real party in interest entitled to maintain the action so far as defendants were concerned.

Appeal from Superior Court, Riverside County; Hugh H. Craig, Judge.

Action by the Title Insurance & Trust Company against A. Pfenningshausen and others. Judgment for defendants, and plaintiff appeals. Affirmed.

Edw. F. Wehrle and Asa V. Call, both of Los Angeles, and O. K. Morton and Hayden L. Hewes, both of Riverside, for appellant.

Walter C. Davison, of Riverside, for respondents.

SHAW, J. This is an appeal by plaintiff upon the judgment roll from a judgment entered in favor of defendants.

As appears from the complaint, the cause

of action stated therein was to recover for the use and occupation of certain lands of which plaintiff alleged it was at all times mentioned the owner and which defendants, with its consent, held and occupied for a period of two years from and after January 1, 1917.

Appellants' contention is that the findings are insufficient to support the judgment. The material facts appearing therefrom are that on January 13, 1917, at a sale on mortgage foreclosure proceedings, the plaintiff bought in and became the owner and holder of a certificate of sale to the land in question, upon the surrender of which certificate it, on January 21, 1918, received a deed to the property, and ever since said date plaintiff had been the owner of the property; that Rogers Development Company was, prior to the sale upon foreclosure of the mortgage thereon, in which proceedings the title thereto was acquired by plaintiff, the owner thereof, and on October 1, 1916, leased the same to defendants for the term of one year for one-fourth of the crop produced thereon, and thereafter, without demand for possession or notice to quit, defendants continued in possession for the year, which expired on October 1, 1918, the effect of which, as provided in section 1161, Code of Civil Procedure, was to renew the lease upon the same terms; "that on October 1, 1917, defendants not having received or been given any notice of the claim or claims, if any, of said Title Insurance & Trust Company to the rent or any portion thereof, * * * for the year ending October 1, 1917," thereupon paid the same to Rogers Development Company; that in payment of the rent due for the year ending October 1, 1918, they set aside one-fourth of the crop grown upon the land and left the same thereon as rental of said premises, of which fact they notified one Thomas F. Joyce, who was the duly authorized agent of plaintiff.

From these facts the court, as a matter of law, concluded that defendants were not indebted to plaintiff in any sum whatsoever.

That defendants had the use and occupation of the land from the time of the issuance of the certificate of sale of the mortgaged property, to wit, from January 13, 1917, to October 1, 1918, clearly appears. It likewise appears that for the use thereof for the year expiring October 1, 1917, defendants paid the rental, not to plaintiff as holder of the certificate of purchase in the foreclosure proceedings, but to Rogers Development Company, who up to the time of the sale was the owner of the property.

[1] The right on the part of the purchaser upon a judicial sale of mortgaged property to receive the rents and profits thereof, or the value of the use and occupation, based upon the provisions of section 707, Code of Civil Procedure, has been repeatedly sustained. *Page v. Rogers*, 31 Cal. 294; *Walk-*

er v. McCusker, 71 Cal. 595, 12 Pac. 723; *Clarke and Cain v. Cobb*, 121 Cal. 595, 54 Pac. 74. The provisions of the section, however, must be read in connection with section 1111, Civil Code, which provides that grants of rents are good and effective without attornment of the tenants, but no tenant who, before notice of the grant, shall have paid rent to the grantor, must suffer any damage thereby. In the cases cited it was made to appear that the tenant had either actual or constructive notice of the sale under which he was required to pay the rental of the property to the purchaser holding the certificate.

[2] Indeed, appellant in its argument seems to concede that notice is necessary, but insists that since, under section 700a, Code of Civil Procedure, it is made the duty of the sheriff when selling real estate at a judicial sale not only to issue to the purchaser a certificate of sale, but to file a duplicate thereof for record in the office of the county recorder, we must indulge in the presumption that such official duty was regularly and duly performed (subdivision 15, § 1963, Code Civ. Proc.); in other words, that the certificate of sale was filed for record, which if done, such act constituted constructive notice at least to defendants of the transfer of title. Since, however, the presumption invoked by appellant is a disputable one, it is deemed to have been overcome by the evidence upon which the court based the finding hereinabove quoted, to the effect that defendants were without notice of the sale and purchase by plaintiff. Hence, since at the time of the payment of the rent to Rogers Development Company defendants had no notice of the sale under foreclosure, or of the fact that plaintiff was the purchaser of the property in such proceedings, they were, as provided in section 1111, Civil Code, justified in paying the rent to their lessor in discharge of any liability for the use and occupation of the property for the year ending October 1, 1917.

[3] As stated, the deed of the property to plaintiff was filed for record on January 21, 1918, of which fact and the acquisition of title to the property by plaintiff defendants must be deemed to have had constructive notice and were liable to plaintiff for the use and occupation of the property thence on to October 1, 1918, when they surrendered possession.

[4] It appears from the findings that they recognized plaintiff as entitled to the rent for the entire year and delivered to plaintiff upon the premises one-fourth of the crop grown and harvested during said year, of which fact plaintiff was repeatedly notified, and made no objection to the tender. Applying the rule that findings must be construed most strongly in support of the judgment, we think they are sufficient to support the same.

[5] For some reason not appearing by the record, Thomas F. Joyce was included as appellant in the notice of appeal. He was not a party to the action, and although the court finds that plaintiff bid in the property at the foreclosure sale for his use and benefit and at all times held it for his use and benefit, such fact, if true, was no concern of defendants. As to them, plaintiff was the real party in interest and was entitled to maintain the action. *Walker v. McCusker*, 71 Cal. 595, 12 Pac. 723; *Cortelyou v. Jones*, 132 Cal. 131, 64 Pac. 119.

The judgment is affirmed.

We concur: CONREY, P. J.; JAMES, J.

57 Cal. App. 462

KOBLOCK v. LARSON et al. (Civ. 4208; S. F. 9955.)

(District Court of Appeal, First District, Division 1, California. April 27, 1922. Hearing Denied by Supreme Court June 26, 1922.)

1. Vendor and purchaser — 37(1)—Purchaser may rely upon false representations although he has means of knowledge.

A purchaser of real estate may rely on false representations although he has means of knowledge, and is under no duty in such a case to employ his means of knowledge.

2. Vendor and purchaser — 37(1)—Independent investigation of real estate not made by purchaser where under control of vendor.

An independent investigation by a purchaser of real estate, such as to preclude his reliance on vendor's statements, was not made where an inexperienced purchaser visited the land, accompanied by vendor, in whom he had full confidence, and at all times controlled by his suggestions.

3. Appeal and error — 1071(1)—Failure to make specific finding held not prejudicial.

Where vendor claims that purchaser investigated the land, a finding that purchaser had no knowledge would ordinarily include the element of want of investigation, and this general finding is not prejudicial where a correct specific finding would be adverse to the objecting party.

On Hearing in Supreme Court.

4. Judgment — 194—Specific performance — 49(2), 51—Judgment supported notwithstanding failure to find on all issues; remedy denied if contract was inequitable as to defendant, or consideration was inadequate.

Plaintiff, to enforce specific performance of a sale of land, must show that the contract as to defendant was just and reasonable, and upon adequate consideration, and a finding against plaintiff upon this issue is sufficient to sustain judgment for defendants notwithstanding failure to find on other issues.

Appeal from Superior Court, Sonoma County; R. L. Thompson, Judge.

Action by Nison Koblock against Otto A. Larson and others. From a judgment for defendants, plaintiff appeals. Affirmed.

F. A. Meyer, of Petaluma (E. J. Dole, of Petaluma, of counsel), for appellant.

W. F. Cowan, of Santa Rosa, and F. J. Burke, of Petaluma, for respondents.

TYLER, P. J. This is an action brought to enforce specific performance of a contract relating to certain real property. The action was the result of a real estate transaction involving some 66 acres of land situated near Windsor in the county of Sonoma, which appellant, as an agent of the owners, sold to respondent Larson. The facts are substantially without conflict, and are in substance as follows:

One James E. Dowd and his wife, Sarah, were the owners of the land, and in January, 1920, appellant procured an option entitling him to either purchase or sell the same. This option was never exercised by him, and was canceled, but Dowd and his wife verbally authorized plaintiff to buy or sell the ranch for \$16,500 net to the owners. Respondents Horovitz and Noreen were real estate brokers who associated themselves with appellant for the sale of the property, and they procured a purchaser for the same in respondent Larson. According to the agreement of sale Larson was to pay the sum of \$22,000 for the property. This sum was made up by a cash payment of \$9,800, a note for \$8,000 secured by a mortgage and the balance of the consideration was to be paid by a conveyance to appellant of the land in dispute, which consisted of a house and lot in Petaluma valued at \$4,200. After the transfer of the land was made to Larson, in accordance with the terms of the agreement of sale, he refused to execute a deed of the Petaluma property to appellant, but conveyed the same to respondents Horovitz and Noreen, the associates of appellant. Thereupon this action was brought, and Horovitz and Noreen are joined as parties defendant. All respondents joined in common cause against appellant. They appeared by answer and cross-complaint alleging fraudulent representations on the part of plaintiff with reference to the sale of the property. These alleged fraudulent representations were to the effect that plaintiff owned the land, and had paid \$19,000 therefor, and that it was worth \$25,000; that the trees and vines growing thereon were in a good and healthy condition and that the land produced an income of \$6,000 a year. Defendants sought damages under their cross-complaint to the extent of \$5,500, together with a prayer that it be decreed that respondents Horovitz and Noreen were entitled to an undivided

one-third interest in the house and lot in Petaluma. Appellant, answering the cross-complaint, denied that plaintiff or his associates had made any false representations, and alleged that respondent Larson purchased the property after full, fair, and complete examination of the same.

The trial court found in substance that the representations as to ownership, income, and productiveness of the lands were false; that the land was not suitable for raising fruit trees or grape vines, and that the vines or trees growing thereon were not sound and healthy as represented, but, on the contrary, were unsound, decayed, and unhealthy, and were dying out, and that trees would not grow on the land on account of the poor quality of the soil. The court further found that the property was reasonably worth the sum of \$16,500, and no more. Transfer of the Petaluma property was refused, and ownership thereof was decreed to be in defendant Larson, in addition to which a money judgment for the sum of \$1,300 was entered in his favor. Appellant appeals from the judgment, and contends that the trial court failed to find on a material issue, which, it is claimed, justifies a reversal of the judgment. The issue referred to is that defendant Larson made an independent investigation of the property, and had the means of ascertaining the truth of the character of the land, and that he completed the purchase after such investigation had been made by him.

[1] In response to this issue the findings of the trial court are to the effect that Larson had no knowledge or any means of ascertaining the truth or falsity of the representations, but that he had full and implicit confidence in defendants, and relied upon their statements, and was induced thereby to make the purchase and transfer. The principle is well established that a purchaser is justified in relying upon false representations, and his rights are not destroyed because means of knowledge are open to him, and no duty in law is devolved upon him in such a case to employ such means of knowledge. *Spreckels v. Gorrill*, 152 Cal. 383, 92 Pac. 1011; *Ruhl v. Mott*, 120 Cal. 668, 53 Pac. 304; *Gratz v. Schuler*, 25 Cal. App. 117, 120, 142 Pac. 899.

[2] Appellant concedes this to be the rule, but he claims that the principle has no application where an independent investigation is made by a purchaser, and he contends that, as the pleadings raised this issue and there is evidence upon the subject, the findings are incomplete, and do not conclude the issue. It would seem that a finding that one has no knowledge of the subject includes the elements of want of investigation and lack of consequent information following upon such investigation. This reasoning seems to be conceded by appellant, but it is argued that it cannot avail respondents in the face of positive evidence that an investigation was

made. It is true that the record discloses that Larson did at different times attempt to make an investigation, but it further shows that upon all these occasions he was accompanied by the agents, and was controlled entirely by their suggestions, and that such investigations were, in consequence, unsuccessful. True, he was requested by them to dig upon the land to ascertain the depth of the soil, and in so doing discovered hardpan, but the evidence further shows that this meant nothing to him, as he was inexperienced in and knew nothing about farm lands, or what the presence of hardpan might indicate. The evidence upon this subject fully supports the finding that Larson relied implicitly and solely upon the representations of the agents, whom he considered and believed to be his friends. Under such circumstances the court was justified in finding that Larson had no knowledge or means of ascertaining the truth or falsity of the representations.

[3] Even if we concede the findings to be subject to the criticism here made, still we cannot see how this can avail plaintiff, for, in view of the conclusion reached by the trial court, a direct and specific finding, if made, would of necessity have been adverse to him. As before stated, the evidence shows conclusively that no real investigation was ever made by Larson, but that he depended entirely upon the representations of plaintiff and his associates. Under such circumstances, failure to find specifically on this subject is not ground for reversal. *Estate of Connors*, 110 Cal. 408, 42 Pac. 906; *Senter v. Senter*, 70 Cal. 619, 628, 11 Pac. 782; *Haight v. Costanich*, 184 Cal. 426, 194 Pac. 26.

We are therefore of the opinion that the findings are sufficient to support the judgment. For the reasons given it is affirmed.

We concur: KERRIGAN, J.; KNIGHT, Justice pro tem.

Opinion of Supreme Court in Bank Denying Hearing.

PER CURIAM. [4] The action in this case was for specific performance of a contract for the sale of real estate. In such an action it is necessary for the plaintiff to show that, as to the defendant, the contract was just and reasonable, and that the defendant received an adequate consideration. The pleadings put in issue the question whether or not the contract was just and reasonable and the consideration adequate as to the defendant Larson. The findings, omitting all consideration of the finding on the question whether or not the defendant Larson made an independent investigation of the property or had the means of ascertaining the truth as to the character of the land, show beyond question that the consideration received by Larson was not adequate, and that as to him the contract was not just and reasonable. The judg-

ment, therefore, should have been in favor of Larson, as it was, and the District Court properly affirmed it, regardless of the question whether the finding covered all other issues or not.

The petition for rehearing is denied.

SHAW, C. J., RICHARDS, Justice pro tem., and LAWLOR, WILBUR, LENNON, SLOANE, and WASTE, JJ., concur.

57 Cal. App. 751

LUITWIELER v. LUITWIELER.
(Civ. 4231.)

(District Court of Appeal, First District, Division 2, California. May 22, 1922.)

1. Divorce — 87 — Order excluding husband from home pending action improper.

An order excluding defendant husband from his residence pending hearing of the divorce action, was not within the trial court's sound discretion, where there was no showing that he had been guilty of or threatened physical injury to his wife.

2. Divorce — 1 — Provisional remedies are matters of statutory regulation.

In view of Civ. Code, §§ 136-148, provisional remedies in divorce cases are the matter of statutory regulation.

3. Appeal and error — 277 — Certain exceptions written into bill of exceptions by statute.

Though a bill of exceptions does not expressly contain an exception, certain exceptions are written into it by Code Civ. Proc. § 647, declaring that certain matters are deemed to have been excepted to.

Appeal from Superior Court, Los Angeles County; Thomas O. Toland, Judge.

Action by Sophia C. Luitwieler against Samuel W. Luitwieler. From an order or orders, defendant appeals. Reversed in part. See, also, 202 Pac. 165.

Taylor & Forgy, of Los Angeles, for appellant.

Bradner W. Lee, Bradner W. Lee, Jr., and Kenyon F. Lee, all of Los Angeles, for respondent.

STURTEVANT, J. This is an appeal from an order restraining the defendant. The order was issued pending the hearing of a divorce case. What cause of action is pleaded in the divorce case does not appear. The appellant has brought up the order, his notice of appeal therefrom, and the bill of exceptions. The order appealed from might more properly be termed five several orders all contained in one paper. We have inserted our own numbering, but otherwise the charging part of the orders is as follows:

"(1) It is hereby ordered, adjudged, and decreed that said defendant, until the further order of this court, be, and he is hereby, ordered to forthwith vacate the residence of plaintiff, known and designated by number and street as No. 2114 South Crenshaw boulevard, Los Angeles, Cal.

"(2) It is further hereby ordered that defendant refrain from either directly or indirectly disturbing, speaking to, or writing to, or in any other manner communicating with, plaintiff until the further order of this court.

"(3) And it is further hereby ordered that defendant may lock the room in said premises wherein his personal belongings are contained, and retain the key to said room.

"(4) And it is further hereby ordered that said defendant shall forthwith deliver to counsel for plaintiff the key to the front door of said premises, and any other keys that will give defendant ingress to said premises, or any part or portion thereof.

"(5) It is further hereby ordered that C. A. Rees, as receiver, appointed by this court in action No. BS3955, in interlocutory decree entered therein be, and he is hereby, required to pay to the defendant herein the sum of \$100 per month upon the 1st day of each and every month until the further order of this court, and charge the same to said defendant in said action, relating back to and commencing with the 1st day of September, 1921."

[1] The appellant concedes that the second order was within the power of the trial court. Therefore it is eliminated from attack. The third order appears on its face to be a permission granted to the defendant, and was not adverse to him. The fifth order may also be said to be a permission granted to the defendant, and not an order adverse to him. Therefore we will address ourselves to orders 1 and 4. Those two orders are, in legal effect, a direction that the defendant forthwith deliver the outside door keys to the plaintiff, and thereafter to remain away from the residence of the plaintiff until the further order of the court. From the bill of exceptions it appears that the residence mentioned is the residence of both parties; indeed, that it is the home- stead of said parties; that the plaintiff and defendant are husband and wife; that both of them are 74 years of age or thereabouts; and that an unmarried daughter and at least one son are members of the same household. It also appears that the plaintiff was, on the 14th day of September, 1921, confined to her bed; that she had suffered from two strokes of paralysis, and was in a nervous condition; that she occupied a room upstairs in a roomy house, and defendant's room is downstairs. In his affidavit the defendant claimed that his properties were being withheld from him by his wife, and that he had commenced an action against her to recover the same, and had progressed to a point where a receiver had been appointed and the receiver had obtained possession of

certain of the properties, but the defendant had not obtained physical possession thereof. The daughter, Adelaide, acted as secretary for her mother.

In the affidavit of the daughter it is stated:

"That on the 14th day of September, 1921, said defendant stated in the hearing of plaintiff that, if he did not receive from her the sum of \$1,000 immediately, he would sell the household furniture and furnishings of plaintiff; that defendant accused one of his sons of stealing his (defendant's) shoes; that the conduct and statements of defendant caused plaintiff to become extremely nervous and ill, and caused plaintiff to cry; * * * that defendant called in the police; * * * that defendant conducted himself in a loud, angry, and belligerent manner; that plaintiff heard the altercation between defendant and his said son, and the conversation between the police officers and the defendant and said Dr. Wilson; that the conduct of said defendant resulted in plaintiff crying, and caused her to become extremely nervous and ill; that affiant fears that, if said defendant is not removed from said residence, his conduct may result in the death of the plaintiff herein, affiant's mother."

Some of the foregoing facts are corroborated in the affidavit of Dr. L. E. Wilson. The doctor also states:

"That it is absolutely necessary that the plaintiff herein be kept quiet and undisturbed, and that the presence of the defendant in the house with plaintiff excites her to such a degree that it is highly dangerous."

There is no statement in the evidence that the defendant has threatened physical injury, or that he has been guilty of physical injury to the plaintiff. Under these circumstances it may not be said that the trial court was acting within a sound discretion in making the order excluding the defendant from his residence pending the hearing of the divorce case. In so ruling we are not to be understood as holding that the order is proper or can be made under other circumstances.

[2] Provisional remedies in divorce cases are the matter of statutory regulation. *Grannis v. Superior Court*, 146 Cal. 245, 256, 79 Pac. 891, 106 Am. St. Rep. 23; Civ. Code, §§ 136-148. Counsel have not called to our attention and we find no statute in California authorizing the making of such an order. In *Iowa* the Supreme Court recently held in *Moir v. Moir*, 182 Iowa, 370, 165 N. W. 1001, that an injunction would not be issued in a divorce case to prevent a wife from killing her husband, the court saying:

"According to the plaintiff, one who has made it clear that she has murderous intentions, and has given probable cause to believe that she will carry them out, will be adequately restrain-

ed by an injunctive order. This means that, while the punishment for murder will be no deterrent, the danger of comparatively very mild punishment for contempt of court will insure safety from murderous attack. Another differentiation from the usual is that the husband will suffer great impairment in health and may even suffer death because the wife uses profane and abusive epithets. The claim first adverted to will receive no serious consideration here. There is no imminent danger of murder on the part of one who will desist because a restraining order issues. It might be added that such order is not supposed to be usually available to restrain the commission of a crime."

In *Chapman v. Chapman*, 25 N. J. Eq. 394, the wife alleged the adultery of her husband. By an interlocutory motion she asked that he be excluded, pending the litigation, from the house, which she alleged was her own property. The court said:

"The question here is, whether this court will exclude the defendant from the house in which he and his wife reside with their family, and where as yet he has a right to dwell, merely because his wife has filed her bill for divorce on the ground of adultery. To do so would, to say the least of it, be to prejudge him. Certainly, the proposition that a husband against whom his wife files a bill for divorce on the ground of adultery, is, in case she claims to be the owner of the house in which they dwell, to be banished from his home until it shall have been determined by the result of the litigation whether his wife's charges are well or ill founded, is novel and extraordinary. It cannot be maintained. The prayer of the petition is denied, and the petition dismissed."

[3] The respondent objects to the bill of exceptions being used by appellant because it does not contain an exception. It does not expressly contain an exception, but the statute writes into such a bill certain exceptions. Code Civ. Proc. § 647.

The respondent objects to a consideration of the appellant's main point to the effect that orders 1 and 4 were improperly made. In making this objection respondent claims that the appellant is resting his case on the proposition that certain findings are not supported by the evidence. But, as we understand the appellant, he is not making such a claim, nor is he claiming that the trial court should have made findings in ruling on a mere motion. *Waller v. Weston*, 125 Cal. 201, 204, 57 Pac. 892. We understand him to be claiming that the evidence received did not warrant injunctive relief either mandatory or prohibitory in so far as orders 1 and 4 are concerned.

For the reasons herein set forth, orders hereinabove numbered 1 and 4 are reversed.

We concur: LANGDON, P. J.; NOURSE, J.

(58 Cal. App. 31)

PEOPLE v. ROMERO. (Cr. 863.)(District Court of Appeal, Second District,
Division 2, California. May 29, 1922.)**1. Criminal law §377—Accused cannot introduce evidence of good reputation for veracity.**

It was not error for the court to restrict the testimony of witnesses as to the character of accused in a prosecution for homicide with reference to the reputation of accused for truth, honesty, and integrity.

2. Criminal law §1170½(5)—Cross-examination as to matter otherwise testified to without objection by same witness is not prejudicial.

Error, if any, in permitting cross-examination of a witness for defendant as to whether the mother of witness did not state defendant took a knife was not prejudicial to accused where substantially the identical question was asked in another part of the cross-examination, and an answer permitted by the defendant without objection.

3. Criminal law §1110(6)—Court can correct record as to matters within own knowledge without calling witnesses.

The omission from the transcript of testimony of some language of the witness was a matter entirely within the court's own knowledge, the evidence having been received in its presence, and it was therefore not necessary to call any witnesses to testify concerning it before an order incorporating the omitted language in the record was made.

4. Criminal law §1110(2)—Court can correct stenographic transcript of testimony.

Under Code Civ. Proc. § 273, the notes of the shorthand reporter and his transcript made from them are only prima facie evidence of the testimony, and it is the duty of the judge to make the record contain the language used by the witness by allowing an amendment of the record to supply omitted testimony.

5. Criminal law §683(1)—Shirt worn by accused held admissible in rebuttal of testimony he was wounded.

In a prosecution for homicide, where accused testified that he was wounded in several places, and bled profusely, it was proper rebuttal for a witness for the state to produce the shirt worn by accused when he was arrested shortly after the homicide to show there was no blood on it.

Appeal from Superior Court, Los Angeles County; Russ Avery, Judge.

Jose Romero was convicted of murder in the second degree, and he appeals from the judgment, and from the order denying his motion for a new trial. Affirmed.

A. Orfila, Ernest R. Orfila, and Robert J. Adcock, all of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and John W. Maltman, Deputy Atty. Gen., for the People.

CRAIG, J. Defendant appeals from a judgment upon a verdict of guilty of murder in the second degree and from an order denying his motion for a new trial. The evidence substantially establishes the following, among other facts: On a Saturday night and Sunday morning a dance was given at the house of Emilio Duran, at Lankershim. The members of the party consumed a considerable amount of intoxicating liquor, and on Sunday morning, as the dancers were leaving, a dispute arose between one Reza and one Dalgado. During the difficulty, which appears to have been more or less of a free-for-all fight, Emilio Duran received a knife wound from which he shortly afterward died. The defendant was observed by witnesses brandishing a knife at the door of the Duran home, at which time he made the statement that he would permit no one to leave the house. This was shortly preceding the time that the deceased was stabbed. It was testified also that the defendant stabbed Juan Duran, the father of the deceased, and another party named Escarziga.

[1] It is not contended that the evidence was insufficient to sustain the verdict, but the appeal is based upon several alleged errors, first of which is that the court restricted the testimony of character witnesses, refusing to permit them to state the defendant's reputation for truth, honesty, and integrity. This ruling by the court was a proper one. *People v. Cowgill*, 93 Cal. 596, 29 Pac. 228, and *People v. Fair*, 43 Cal. 137.

[2] Maria Salisado was called as a witness on behalf of the defendant. On cross-examination she was asked whether or not upon a certain occasion subsequent to the killing, her mother did not tell her that Jose Romero took a large knife with which he used to kill hogs to the dance. This was objected to upon cross-examination, and the objection was overruled. The witness answered the question. It cannot be said that the court's ruling upon this was prejudicial, even though erroneous, because almost the identical question was asked in another part of the cross-examination, and an answer permitted by the defendant without objection. This question was as follows:

"Did not your mother state, in your presence, on the 23d of August, 1921, the time which I have mentioned, that Jose Romero took the knife which he had in the house and used to kill hogs, to the dance with him that night?"

[3, 4] It is urged that the court erred in allowing an amendment of the record of the daily transcript of testimony to supply some language which the reporter had omitted. The matter was one entirely within the court's own knowledge, the evidence having been received in its presence, and it was not necessary to call any witnesses to testify concerning the matter before the order was

made. The notes of the shorthand reporter and his transcript made from them are only prima facie evidence of the testimony. Section 273, Code Civ. Proc. It is the duty of the judge to make the record contain the language used. This was directly decided in *People v. Cox*, 76 Cal. 281, 18 Pac. 332, concerning the instructions and the same principle applies to the testimony.

[5] Objection is made to several rulings of the court on the taking of the testimony of the witness Krause. As to those pertaining to questions on direct examination, the objections urged upon appeal were not stated when the questions were asked and the court's ruling made. The same witness was called by the prosecution in rebuttal, and was shown a shirt. This he testified was the one which defendant was wearing when he was arrested soon after the homicide. To this evidence objection was made that it was not proper as rebuttal. The defendant had testified that during the fight he had been wounded in several places, and had bled a great deal. The shirt was offered to rebut this testimony. For that purpose it was competent and relevant. The fact, if it were one, that there were no bloodstains on it would be a matter to be weighed by the jury in determining whether or not the defendant's statements about having been injured were true. However, if it had such stains, this would, of course, corroborate his testimony.

We find no error in the record, and the judgment is therefore affirmed.

We concur: FINLAYSON, P. J.; WORKS, J.

57 Cal. App. 759

WALL v. HUNTER et al. (Civ. 4218.)

(District Court of Appeal, First District, Division 2, California. May 22, 1922.)

1. Costs $\S$ 112(2)—Demand for security from nonresident plaintiff sufficient, though not filed and though after demurrer and answer.

Demand for security for costs from a nonresident plaintiff is sufficient, though not filed in the action and though made after demurrer and answer, there being no requirement to the contrary in Code Civ. Proc. $\S\S$ 1036, 1037.

2. Appeal and error $\S$ 1024(3)—Finding on question of fact of nonresidence of plaintiff for purpose of security for costs not disturbed.

The finding by the trial court on the question of fact of nonresidence of plaintiff for purpose of security of costs cannot be disturbed on appeal.

Appeal from Superior Court, Riverside County; Wm. H. Dehy, Judge.

Action by Sarah J. Wall against J. George Hunter and others. From judgment of dismissal, plaintiff appeals. Affirmed.

See, also, 199 Pac. 775; 200 Pac. 929.

D. B. Chapin, Lee R. Taylor, and James L. King, all of Los Angeles, for appellant.

A. Aird Adair, of Riverside, for respondents.

NOURSE, J. This is an appeal by plaintiff from a judgment dismissing her action as to the defendant John J. Wall, upon the ground that she had failed to comply with a demand for security for costs in the action, she being a nonresident of the state. The action was commenced on August 19, 1919, by plaintiff against three defendants, Hunter, Wall, and Winder, charging them with alienating the affections of her husband and in procuring him to make a will disinheriting her. Summons was served upon the defendant Wall while he was in attendance upon the superior court in Riverside county during the progress of plaintiff's contest of the will of her husband. On May 5, 1920, the defendant, Wall, served and filed his special appearance in this action and at the same time gave notice of motion to quash the service of summons, upon the ground that he was a resident of the state of Nevada and was served while in attendance upon the court as a suitor and party interested in said proceedings and as a witness thereat. On the same day the defendant Wall served and filed a demurrer to plaintiff's complaint, upon the sole ground that the trial court had no jurisdiction of the defendant. The motion to quash was granted and the demurrer sustained. The plaintiff thereupon sued out a writ of certiorari to review these orders, and, on July 19, 1920, the District Court of Appeal of the Second district, Division 2, ruled that, by the filing of the demurrer to the complaint, the defendant, Wall, had submitted his person to the jurisdiction of the court and that it was error to grant the motion and sustain his demurrer. It was held, however, that, as plaintiff had an adequate remedy by appeal, certiorari would not lie, and accordingly the writ was discharged. Thereafter the matter was again brought before the superior court, and, on January 13, 1921, the court made an order setting aside its previous ruling and overruled the demurrer and granted this defendant 20 days in which to answer the complaint. On January 22, 1921, this defendant served on the plaintiff a demand for security for costs, in accordance with the provisions of section 1036, Code of Civil Procedure, based upon the ground that she was a nonresident of the state. As the plaintiff failed to comply with the demand in the 30 days allowed by section 1037, this defendant, on February 25, 1921, served and filed his notice of motion to dismiss the action. This motion was granted some four months later, on June 29, 1921, and judgment followed dismissing the action as to defend-

ant, Wall. In this judgment the trial court found as a matter of fact that the plaintiff had failed and neglected to file an undertaking within the time allowed by the statute and that none had been filed at the time of the judgment, and that the plaintiff was in fact a nonresident of the state at the time of the institution of the action. It is from this judgment that the appeal is prosecuted.

The points urged by appellant are (1) that the defendant, Wall, having answered the complaint by filing a general demurrer and afterwards an answer thereto, waived his right to make a demand for security for costs; (2) that the court erred in dismissing the action because the plaintiff was in fact a resident of the state of California; and (3) that the court erred in dismissing the action because the demand for costs was not "filed" in the action.

[1, 2] As to points 1 and 3, it is sufficient to refer to the statute, sections 1036 and 1037, Code of Civil Procedure. These sections do not require that the demand for costs be filed or that it be made and served upon the plaintiff before demurrer or answer. As to the second point urged, it is sufficient to say that the question whether the plaintiff was in fact a nonresident of the state was the very question which the trial court was called upon to decide and, having found that she was a nonresident, the judgment cannot be disturbed.

Judgment affirmed.

We concur: LANGDON, P. J.; STURTEVANT, J.

57 Cal. App. 631

MARTIN v. GOING. (Civ. 3768.)

(District Court of Appeal, Second District, Division 1, California. May 8, 1922.)

1. Assignments §134—On denial of assignment in action on labor claims, burden on assignee to show assignment in writing.

Where, in an action by the assignee of labor claims, the answer denied the allegations made in the complaint as to the assignments, the effect of such denial was to place the burden upon plaintiff to show assignments made in accordance with the requirements of Civ. Code, § 955, providing that no assignment of wages should be valid unless made in writing by the person by whom the wages were earned.

2. Master and servant §83—Penalty wages stopped by action.

Under St. 1919, p. 294 (Deering's Gen. Laws Supp. 1921, Act No. 2142b), "penalty wages" stopped running upon the commencement of an action to collect.

3. Assignments §80—Penalty wages not preserved after assignment of claim.

An assignment of a labor claim does not carry with it and preserve in favor of the as-

signee the right to penalty accruing subsequent to the date of assignment, under St. 1919, p. 294 (Deering's Gen. Laws Supp. 1921, Act No. 2142b).

Appeal from Superior Court, Tulare County; W. B. Wallace, Judge.

Action by J. C. Martin against J. S. Going. From judgment for plaintiff, defendant appeals. Reversed.

Nowell & Moran, of Tulare, and Lamberson & Lamberson, of Visalia, for appellant.

A. P. Harris and Burns & Watkins, all of Fresno, for respondent.

JAMES, J. The appeal in this case was taken from a judgment for the sum of \$485.30 entered against appellant.

Plaintiff alleged in his complaint that he had acquired by assignment three claims for farm labor performed by individuals upon the ranch of appellant. He alleged that one Martin performed labor from July 11 to August 5, 1920, at the reasonable value of \$81.40; that one Clark performed labor from July 4 to August 5, 1920, at the value of \$68; and one Long performed labor from the 31st of May to August 5, 1920, at the reasonable value of \$115.40. These claims totaled the sum of \$264.80. The difference between this amount and the amount for which judgment was awarded is made up of sums which the court assessed as penalties because of the failure of appellant to pay the wages on demand. Preliminarily it is worth while to state that, upon the face of the record, a fair inference is indicated that the plaintiff here acquired these claims for the purpose of making collection of them. The transaction in that light would be a perfectly legitimate and legal one, but it is somewhat remarkable that, as these claims in their several original amounts, and including any penalty that might be imposed were each within the jurisdiction of the justice's court, they were lumped together so that the alleged assignee's demand brought the amount within the jurisdiction of the superior court. Instead of trying the actions in the justice's court, where a speedy trial could be had, and a prompt disposition of the matters be made in the superior court in the event of an appeal thereto, the claimants have chosen to put the controversy in a position where it has necessarily been attended by largely increased expenses for printing and other costs, and added delay before final determination is reached. However, the controversy has been brought here, and the questions presented will be fully considered.

[1] Among other contentions made appellant insists that no right is shown in the plaintiff to recover because no valid assign-

ment was proved to have been executed by the three original claimants. In this connection section 955 of the Civil Code is cited, which expressly provides that—

"No assignment of, or order for, wages or salary shall be valid unless made in writing by the person by whom the said wages or salary are earned. * * *

The defendant in his answer specifically denied the allegations made in the complaint as to the assignments, and the effect of such denial was to place the burden upon the plaintiff to show, by legal evidence, assignments made in accordance with the requirements of the Code provision. That such a denial in the answer was sufficient to put in issue the sufficiency of the assignments is established by the cases of Wakefield v. Greenwood, 29 Cal. 597, and Feeney v. Howard, 79 Cal. 525, at page 535, 21 Pac. 984, 4 L. R. A. 826, 12 Am. St. Rep. 162. These decisions also hold that, where the issue of the statute of frauds is made, plaintiff must prove a sufficient contract, and it is declared that this can "be done only by the production of proof of the execution and contents of the written agreement, or some note or memorandum thereof executed according to the provisions of the statute of frauds." See, also, Jonas v. Field, 83 Ala. 445, 3 South. 893; Brown on Statute of Frauds (5th Ed.) § 535; Gard v. Ramos, 23 Cal. App. 303, 138 Pac. 108. Respondent replies to this contention with the argument that, as the assignors were permitted without objection to answer general questions in the affirmative as to whether they had assigned their claims to the plaintiff, it is now too late to question the sufficiency of the proof. Defendant was entitled to rest upon his answer raising the issue, and to require that the plaintiff establish the assignments by legal evidence, and that, as the authorities cited hold, could only be done by the production of a writing properly executed, or at least proof that one had been so made. Respondent's argument would be sound were the situation one where witnesses had testified without objection that written assignments had been made; in that case the opposite party could not be afterwards heard to complain because the writings had not been produced. The mere statement of the witnesses that each had assigned his claim, without stating the manner in which that assignment was made, fell short of establishing the fact in the required manner.

While the conclusion expressed on the contention just discussed is determinative of this appeal, in view of the fact that further proceedings may be had it will be advisable to consider other objections which have been urged.

Appellant argues that the evidence was in-

sufficient to show that any contractual relation existed between the defendant and the alleged assignors of the plaintiff. This contention must be considered in the light of the evidence which is most favorable to plaintiff's case.

It appears that two men, Bunch and Barnes, on the 1st of April, 1920, entered into a contract with the defendant, who was the owner of a ranch, whereby they agreed to crop the ground and receive one-half of the proceeds as compensation. Under that contract they were to pay all expenses except for "power." Barnes and Bunch did not work harmoniously, and on the 4th day of May, Barnes having retired from the contract with the consent of the owner of the ranch, Bunch arranged with the defendant to proceed with the growing and harvesting of the crop of hay. Bunch testified that the original agreement was entirely abrogated and that the defendant agreed from then on to pay all expenses incident to the growing and harvesting of the crop, and that for his services Bunch was to have one-half of that crop less the cost of producing the whole. He stated that he was under the direction of the defendant as to the manner in which the crop was to be grown and that he performed his part of the agreement and remained on the ranch until the hay was harvested, baled and stacked; he testified that he gave written orders on the defendant for the payment of claims of laborers, which were honored up to the time that the three assignors of the plaintiff who had been employed by Bunch on defendant's ranch, asked to be paid. It appeared by his testimony that he had received no part of the hay, and that the matter of adjusting his own claim remained open. Without making any further statement of the evidence, it has already appeared that there was some substantial evidence upon which the trial court might properly conclude that, after the making of the agreement between Bunch and the defendant, and after Barnes left the ranch, Bunch became the agent of the defendant in the matter of hiring men to care for and harvest the hay crop. The testimony of the defendant, from which it would appear that Bunch did not act as his agent, but that he (the defendant) advanced to Bunch as a loan various sums of money, created a conflict which it was the trial court's duty to resolve, and as to which this court has no concern.

[2, 3] Another contention made by appellant is that the court erred in allowing recovery for additional sums as penalties for nonpayment of the alleged wages. In the Statutes of 1919, p. 294 (Deering's General Laws, 1921 Supplement, p. 1552), it is provided that, as to an employee not working under a written contract for a definite period, his wages shall become due and payable

not later than 72 hours after termination of the employment, and that (section 5), where an employer willfully fails to pay such wages, "as a penalty for such nonpayment the wages or compensation of such employees shall continue from the due date thereof at the same rate until paid, or until an action therefor shall be commenced; provided, that in no case shall such wages continue for more than thirty days. * * *"

To this point appellant's argument consists mainly of the assertion that the penalty could not be collected because appellant was not shown to have employed plaintiff's alleged assignors. That question is necessarily determined by what has been last stated in the foregoing. However, attention should be called to the fact that, while the court allowed as a penalty on each claim a sum equal to 30 days' wages, it appeared that the original complaint herein was filed on August 24, 1920, and all of the amounts alleged to be owing were alleged to have accrued on August 5, 1920. Furthermore, the court, referring to the assignment, found only that such assignment had been made "prior to the commencement of the action." These facts suggest two questions, which may be thus answered: (1) Under the terms of the statute the "penalty wages" would stop running upon the commencement of an action to collect the same, where the action is brought by an original claimant. But 19 days elapsed between the cessation of labor and the commencement of the action; hence in no event could there be a thirty-day penalty allowed. (2) An assignment of a labor claim cannot carry with it and preserve in favor of the assignee the right to a penalty accruing subsequent to the date of the assignment. For aught that appears in the findings of the court, the assignment may have been made on any day subsequent to the cessation of work. For the various reasons expressed it is clear that the judgment cannot be sustained.

The judgment is reversed.

We concur: CONREY, P. J.; SHAW, J.

57 Cal. App. 756

SANDOVAL v. SALAZAR. (Civ. 4219.)

(District Court of Appeal, First District, Division 2, California. May 22, 1922. Hearing Denied by Supreme Court July 20, 1922.)

1. Appeal and error §933(1)—Order denying motion for new trial presumed correct.

Where the record showed that a notice of intention to move for a new trial was served and filed, but did not show that the motion was ever made, or, if made, what evidence was introduced to support it, an order denying the motion is presumed to be correct.

2. Reference §103(1)—Statutory modes of attacking referee's report and subsequent judgment referred to.

The only statutory modes of attack on the report of the referee and a judgment entered pursuant to such a report is that provided under Code Civ. Proc. §§ 473, 663-663a, or 656-660.

3. Appeal and error §1044—Stipulation for reference not indorsed, filed until after entry of judgment, held not to warrant reversal.

The fact that a referee was appointed by the court on a stipulation of the attorneys which was not indorsed, filed by the clerk until after the referee had made his report and the court had entered judgment, did not warrant a reversal of the judgment.

4. Reference §2, 99(1)—Statute relating to trial by referees held constitutional.

Code Civ. Proc. §§ 638-645, relating to trials by referees, is not violative of Const. art. 6, § 14, as the referee's report may be accepted or rejected by the trial court which renders the judgment.

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Action by A. Sandoval against L. M. Salazar. Judgment for plaintiff, and defendant appeals. Affirmed.

J. M. Chatterson, of Los Angeles, for appellant.

Schmidt & Riggins, of Los Angeles, for respondent.

STURTEVANT, J. The plaintiff brought an action in conversion against the defendant, he obtained a judgment, and thereafter he moved for a new trial and the motion was denied, and he also made a motion to vacate the judgment and that motion was denied. After the judgment was entered and before the motion for a new trial was ruled on the trial court made an order that a certain stipulation and the report of a referee should be filed as of May 18, 1921, one week before the judgment was ordered. The defendant served a paper purporting to be a notice of appeal from each and all of said determinations, including the judgment and each of said orders. The appeal was taken under the provisions of section 953a of the Code of Civil Procedure. The appellant has brought up the clerk's transcript, but has not brought up a transcript of the reporter's notes or any paper purporting to be a bill of exceptions. On the 5th day of January, 1921, Carroll Allen, Esq., as attorney for plaintiff, and Frank P. Jenal, Esq., as attorney for defendant, entered into a stipulation:

"Whereas the issues of fact raised by the complaint and answer in this case requires the examination of long accounts on both sides; and whereas, the parties hereto desire a reference made to enable the court to determine

said action as provided for in sections 638 and 639 of the Code of Civil Procedure of the state of California: Now, therefore, it is hereby stipulated that an order may be entered herein appointing W. J. Palethorpe as referee to hear and report upon the facts involving such accounting so raised by the complaint and answer herein."

On that date there was indorsed on the foot of said stipulation the following:

"So ordered. John W. Shenk, Judge. January 5, 1921."

The paper was filed May 18, 1921. On June 27, 1921, an order was made as follows:

"It appearing to the court that the stipulation for the order of reference herein and the order of reference based thereon, together with a report and findings of the referee were filed with the clerk of this court on May 18, 1921, and that by an oversight the same bear no filing date or mark of said clerk, and that the same have not been formally filed: It is hereby ordered that the clerk is, be, and is hereby directed to file said stipulation, order of reference and said report and findings of the referee as of date May 18, 1921."

A report of a referee is set forth in the transcript, and is marked filed May 18, 1921. On May 3, 1921, the same attorneys entered into a stipulation filed on that day, which provided, among other things:

"That each of said parties waives his right to appeal from the findings of the said referee and the judgment entered herein."

The judgment entered May 25, 1921, contains the following recitals:

"The issues of fact in this case having been referred to W. J. Palethorpe and said referee having heard evidence thereon and having filed his report herein, and it having been stipulated by the parties to this action that the same should be accepted as final, and findings having been waived by stipulation and said matter coming on regularly to be heard this day upon motion of Carroll Allen, Esq., attorney for plaintiff," etc.

[1, 2] The appellant vigorously attacks the above stipulations. In making his attacks he has not followed any rule of practice that authorizes him to have a hearing in this court. Secondly, even though he had done so as a matter of substantive law his attack is without merit. Addressing ourselves to the former proposition first, it is clear that by reason of a recital in the judgment this court must assume that the judgment was based, at least in part, on a report of W. J. Palethorpe as referee but whether such reference was made by any stipulation or by the above stipulation does not appear. The record before us shows that a notice of intention to move for a new trial was served and filed, but the record does not show, excepting by

inference, that the motion was ever made, or, if made, on what grounds it was made or what evidence was introduced in support of the motion. The only additional material contained in the record regarding that motion is that an order was made July 7, 1921, denying a motion for a new trial. We must presume that the motion was improperly made or improperly supported, and that the order denying the same was properly made. The nunc pro tunc order above set forth is regular on its face, and there is nothing in the record before us to show that the recitals contained in it are not true and correct, and we must presume that they are what they purport to be. On July 1, 1921, the defendant gave notice that he would move the court to vacate the order of June 27, 1921. The transcript contains the defendant's affidavit made on the 30th day of June, 1921. Assuming for the purposes of argument that said affidavit was used to support the motion noticed for hearing, there is nothing in the affidavit showing or tending to show that the recitals contained in the nunc pro tunc order are not true and correct. The same notice and affidavit purport to make an attack on the report of the referee and on the judgment. Such practice is not authorized in this state. The appellant did not make his attack under sections 473, 663-663a, or 656-660 of the Code of Civil Procedure. No other modes of attack are provided by our statutes.

[3] Assuming that the judgment was based on the report of W. J. Palethorpe as referee; that the referee was appointed by the trial court on a stipulation of the attorneys; that the stipulation of the attorneys was not indorsed filed by the clerk until the referee had made his report and until the trial court had entered its judgment; and that the judgment of the trial court was entered before the report of the referee had been indorsed by the clerk with the filing mark—said facts, taken singly or collectively, are of such a nature as not to warrant a reversal of the judgment by this court. *Coonan v. Loewenthal*, 129 Cal. 197, 200, 61 Pac. 940.

[4] Assuming that sections 638-645, inclusive, of the Code of Civil Procedure provide that a referee may render a judgment, the appellant contends that such provisions of the statute are unconstitutional as being in violation of section 14, article 6, of the state Constitution. The vice in this contention rests in the assumption on which it is based. A referee is appointed to make a report. The report may be accepted or rejected. In any event the trial court renders the judgment.

No error is made to appear by the record presented to this court. The judgment of the trial court is affirmed.

We concur: LANGDON, P. J.; NOURSE, J.

58 Cal. App. 33

PEOPLE v. NAVARETTE. (Cr. 611.)

(District Court of Appeal, Third District,
California. June 2, 1922.)**Homicide** ⚡234(1)—Evidence held sufficient to show defendant fired the shot which killed deceased.

In a prosecution for the murder of a railroad brakeman while he was attempting to eject several Mexicans from a car in which they were riding, evidence held sufficient to sustain the jury's finding that it was defendant who fired the shot which killed the brakeman.

Appeal from Superior Court, Sacramento County; C. P. Vicini, Judge.

Ygnasio Navarette was convicted of murder in the second degree, and he appeals from the judgment and from the order denying his motion for a new trial. Affirmed.

P. H. Johnson and M. A. Thomas, both of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and J. Chas. Jones, Deputy Atty. Gen., for the People.

FINCH, P. J. The defendant appeals from the judgment of conviction of the crime of murder of the second degree and the order denying his motion for a new trial.

The defendant and four other Mexicans and three white men were riding at night, without authority or permission, in an open freight car, known as a gondola car, attached to a Southern Pacific train. A brakeman ordered the Mexicans to leave the train, saying the white men might remain. The train was moving at a speed of about six miles an hour in a southerly direction. The white men and one of the Mexicans were at the west side of the car and the other Mexicans at the front. At the time of the shooting the brakeman was standing in the center of the car. Two of the white men testified that when the brakeman ordered the Mexicans to leave, those in the front of the car moved towards the rear past the brakeman, but that the one on the west side with the white men did not change his position; that the brakeman then fired a shot over the head of the Mexican who had refused to move, whereupon one of the Mexicans who were moving towards the rear shot the brakeman from a distance of four to six feet away, and that at the time the brakeman was facing the rear end of the car. The bullet entered the right side three inches above the hip bone and ranged slightly backward to the left side, causing death. Alexander Verdugo, one of the Mexicans, testified that the Mexicans were in the front of the car at the time of the shooting; that the brakeman shot twice over the head of the Mexican who was at the west side of the car, and that thereupon the

defendant shot the brakeman; that he saw the defendant fire the shot which killed the brakeman; that the witness and the defendant immediately jumped off the car and left together; that as they were walking away the defendant said he had shot the brakeman and hoped he would die; that the defendant said: "I wish I had some Mexican to give the gun to," and then threw the gun away. The defendant testified that he did not shoot the brakeman and did not know who shot him.

The only ground urged for a reversal is that the evidence is insufficient to show that the defendant fired the fatal shot. The evidence is so clearly sufficient that any further discussion of the matter would be superfluous.

The judgment and order are affirmed.

We concur: HART, J.; BURNETT, J.

57 Cal. App. 766

ESPONDA v. KELLY et al. (Civ. 4230.)

(District Court of Appeal, First District, Division 2, California. May 22, 1922.)

1. Animals ⚡22—Substitution of bailee held a "novation."

There is a novation within Civ. Code, § 1531, whereby one becomes a substitute for bailee of cattle for pasturage where he receives the animals from the original bailee, and in consideration thereof agrees with him to return them to the bailor upon the latter's demand in consideration of bailor's cancellation of original bailee's obligation and bailor's acceptance of the substituted bailee's promise to redeliver in lieu of such obligation of the original bailee.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Novation.]

2. Adverse possession ⚡64—Limitations do not run in favor of substitute bailee holding property in recognition of bailor's right.

Where a person holds property as substitute bailee by novation, his assertion of an adverse claim of which bailor has notice may set in motion the statute of limitations (Code Civ. Proc. § 338, subd. 3, and section 339, subd. 1), but so long as he holds in recognition of bailor's right the statute will not run; and the rule is not altered merely because bailor assigns the property after the substitution.

Appeal from Superior Court, Kern County; Howard A. Pairs, Judge.

Action by Mary Esponda against J. J. Kelly and Ione Kelly. From a judgment for plaintiff, defendants appeal. Affirmed.

W. B. Beazley, of Bakersfield, for appellants.

Dorris & Henderson and Kaye & Siemon, all of Bakersfield, for respondent.

NOURSE, J. Action for damages for conversion. Plaintiff recovered judgment, and defendants appeal. The case comes before this court on the judgment roll alone; no transcript of evidence or bill of exceptions having been filed. The facts as found by the trial court are that at all times prior to September 5, 1917, plaintiff's husband, Bernardo Esponda, was the owner of and entitled to the possession of certain personal property, to wit, nine head of cattle, which was the community property of plaintiff and her husband; that on that date he assigned to plaintiff as her separate property all of his right, title, and interest therein, together with all rights, claims, and demands growing out of his previous ownership thereof; that on or about September 22, 1914, plaintiff's assignor placed said cattle, which were then calves of approximately one year of age, in the care, custody, and keeping of one Ansolabehere as a bailee for hire for the purpose of pasturing them, and Ansolabehere then and there agreed to return the cattle to plaintiff's assignor upon demand. Five days later "defendant J. J. Kelly took and received the said cattle from the possession of the said Ansolabehere, and in consideration thereof the said J. J. Kelly then and there promised, undertook, and agreed to and with the said Ansolabehere to return and redeliver said cattle to the said Bernardo Esponda upon demand of said Bernardo Esponda in consideration of the cancellation by said Bernardo Esponda of the obligation of said Ansolabehere to redeliver said cattle on demand and the acceptance by said Esponda of the promise and agreement of the defendant J. J. Kelly in lieu of and as a substitute for such obligation of said Ansolabehere; and thereafter, on or about January 1, 1915, said Esponda approved and ratified the agreement so made by the defendant J. J. Kelly with the said Ansolabehere and accepted the same as a substitute for and released the said Ansolabehere from and canceled the obligation of said Ansolabehere to redeliver said cattle to said Esponda on demand"; that thereafter, and on or about September 27, 1917, after receiving the assignment referred to, plaintiff made demand upon defendant J. J. Kelly for the return of said property, but the said defendant then and there failed, refused, and neglected, and at all times since has continued to fail, refuse, and neglect to return or redeliver said property or any part thereof to the plaintiff or to the plaintiff's husband, and said Kelly thereupon converted said property and the whole thereof to his own use and benefit. Defendants pleaded that the action was barred by the provisions of section 338, subd. 3, and section 339, subd. 1, of the Code of Civil Procedure, prescribing respectively three and two years as the period of limitation.

[1, 2] The only point made by appellant is that demand for the return of the property was not made within time; that the time within which it should have been made was coincident with the period provided in the statute of limitations for barring the action. There is no merit in this contention. J. J. Kelly's possession of the property was with the consent of plaintiff's assignor and under an express agreement to return it upon demand. The facts shown constitute a novation (Civ. Code, § 1531; *Molera v. Cooper*, 173 Cal. 259, 160 Pac. 231) by which he was substituted for the original bailee. Any assertion of an adverse claim by appellant J. J. Kelly of which respondent or her assignor had either actual or constructive notice may have set the statute in motion, but so long as he held the property as bailee for respondent or her assignor and recognized that relation the statute would not run in his favor. *Estate of Rathgeb*, 125 Cal. 302, 57 Pac. 1010. The refusal to comply with respondent's demand amounted to a conversion of the property and a cause of action then arose.

Judgment affirmed.

STURTEVANT, J., concurs.

57 Cal. App. 640

**ALVARADO v. SUNSET SUPPER CLUB
et al. (Civ. 3894.)**

(District Court of Appeal, Second District, Division 1, California. May 9, 1922.)

1. Judgment $\S$ 155—Notice of motion to open default need not allege particular facts to be relied on.

Notice of motion to open default under Code Civ. Proc. § 473, need not set forth a statement of the particular facts on which defendants will rely, but it is enough to allege that motion will be made on the ground that judgment had been entered through the mistake, inadvertence, surprise, and excusable neglect of defendants, and each of them, and on the affidavits and verified answer of defendants.

2. Judgment $\S$ 159—Affidavits for opening default held to authorize conclusion of excusable neglect.

Affidavits of M., secretary, and O., president, of defendant corporation, for opening default against the three—that of M. stating that immediately after service of summons and complaint he took them to an attorney and requested him to represent him, and that it was understood that he would represent all defendants, and that of O. that when summons and complaint were served it was agreed that M. should consult the corporation's attorney, and request him to conduct the defense, and that he was informed by M. that he had so consulted the attorney and that he had agreed to conduct the defense—entitled the court to conclude that a case of excusable neglect was made out.

3. Judgment ☞160—Affidavit of merits for opening default sufficient.

The affidavit of merits for opening default that affiant had stated all the facts of the case to his attorney, and had been advised by him that he had a good and meritorious defense, is sufficient in form and substance.

4. Judgment ☞160—Affidavit of merits for opening default aided by answer.

Affidavit of merits for opening default is aided by verified answer tendered at the hearing and raising material issues.

5. Appeal and error ☞957(1)—Judgment ☞139—Opening default judgment interfered with only for abuse of discretion.

Motions to vacate defaults and default judgments are peculiarly addressed to the trial judge's discretion, and in view of the policy of the law to allow trial on the merits, orders of vacation will be interfered with only where a clear and unmistakable abuse of that discretion is shown.

Appeal from Superior Court, San Diego County; C. N. Andrews, Judge.

Action by Aileen Alvarado against the Sunset Supper Club and others. From an order granting motion to set aside default judgment against certain defendants, plaintiff appeals. Affirmed.

M. M. Gordon, of San Diego, for appellant.

Leonard Wright, of San Diego, for respondents.

JAMES, J. This action was brought to recover from defendants an amount of money as damages. Defendants Sunset Supper Club (a corporation), Tony Matowich, and George Morris failed to answer within the time fixed by law after service of summons, and their default was duly entered and judgment taken on May 18, 1921. On the 13th of June, 1921, after notice to the plaintiff, said defendants presented to the superior court their motion to set aside the default and the judgment entered thereon and to be allowed to file an answer. The court made an order granting the motion, conditioned upon said defendants paying to the plaintiff the sum of \$33.30 costs, which costs were paid. The plaintiff has appealed from the order.

[1-4] In support of the appeal it is argued by counsel for the plaintiff that the showing made by the defendants was insufficient to authorize the trial court to grant the motion. It is contended that the notice of motion was insufficient in its statement of grounds, that the facts shown by the affidavits did not establish that the neglect on the part of the defendants in failing to appear and answer was excusable, and that no sufficient affidavit of merits was presented. The notice of motion did state that it would be made upon

the grounds that the default judgment had been entered through the "mistake, inadvertence, surprise, and excusable neglect of these defendants, and each of them," and that the motion would be made upon the affidavits of the individual defendants and upon the verified answer of said defendants, including the Sunset Supper Club. The notice of motion contained all of the statements requisite under the provisions of section 473, Code of Civil Procedure, and it was neither necessary nor proper that there should be set forth therein a statement of the particular facts upon which the defendants would rely. By the affidavits of the defendants facts were shown which entitled the court to conclude that a case of excusable neglect was made out. These affidavits showed that defendant Tony Matowich, immediately after service thereof, took a copy of the summons and complaint to an attorney, and requested said attorney to represent him; he set forth in the affidavit that it was understood that said attorney would represent all defendants. It appeared by Matowich's affidavit that he was secretary of the defendant corporation. In the affidavit of defendant Morris it was stated that said defendant was president of defendant corporation; that when the summons and complaint were served it was agreed that Matowich should consult the attorney of defendant corporation and request him to conduct the defense of the action, and that said defendant was informed by Matowich that he had so consulted the attorney, and that the latter had agreed to attend to the defense of the action. These two affidavits were made on behalf of the individual defendants and also on behalf of the corporation. Each one contained the statement that the affiant had "stated all the facts of said case to his said attorney, and has been advised by him that he has a good and meritorious defense to the plaintiff's cause of action." The affidavit of merits was sufficient in form and substance; moreover, it was aided by a verified answer, which was tendered at the hearing of the motion, and which raised material issues. *Savage v. Smith*, 170 Cal. 472, 150 Pac. 353.

[5] The attorney to whom Matowich had taken the summonses in the first instance testified orally on the hearing of the motion that Matowich came to his office with one of the defendants Topuzes, and that he was requested to secure a dismissal of the action as to Topuzes, but he did not understand that he had been employed to represent the other defendants, although he testified that it was "entirely possible that Matowich may have believed so." He testified further: "They are Greek; they speak rather imperfect English, and may not have fully understood all that occurred." This attorney was

at that time representing defendant Matowich in another proceeding, and had also, at a prior time, been the attorney for defendant corporation. It has been declared over and over again in the appellate decisions of this state that it is the policy of the law to allow causes to be tried upon their merits; that motions to vacate defaults and default judgments are peculiarly addressed to the discretion of the trial judge, and that only in cases where a clear and unmistakable abuse of that discretion is shown will an appellate court interfere with such orders. *Berri v. Rogero*, 168 Cal. 736, 740, 145 Pac. 95; *Savage v. Smith*, supra; *Lynch v. De Boom*, 26 Cal. App. 311, 146 Pac. 908; *Morton v. Shannon*, 26 Cal. App. 689, 147 Pac. 1179; *McMunn v. Lehrke*, 29 Cal. App. 298, 155 Pac. 473.

The order is affirmed.

We concur: CONREY, P. J.; SHAW, J.

57 Cal. App. 665

BLANCHARD v. HAIG. (Civ. 4054.)

(District Court of Appeal, First District, Division 1, California. May 12, 1922. Rehearing Denied June 9, 1922. Hearing Denied by Supreme Court July 10, 1922.)

Principal and agent §78(1)—Parties held not entitled to accounting where accounts were loosely kept.

Where plaintiff and defendant operated a jewelry and repair shop with defendant as manager, plaintiff furnishing the stock and agreeing to pay defendant a part of the profits from sales as salary, and plaintiff and defendant at different times operated the store alone and made sales which were not entered in the books, neither party was entitled to an accounting.

Appeal from Superior Court, Santa Clara County; W. A. Beasley, Judge.

Action by Marcus Blanchard against Samuel M. Haig, in which defendant interposed a counterclaim. Relief was denied both parties, and plaintiff appeals. Affirmed.

H. A. Blanchard, of San Jose, for appellant.

W. H. Johnson, of San Jose, from respondent.

TYLER, P. J. This action was one brought to recover certain sums of money and other personal property of the value of \$1,789.67, which it is alleged defendant received as agent of the plaintiff. Defendant, by answer, denied plaintiff's allegations, and by way of counterclaim alleged that plaintiff was indebted to him in the sum of \$858.75.

Relief was refused both parties, and plaintiff appeals.

It appears from the record that on or about November 1, 1917, the parties hereto entered into an agreement whereby they undertook to operate a jewelry and repair shop with defendant as manager. Plaintiff agreed to furnish the stock in trade and the store where the business was to be conducted, and to pay defendant for his services one-half of all the profits derived from sales. The trial court found, among other facts, that the total cost of merchandise purchased by plaintiff and furnished to defendant as manager for the purposes of sale amounted to the sum of \$5,603.64. It further found that the total cost price of certain goods sold amounted to \$1,584.36, and that an inventory of the merchandise on hand at the close of defendant's employment showed goods to the value of \$2,229.61. Other findings are to the effect that the books kept by defendant did not show all of the sales made, and that both plaintiff and defendant sold merchandise not accounted for, and that in fact the books kept by the parties were inaccurate, for which reason the court found it was impossible to ascertain the amount of goods sold, the prices obtained therefor, or in any manner to arrive at a true account thereof, and accordingly judgment was denied both parties.

Appellant contends that the conclusion of the trial court that plaintiff was not entitled to recover from defendant is against law and contrary to the facts and findings, for the reason that the effect of the findings is that defendant converted to his own use merchandise or cash to the extent of at least \$1,789.67. We see no force in this contention. It appeared in evidence that both plaintiff and defendant at different times operated the store alone. It also was shown, by the testimony of defendant, that he was instructed by plaintiff not to make entries of all sales for the reason that he did not desire to pay an income tax to the government, as he was not responsible for the war. True, plaintiff denied that he made any such request, but, however this may be, both plaintiff and defendant admit the making of sales which were not entered in the books. Under these circumstances the trial court could have come to no other conclusion than it did in finding that it was impossible to determine the true amount of goods sold, and what sum, if any, plaintiff was entitled to recover.

It is true that the trial court did find that the plaintiff sold \$1,500 worth of merchandise, but other findings show that this amount did not indicate the full amount of sales. The findings are therefore not conflicting. So far as the record shows, both parties were in a position to bring about the

claimed shortage of merchandise, and either or both of the parties may have been responsible for it. The evidence throws no light upon this subject. Under such circumstances relief was properly denied both parties.

The judgment is affirmed.

We concur: KERRIGAN, J.; KNIGHT, Justice pro tem.

(57 Cal. App. 568)

MCCORMICK v. WOODMEN OF THE WORLD. (Civ. 4135.)

(District Court of Appeal, First District, Division 1, California, May 4, 1922. Hearing Denied by Supreme Court July 3, 1922.)

1. Contracts ⚡127(3)—Insurance ⚡722—Provision of death benefit certificate that member's disappearance for any length of time should not be evidence of death held void.

A condition in a death benefit certificate that absence or disappearance of insured member for any length of time should not be sufficient evidence of his death held void as unreasonable and as an agreement to oust the courts of jurisdiction, in view of Code Civ. Proc. § 1963, subd. 26.

2. Contracts ⚡127(1)—Stipulation restricting admissibility of evidence void.

A stipulation in a contract that certain evidence only shall be admissible in case of litigation subsequently arising under such contract cannot be allowed to control the action of the court in the admission or in the effect to be given to the evidence.

3. Stipulations ⚡3—Stipulation not permitted to control course of justice upon trials.

Courts will not permit the course of justice upon trials before them to be stipulated and controlled in such a manner as to defeat the ends to be subserved by such trials.

Appeal from Superior Court, City and County of San Francisco; T. I. Fitzpatrick, Judge.

Action by Mary C. McCormick against the Woodmen of the World. Judgment for plaintiff, and defendant appeals. Affirmed.

M. T. Moses, of San Francisco, for appellant.

Heidelberg & Murasky, of San Francisco, for respondent.

TYLER, P. J. This action was brought to recover upon a benefit certificate issued by defendant company. Plaintiff is the wife and sole beneficiary of one Fasty M. McCormick, a member of defendant society, an unincorporated fraternal organization.

The action was commenced on the 20th day of November, 1920, and is one of the so-called

"disappearance" cases. It appears from the record that Fasty McCormick became a member of the society on the 31st day of December, 1911. At that time the benefit certificate here sued upon was issued to him. He expressly and in writing accepted the same subject to the conditions and terms therein specified. Among these conditions was one which provided that the absence or disappearance of a member holding the certificate from his last-known place of residence for any length of time should not be sufficient evidence of his death, and that no right should accrue under such a certificate to a beneficiary or beneficiaries, nor any benefits be paid until proof had been made of the death of said member, while in good standing. Another condition provided that the beneficiary was entitled to the sum of \$1,500 if the insured died within one year from the date thereof, \$2,250 if death occurred within two years, and \$3,000 if death occurred two years thereafter.

McCormick disappeared on the 2d day of July, 1913, and has not been seen nor heard of for more than seven years, though diligent search was made to ascertain his whereabouts, and plaintiff claims that he is dead. Judgment was rendered in her favor for \$3,000, the full amount of the certificate, and defendant appeals. Appellant contended below, and does here, that the disappearance clause in the certificate bars recovery, and also that respondent is not entitled to the full amount of the policy, but is only entitled in any event to partial recovery.

[1] The record contains no direct proof that McCormick is dead, and in fact no such claim is made; plaintiff relying solely on the circumstance that the insured has been absent and neither seen nor heard from for more than seven years, and is therefore presumed to be dead. Subdivision 26, § 1963, Code Civ. Proc. It is conceded, as indeed it must be, that if the disappearance clause in the contract is valid and binding, it is conclusive against plaintiff, and no recovery can be had thereon. Respondent claims in support of the judgment, however, that the clause is against public policy and is violative of the laws of the state and contrary to the terms of the policy itself. The attempt of beneficial societies to adopt a by-law or contract relating to disappearance cases, and to control the rule of evidence with respect to the presumption of death, has been fully considered and discussed by the courts of various jurisdictions. There is considerable variance in the views of those courts upon the question. In some of the cases the assailed provision was in the by-laws at the time the contract of insurance was made; in others it appeared in after-enacted by-laws. It would be a matter of supererogation to review the authorities in detail, for we are of the opinion that the appellate courts of

this state have arrayed themselves on the side of those jurisdictions which hold similar provisions to be unreasonable and against public policy. In the case of *Bennett v. Modern Woodmen of America* (Cal. App.) 199 Pac. 343, where a disappearance clause was considered, it was said:

"But it is a rule of common law and of the statutory enactment of this state that a person not heard from in seven years is presumed to be dead (Code Civ. Proc. 1963, subd. 26), and appellant's by-law is not only unreasonable and violative of statutory enactment, but is against the weight of public policy. It has been repeatedly so held. *Reynolds v. North America Union*, 204 Ill. App. 316, 327; *Samberg v. Knights of Modern Macabees*, 158 Mich. 568, 123 N. W. 25, 133 Am. St. Rep. 396; *National Union v. Sawyer*, 42 App. D. C. 475; *Supreme Lodge, Knights of Pythias, v. Wilson* (Tex. Civ. App.) 204 S. W. 891, 894. Its enforcement would not only have the effect to render nugatory a salutary statute, but the further result of making it practically impossible to make proofs of death in cases within the recognized experience of man, and thereby work a substantial injustice to the beneficiary. *Sovereign Camp, W. O. W., v. Robinson* (Tex. Civ. App.) 187 S. W. 215, 219; *Reynolds v. North American Union*, supra. In *Olson v. Modern Woodmen of America*, 182 Ia. 1018, 164 N. W. 346, L. R. A. 1918F, 1164, this same appellant invoked the defense of this same by-law. The court refused to countenance the plea, holding that its application would impose on a beneficiary the burden of paying all dues and assessments during the whole period of expectancy of the assured, thereby making the certificate practically worthless."

A transfer was denied by the Supreme Court in this case.

Counsel for appellant seeks to distinguish this authority from the instant case and claims that no question there arose as to the validity of the original contract between the member and the society, the terms upon which he was admitted to membership, and that the case involved an after-enacted by-law. We cannot distinguish this case in principle from the *Bennett* Case. The reasons assigned for holding the by-law in that case invalid are not less apparent or persuasive because of the fact that it was not part of the original contract of the insurer.

[2] The law implies that in every contract of insurance upon human life the insurer will pay the indemnity upon proof by competent evidence judicially tested and weighed by the law of the land, and such contracts ought to be immune from material impairment of this right. A stipulation in a contract that certain evidence only shall be admissible in case of litigation subsequently arising under such contract cannot be allowed to control the action of the court in

the admission of or in the effect to be given to the evidence.

[3] Courts will not permit the course of justice upon trials before them to be stipulated and controlled in such a manner as to defeat the ends to be subserved by such trials. Parties to a contract cannot agree to oust courts of jurisdiction over such contracts. Such acts transcend their power. *Utter v. Travelers' Insurance Co.*, 65 Mich. 545, 32 N. W. 812, 8 Am. St. Rep. 913; *Travelers' Insurance Co. v. McConkey*, 127 U. S. 661, 8 Sup. Ct. 1360, 32 L. Ed. 308.

As shown in the *Bennett* Case, such a stipulation in a contract is unreasonable and against public policy, as it nullifies the contract of insurance in the event of the disappearance of the insured. It is further objectionable, as above indicated, as being an attempt to contract as to the effect of evidence, and to thus control the action of the court in the determination of what shall be considered sufficient evidence to prove a given fact. Its enforcement would therefore deprive a court of its ordinary functions. Deceased had the right to have his insurance paid upon the occasion of his death. If such a clause in a contract of insurance is enforceable in controlling the involved rule of evidence, it would be impossible for a beneficiary to prove the death of the insured under these circumstances, even though the fact of death would be presumed to exist under established legal principles. Such an agreement clearly impairs the vested right of the insured to have the amount of his policy paid to his beneficiary upon his death. *Olson v. Modern Woodmen of America*, 182 Iowa, 1018, 164 N. W. 346, L. R. A. 1918F, 1164; *National Union v. Sawyer*, 42 App. D. C. 479; *Samberg v. Knights of Modern Macabees*, 158 Mich. 568, 123 N. W. 25, 133 Am. St. Rep. 396; *Supreme Lodge, K. of P., v. Wilson* (Tex. Civ. App.) 204 S. W. 891.

We are of the opinion, therefore, that the doctrine announced in the *Bennett* Case to the effect that such a clause is void as against public policy is controlling here. We see no merit in the further contention that plaintiff is only entitled to a partial recovery. The presumption being that the insured was dead at the expiration of seven years from his disappearance would make him a member for a period approximating nine years, and it appears that during this time plaintiff paid and defendant accepted all dues and assessments which became payable by reason of the benefit certificate. Plaintiff was therefore entitled to the maximum value of the policy.

For the reasons given the judgment is affirmed.

We concur: KERRIGAN, J.; KNIGHT, Justice pro tem.

57 Cal. App. 683

MILLER v. POWELL. (Civ. 3546.)

(District Court of Appeal, Second District, Division 2, California. May 18, 1922. Hearing Denied by Supreme Court July 17, 1922.)

1. Ejectment ☞111(6)—Finding held sufficient as disposing of claim that court failed to rule on an allegation of ouster.

In ejectment the claim of plaintiff that the court failed to make any finding upon his allegation that defendant entered and ousted him from his premises and has ever since unlawfully withheld possession was disposed of by the court's finding that defendant was not nor at any time had been in the possession of any real property belonging to plaintiff.

2. Ejectment ☞111(3)—Where complaint described land by government survey, court's failure to locate land by metes and bounds not error.

Where in ejectment plaintiff's complaint described the lands according to government survey, he could not complain where court failed to define or locate the land in its findings with reference to physical monuments.

3. Appeal and error ☞1071(1)—Findings of ownership of land and object of action not raised by pleadings not prejudicial.

In an action in ejectment, where the answer contained no allegation of ownership of land, *held*, that plaintiff was not prejudiced by findings that defendant was owner of the land, and that the only controversy involved was the determination of the ownership of a certain strip of land.

Appeal from Superior Court, San Diego County; S. M. Marsh, Judge.

Action by Edwin S. Miller against F. L. Powell. From a judgment for defendant, plaintiff appeals. Affirmed.

See, also, 199 Pac. 857.

C. E. Burch, of San Diego, E. J. Henning, of Washington, D. C., and W. H. Wylie, of San Diego, for appellant.

Heskett & Sample, of San Diego, for respondent.

CRAIG, J. This action is one in ejectment. By finding No. 1 the court found the plaintiff to be the owner of the property claimed by him and described in his complaint. It is to be noted that this description is only a legal one and does not locate the property of the plaintiff by metes and bounds or any physical objects upon the ground. It is as follows:

"The southeast quarter (S. E. $\frac{1}{4}$) of the southwest quarter (S. W. $\frac{1}{4}$); of the southwest quarter (S. W. $\frac{1}{4}$); also the north half (N. $\frac{1}{2}$) of the southwest quarter (S. W. $\frac{1}{4}$) of the southwest quarter (S. W. $\frac{1}{4}$); also the northwest quarter (N. W. $\frac{1}{4}$) of the southwest quarter (S. W. $\frac{1}{4}$); also west half (W. $\frac{1}{2}$) of the southwest quarter (S. W. $\frac{1}{4}$) of the

northwest quarter (N. W. $\frac{1}{4}$); also the south half (S. $\frac{1}{2}$) of the southwest quarter (S. W. $\frac{1}{4}$) of the northwest quarter (N. W. $\frac{1}{4}$) of the northwest quarter (N. W. $\frac{1}{4}$) of section twenty-two (22), township fifteen (15) south, range four (4) east of the San Bernardino meridian, San Diego County, California."

In finding No. 4 the court further found:

"And the court finds that the defendant herein is not now, and has not been at any time, in the possession of any of the real property owned by the plaintiff, or of which plaintiff is entitled to possession, and that as a consequence thereof the plaintiff has sustained no injury or damage whatever from the defendant."

If the finding last quoted is justified by the evidence, the appellant cannot be entitled to the judgment prayed for (for restitution of the property and damages), and this finding, as all others, must be accepted as true, for the appeal is taken upon the judgment roll alone.

[1] The appellant claims that the court failed to make any finding upon the issue presented by the following allegation of the complaint:

"The defendant entered into and upon said premises and ousted the plaintiff therefrom. That the defendant has ever since unlawfully withheld from the plaintiff the possession thereof to plaintiff's damage," etc.

We think it clear that the part of finding No. 4 above quoted disposes of this issue and against the contention of appellant.

[2] Appellant further criticizes the findings and judgment of the court because it is said that no attempt has been made to define or locate the land described in the complaint upon the ground with reference to physical monuments. In this regard the findings fully cover the issues presented by appellant's complaint. The judgment being predicated upon the findings, they properly keep within their scope in describing the appellant's property. Having made no allegation that his property is bounded by particular physical objects or lines between monuments, appellant cannot complain of a lack of a finding concerning such a matter.

[3] Lastly, appellant complains because the court found that the respondent is the owner of certain property. The answer contains no allegation to that effect. Conceding, without deciding, that such a finding is without the issues presented by the pleadings, it cannot have prejudiced plaintiff. The same is true of another finding, to which objection is made, in which the court asserts that the only controversy involved is the determination of the ownership of a certain strip of land.

Findings Nos. 1 and 4 preclude the plaintiff from recovering. They are not contradicted by the other findings. In view of them all,

the judgment was properly rendered against the plaintiff and appellant.

The judgment is affirmed.

We concur: FINLAYSON, P. J.;
WORKS, J.

58 Cal. App. 90

MOSES v. PACIFIC BLDG. CO. (Civ. 3892.)

(District Court of Appeal, Second District, Division 1. California. June 5, 1922.)

1. Appeal and error $\S$ 842(1) — **Mechanics' liens** $\S$ 290(4) — **Whether materials were so applied to building as to become part thereof is a question of fact for the trial court.**

Whether the materials furnished by plaintiff at the request of a lessee had been so attached to the building as to become a part thereof was a question of fact for the trial court, which was determined adversely to plaintiff by finding that plaintiff's only contract was for temporary installation of materials, not to become a part of the building.

2. Appeal and error $\S$ 907(3) — **On appeal on judgment roll, evidence is presumed to justify findings.**

Where the record on appeal consists of the judgment roll, the appellate court is bound to assume that the evidence justifies the findings.

3. Mechanics' liens $\S$ 78 — **Owner, without knowledge particular work was being done, need not disclaim responsibility.**

Code Civ. Proc. $\S$ 1192, permitting the enforcement of a mechanic's lien if the work was of a lienable character and if the owner had knowledge of the work which was ordered by the lessee, unless the owner gives notice disclaiming responsibility, does not apply where the owner consented that the lessee should install certain equipment and machinery, but did not have actual notice of the furnishing of the materials or the performance of the labor in question.

Appeal from Superior Court, San Diego County; C. N. Andrews, Judge.

Action to foreclose a lien for labor and materials by R. P. Moses, against the Pacific Building Company, a corporation, in which Nettie C. Moses, as administratrix, was substituted as plaintiff after the death of the original plaintiff. Judgment for defendant, and plaintiff appeals. Affirmed.

Luce, Sloane & Lee, of San Diego, for appellant.

Sweet, Stearns & Forward, of San Diego, for respondent.

CONREY, P. J. This action was commenced by R. P. Moses for the foreclosure of a lien claimed by him for labor and materials furnished and used in the making of certain improvements and alterations in a building

of the defendant. He appealed from the judgment entered in favor of the defendant. Pending the appeal, R. P. Moses died, and the administratrix of his estate was substituted as plaintiff and appellant.

The record on appeal consists of the judgment roll. From the findings we ascertain the following facts: The defendant, as owner of a storeroom building located on the lots described in the complaint, leased those premises to the San Diego Manufacturing Association, which afterwards became the Inorganic Products Company, a corporation. Thereafter the products company, "with the knowledge and consent of the said defendant," caused to be installed in the building "certain equipment and machinery for the manufacture of paint." On or about the 24th day of May, 1920, the San Diego Manufacturing Association entered into a contract with the plaintiff whereby the plaintiff agreed to furnish certain materials and to do and perform labor in installing in said building electric wiring, conduits, switches, and switchboards. The labor performed and materials furnished by the plaintiff were of the value of \$871.90, which sum the products company agreed to pay.

The court found:

"That all of the said materials which were furnished by said plaintiff and all of the labor performed by him were furnished and performed in putting into said building certain electrical wiring, conduits, and equipment, none of which ever became a part of said building or a fixture, or constituted or formed any improvement or alteration of or in said building, or any addition thereto; but that all of the said wiring, conduits and equipment were installed by the said plaintiff in the following manner: Said conduits were fastened to the studding and rafters of said buildings by metal clamps and eightpenny wire nails, and as a part of said equipment switchboards were fastened to the studding of said building by nailing one-inch boards across said studding and fastening the switch boxes on to said boards by screws and nails; that no nails were used of a smaller size than eightpenny wire nails, and some twentypenny wire nails were used in attaching said conduits and switchboards; that said conduits ran along and upon the studding and rafters of said building, which building was an open framework building, the outside walls of which were corrugated iron, and which had no inside walls other than the studding, sills, and rafters, and that said building had originally been used by the defendant as a storehouse and a place within which to manufacture doors and windows, etc., for the houses and buildings being erected by said defendant, and that said building was leased to the San Diego Manufacturing Association, for the purpose of manufacturing paint therein, and that said lease provided that the lessee might make such alterations and improvements as might be necessary for the carrying on of their said manufacturing business; that the electric wires and conduits placed in said building by the said plaintiff were by the

plaintiff connected to certain motors installed by the lessee to operate the machinery for manufacturing paint, and also connected to the lighting system of said building, plaintiff installing droplights in the office room and main portion of said buildings, but that said conduits, electric wiring, and switchboards were not so installed as to become permanently attached to said building or to become any part thereof, or to become fixtures therein; that all of the materials and equipment which the said plaintiff placed in said building were placed therein temporarily for a lessee of the said building, and that there was no understanding by said plaintiff or any lessee of said building, or the persons with whom plaintiff made the contract referred to in said complaint and for whom said plaintiff placed or installed certain electrical wiring and equipment in said building, that any of the said wiring, wires, conduits, switchboards, equipment, or other materials placed in said building by said plaintiff should become a fixture or be or become permanently attached to said building, or form a part thereof, or constitute or form any improvement or alteration in or of said building or any addition thereto, or repair thereof, or constitute or form any improvement or alteration in or of said building or any addition thereto or repair thereof, and that the said plaintiff never made any repairs in, of, or to the said building; that when plaintiff made his said contract with said manufacturing association and at all times thereafter he knew that said association did not own said real property, and it only had a lease thereof, and that its only interest therein was a leasehold, and he did said work and furnished said materials for said association with said knowledge."

The court further found:

"That said plaintiff completed furnishing the materials and performing the labor which he did furnish and perform as aforesaid, on or about the 10th day of June, 1920, and that he performed all the conditions of his contract, but that said contract was not a contract for the furnishing of any materials or the performance of any labor in or about the making of any improvements or alterations of or in, or any additions to or repairs of the building referred to in said complaint, to wit, the building standing on said lots and belonging to said defendant; and that said plaintiff never had any contract with the said San Diego Manufacturing Association or San Diego Manufacturing Company, or said San Diego Inorganic Products Company, for the furnishing of any materials or the performance of any labor in or upon any improvements or alterations or for the making of any improvements or alterations in or additions to or repairs of said building; but that the only contract which plaintiff had with any of the said concerns, associations, or companies was for the temporary installation and placing in said building, and so as not to become a fixture or a part of said building, or any improvement or alteration or repair thereof, or addition thereto, certain materials, to wit, certain electrical wiring, switchboards, and equipment."

The court further found:

"That said defendant, Pacific Building Company, on the 4th day of March, 1920, leased the front 100 feet of said land and building to the said San Diego Manufacturing Association, an unincorporated association, for the term of one year from the 4th day of February, 1920, but that on or about the time of making said lease, said defendant was informed by said lessee that it would use said building for the manufacture of paints, and would install therein certain machinery and appliances for said manufacturing purposes, but that the defendant did not have actual notice of the furnishing of the materials or the performance of the labor in placing and installing the wires, conduits, switchboards, and other equipment in said building hereinbefore found by the court to have been put therein by plaintiff, and that the said defendant did not post any notice in or about said building that it would not be liable for the installing of said electrical equipment or of the performance of said labor."

The first question of fact upon which the plaintiff's right to a lien depends is the question whether or not the work and materials furnished by the plaintiff contributed to the "construction, alteration, addition to or repair" of the building. If they did so contribute, the lienable quality of the work is established. Code Civ. Proc. § 1183. The findings affirm that none of the labor performed and materials furnished by the plaintiff and put into the building ever became a part of the said building or fixtures, or constituted or formed any improvement or alteration of or in said building, or any addition thereto, and that conduits, electric wiring, and switchboards were not so installed as to become permanently attached to said building, or to become fixtures therein. According to the finding describing the method of installation of said wiring, conduits, and equipment, the conduits were fastened to the studding and rafters of the building by metal clamps and nails, and the switchboards were fastened to the studding of the building by nailing boards across the studding and fastening the switch boxes to the boards by screws and nails. It may be that the physical facts thus described were such that these materials should be regarded as fixtures attached to and which became a part of the building if such had been the intention of the contracting parties. *Pac. Sash & Door Co. v. Bumiller*, 162 Cal. 664, 667, 124 Pac. 230, 41 L. R. A. (N. S.) 296; *Cal. P. C. Co. v. Wentworth Hotel Co.*, 16 Cal. App. 692, 711, 712, 118 Pac. 103, 113; *Blanck v. Commonwealth Amusement Corp.*, 19 Cal. App. 720, 725, 127 Pac. 805.

[1, 2] But the court found the facts to be that the plaintiff never made any repairs in, of, or to the building, and that the materials furnished did not become a part of any improvement or alteration in the building, or any addition thereto; also that there was no understanding by the plaintiff or the lessee

that any of said materials should become permanently attached to the building. In effect, the court determined that the plaintiff never intended to attach the equipment permanently to the building, but only intended to install the same temporarily for the use of the lessee, with whom his contract was made, and that the only contract of the plaintiff with the lessee was for the temporary installation of materials, not to become a part of the building. Whether materials are so applied to a building as to become a part thereof is a question of fact "to be determined by the court upon the evidence before it." *Bianchi v. Hughes*, 124 Cal. 24, 56 Pac. 610. In the case at bar, since we are bound to assume that the evidence justifies the findings, we conclude that the materials installed by the plaintiff did not constitute any alteration or addition to the building, or repair thereof.

[3] The defendant owner having failed to give notice disclaiming responsibility for the work, as provided by section 1192, Code of Civil Procedure, the plaintiff would be entitled to enforce his claim of lien, if the work had been of a lienable character, and if the defendant had "knowledge of such construction, alteration or repair or work or labor." In the first finding the court said that the products company, with the knowledge and consent of the defendant, caused to be installed in the building "certain equipment and machinery for the manufacture of paint." There is no identification of this equipment and machinery with the work done by the plaintiff. On the contrary, the court, in its seventh finding, said that the defendant did not have actual notice of the furnishing of the materials or the performance of the labor in question.

Construing the finding as one intended to mean that the defendant was without knowledge of the fact that the work was being done, the provisions of section 1192 do not apply to the established circumstances of the case.

The judgment is affirmed.

We concur: SHAW, J.; JAMES, J.

57 Cal. App. 719

KUBISTA v. DANIELS et al. (Civ. 3394.)

(District Court of Appeal, Second District, Division 2, California. Feb. 11, 1922. On the Merits May 19, 1922, after Grant of Rehearing March 8, 1922. Rehearing Denied June 16, 1922.)

On Motion to Dismiss.

I. Appeal and error ☞356—Appeal not filed until 100 days after judgment must be dismissed.

Where the notice of appeal was served and filed more than 100 days after the entry of the

judgment from which the appeal was taken, the appeal must be dismissed under Code Civ. Proc. § 939, requiring the appeal to be taken within 60 days.

On the Merits.

2. Appeal and error ☞880(3)—Guarantor of notes cannot complain of failure to render judgment against maker.

The guarantor of four notes, who conceded that judgment was properly rendered against him for all four of the notes, cannot complain on appeal that judgment was not rendered against the maker on two of the notes.

Appeal from Superior Court, Los Angeles County; Fred H. Taft, Judge.

Action by Frank Kubista against A. J. Daniels and another. Judgment for plaintiff, and named defendant appeals. Motion to dismiss appeal granted, rehearing granted, and judgment affirmed.

T. C. Gould, of Los Angeles, for appellant.

Woodruff & Shoemaker, of Los Angeles, for respondent.

On Motion to Dismiss.

WORKS, J. [1] This is an appeal from a final judgment. Respondent asks for a dismissal of the appeal. The notice of appeal was served and filed more than a hundred days after the entry of the judgment. An appeal from a final judgment may be taken only within 60 days from the entry of the judgment (Code Civ. Proc. § 939).

Appeal dismissed.

We concur: FINLAYSON, P. J.; CRAIG, J.

On the Merits after Grant of Rehearing.

WORKS, J. Defendant Colkins executed her four certain promissory notes to one Brunken, the payment of all of the paper having been guaranteed by defendant, Daniels. Brunken transferred the notes to plaintiff, two of them by indorsement in due course, two by delivery without indorsement, and plaintiff brought the present suit against both Daniels and Colkins on all four of the instruments. Defendant Colkins interposed defense as to all of the notes on the grounds that they had been obtained by the payee by means of fraud and deceit, that they had been given without consideration, and that, if there was a consideration, it had failed. The trial court found against defendant Colkins on each of these issues and rendered judgment against both defendants on the two notes which had been transferred to plaintiff by indorsement. Judgment on the other notes, the title to which had been passed to plaintiff by delivery only, went against defendant Daniels alone. That defendant alone appeals.

[2] The opening brief of appellant is short, fragmentary, and unsatisfactory, no closing

brief having been filed by him. After conceding that judgment against both defendants was proper on the two notes which were transferred by indorsement, and after stating the findings of the trial court on the issues presented by the answer of respondent Colkins, the writer of the brief proceeds:

"But, after finding against every one of defendant Colkins' special defenses, the court nevertheless rendered judgment in favor of defendant Colkins as maker of the notes and against defendant Daniels as guarantor. The court finds that defendant Colkins has no defense to the payment of the notes, and then excuses her from payment, placing the entire burden on the guarantor. The only possible judgment under the findings is one holding defendant Colkins for payment of all four notes. The present judgment is not supported by the findings, and therefore must be set aside."

This language is somewhat cryptic, but we gather from it, and from the whole tenor of the brief, that the only point made by appellant is that judgment on the two notes which respondent Kubista took without indorsement should have gone against both defendants. It is to be observed that no claim is made in the brief that Kubista was not entitled to judgment against appellant, if, at least, the maker of the notes were caught in the net with him. His position appears to be that the judgment against him is a righteous judgment, but that the trial court erred in not rendering judgment against the maker of the two unindorsed notes also. We cannot see what difference it makes to appellant whether or not the maker of the notes was included in the judgment. Undoubtedly, if the judgment had gone against both maker and guarantor the liability of the latter to pay would have been as great as it now is, for in that event he could have been required to pay the entire debt, as he is compellable to do under the judgment now standing against him. It appears to us that appellant has shown no reason why either the judgment against him or the judgment in favor of his codefendant should be disturbed.

Judgment affirmed.

We concur: FINLAYSON, P. J.; CRAIG, J.

189 Cal. 248

CLUNIN v. FIRST FEDERAL TRUST CO.
(S. F. 9560.)(Supreme Court of California. July 10, 1922.
Rehearing Denied Aug. 3, 1922.)**1. Limitation of actions** — 66(12) — **Where money payable on demand, statute begins at date of execution.**

Where a promise to pay money is payable on demand, the statute of limitations begins to run at the date of its execution.

2. Limitation of actions — 148(3) — **Notation on check stubs not communicated to creditor held not acknowledgment of debt to toll statute.**

In view of Code Civ. Proc. § 360, providing that no acknowledgment or promise is sufficient evidence of a new contract to toll limitations unless it is in writing, signed by the party to be charged, where remittances for interest on notes were made by checks, some before and some after the notes were barred, notations on the check stubs showing purposes for which the checks were executed, never having been communicated to the creditor, did not constitute an acknowledgment or promise sufficient to toll the statute.

3. Limitation of actions — 163(4) — **Part payment not an exception to rule requiring written acknowledgment of debt to toll statute.**

A promise implied from the fact of part payment cannot be made an exception to the rule, under Code Civ. Proc. § 360, excluding all acknowledgments and promises not in writing.

4. Limitation of actions — 146(3) — **Written acknowledgment of debt to toll statute must refer and admit existence of debt which debtor willing to pay.**

No writing is sufficient as an acknowledgment under Code Civ. Proc. § 360, unless it contains some reference to a debt, which, either of itself or with the aid of evidence of extrinsic facts in explanation, permissible under section 1860, amounts to an admission that there is a debt existing to the creditor to whom the writing is sent which the debtor is liable to pay and willing to pay; hence checks covering interest on notes, but not referring to any debt nor containing language subject to explanation as referring to a debt, were not sufficient acknowledgment of the debt evidenced by the notes to toll limitations.

In Bank.

Appeal from Superior Court, City and County of San Francisco; George E. Crothers, Judge.

Action by Mrs. Mary Clunin against the First Federal Trust Company, executor of the estate of Jeremiah Lynch, deceased. From judgment for defendant, plaintiff appeals. Affirmed.

Charles A. Shurtleff, of San Francisco, for appellant.

Cushing & Cushing, of San Francisco, for respondent.

SHAW, C. J. The plaintiff appeals from the judgment. The action was upon a promissory note for \$3,000 executed by Jeremiah Lynch to the plaintiff on April 20, 1909, payable on demand.

By demurrer to the complaint, and also by way of answer, the defendant interposed the defense that the action was barred by the statute of limitations. The court found in favor of the defendant on this defense, and rendered judgment accordingly.

[1] Where a promise to pay money is payable on demand the statute of limitations begins to run thereon at the date of its execution. O'Neil v. Magner, 81 Cal. 631, 22 Pac. 876, 15 Am. St. Rep. 88; Jones v. Nicholl, 82 Cal. 32, 22 Pac. 878. The period of limitation is four years (Code Civ. Proc. § 337), and consequently, unless the time is extended in some manner, an action on the note became barred after April 20, 1913. This action was not begun until May 31, 1918.

[2] Section 360 of the Code of Civil Procedure provides that—

"No acknowledgment or promise is sufficient evidence of a new or continuing contract, by which to take the case out of the operation of this title, unless the same is contained in some writing, signed by the party to be charged thereby."

On behalf of the plaintiff it is claimed that the case is taken out of the operation of the statute of limitations by certain writings executed by Jeremiah Lynch and proven at the trial. These writings consist of checks signed by Jeremiah Lynch, payable to the order of plaintiff, together with the memoranda made by Lynch on the stubs to which said checks were attached at the time they were made, showing the amount of the check and the purposes for which it was executed. Some of these checks and memoranda were made prior to the expiration of the period of limitation after the date of the note, and some of them were made after the expiration of that period. As they are all of the same character, it will not be necessary to state more than one of them. The first check is as follows:

"San Francisco, 15th April, 1912.

"The Bank of California, National Association, San Francisco: Pay to the order of Mrs. M. Clunin \$196, one hundred and ninety-six dollars.
Jeremiah Lynch."

The stub opposite this check was as follows:

"No. 1076
Date 15th April 1912
To Mrs. M. Clunin
Quart. Annuity to 1 Apl 150
Int. on 3000# at 6% three months 45
Sundry 1"

Similar checks, for which similar stubs were entered in the check book, were introduced in evidence bearing date as late as April 14, 1917. Consequently, if these transactions operated as an acknowledgment or promise sufficient to take the case out of the operation of the statute of limitations within the meaning of section 360, Code of Civil Procedure, the action was not barred. These checks were transmitted to the plaintiff by said Jeremiah Lynch. It does not appear that they were accompanied by any letter or other writing referring to the purpose for which the checks were executed. The stubs to which the checks were originally attached were separated from the checks before they were sent to Mrs. Clunin, and were not in any manner communicated to her by the deceased.

So far as the stubs are concerned, it is well established in this state that they do not constitute an acknowledgment or a promise sufficient to take the case out of the statute of limitations, since they were never communicated to the creditor, Mrs. Clunin. In *Biddel v. Brizzolara*, 64 Cal. 355, 30 Pac. 609, it being on the second appeal in that case, the court said on this subject:

"It is very certain that an actual promise can only be made to the creditor, and it follows that the acknowledgment from which the promise is to be inferred must be made to the creditor."

This proposition is thoroughly established by the authorities and we have no decision to the contrary.

It is earnestly insisted by counsel for the appellant that the execution of the checks and the sending of them to Mrs. Clunin constituted a sufficient acknowledgment or promise to toll the statute. It will be observed that the checks of themselves make no reference to the existence of any debt, and contain no promise of any sort to pay money or in discharge of a debt of any character. They all include in the amount stated a sum which the stubs show was intended to pay quarterly interest on a \$3,000 debt, but that fact nowhere appears upon the check itself; none of them was for that exact sum; they all include sums for other purposes.

The law is well established in this state by numerous decisions that the acknowledgment or promise referred to in section 360 must be in writing, and that the writing, whether in the form of a promise or not, must contain some reference to an existing debt owing to the creditor, which the debtor is willing to pay. It must, of itself acknowledge the debt. The first decisions upon the subject, those in *Fairbanks v. Dawson*, 9 Cal. 89, and *Barron v. Kennedy*, 17 Cal. 574, showed some uncertainty with respect to the character of the writing by which the acknowledgment should be shown and concerning the effect of the statute then in force, which was

substantially the same in language as section 360, but in later cases the law has been crystallized into a clear statement of the rule. In *McCormick v. Brown*, 36 Cal. 185, 95 Am. Dec. 170, where the court was considering the effect of a letter as an acknowledgment of a debt, it was said:

"The acknowledgment referred to in the statute is not such as may be deduced by inference from a promise or an offer to pay a part of the debt, or to pay the whole debt in a particular manner, or at a specified time, or upon specified conditions. The acknowledgment, say the cases, must be a direct, distinct, unqualified, and unconditional admission of the debt which the party is liable and willing to pay."

In *Biddel v. Brizzolara*, 56 Cal. 380, the court was considering a plea of the statute of limitations upon a promissory note secured by mortgage on real estate and the effect of an agreement executed by the maker of the note and a third person, wherein it was recited that the third person "assumes a mortgage now on said property held by Philip Biddel, principal and interest amounting to \$6,090." The court said:

"The 'acknowledgment' must be a direct and unqualified admission of an existing debt which the party is willing to pay."

And in connection with the quotation it gives a passage from *Bell v. Morrison*, 1 Pet. 362, 7 L. Ed. 174, containing the following:

"Such acknowledgment ought to contain an unqualified and direct admission of a previous, subsisting debt, which the party is liable and willing to pay."

In *Pierce v. Merrill*, 128 Cal. 476, 61 Pac. 68, 79 Am. St. Rep. 63, the last sentence of the above quotation from *McCormick v. Brown* is quoted and followed. The same idea has been stated in slightly different language as follows:

"The acknowledgment must be a direct, unqualified, and unconditional admission of a debt which a party is liable and is willing to pay." *Curtis v. Sacramento*, 70 Cal. 414, 11 Pac. 748.

"The distinct and unqualified admission of an existing debt contained in a writing signed by the party to be charged, and without intimation of an intent to refuse payment thereof, suffices to establish the debt to which the contract relates as a continuing contract, and to interrupt the running of the statute of limitations against the same." *S. P. Co. v. Prosser*, 122 Cal. 415, 52 Pac. 837, 55 Pac. 145.

"The acknowledgment of a debt in contemplation of this statute must be a distinct, unqualified, unconditional recognition of an obligation for which the person making such admission is liable." *Powell v. Petch*, 166 Cal. 331, 136 Pac. 56.

[3] There are expressions in some of the opinions of this court which have apparently been misunderstood, and we deem it proper here to give some explanation and qualification thereof. The remarks in *Barron v. Ken-*

nedy, 17 Cal. 574, seem to say that a part payment alone is sufficient to take the debt out of the statute, if it is not accompanied by some declaration qualifying the implied admission of the existence of the debt. In that immediate connection the necessity of a writing is not mentioned, except to say that it should be proven by a writing, but, as was explained in *Heinlin v. Castro*, 22 Cal. 100, the decision in the *Kennedy Case* was predicated upon the letters accompanying the transmission of the money and which showed that it was to be applied on a debt due to the plaintiff. This view of the case is further emphasized by the decision in *Peña v. Vance*, 21 Cal. 149. In that case the court was asked to reconsider the doctrine of the earlier cases, and upon this point the opinion says:

"On examination of the matter a second time, we are satisfied that the statute intended to exclude all acknowledgments and promises not in writing, and that a promise implied from the fact of part payment cannot with any propriety be made an exception."

In *Concannon v. Smith*, 134 Cal. 14, 66 Pac. 40, the letter held to be a sufficient acknowledgment under the statute, although it distinctly referred to an existing debt, did not describe the debt with any certainty, and it was held that the fact that there was but one debt in existence to which it could refer could be proven as an extrinsic fact to explain the uncertainty in the writing. This, of course, is expressly allowed by section 1860, Code of Civil Procedure, in any case of ambiguity in a writing.

Several decisions contain language apparently indicating that an acknowledgment made by an act or by conduct, although not in writing, may be sufficient to take the case out of the operation of the statute. The context, however, in each case shows that the act or conduct which the court was referring to was a writing which contained an acknowledgment of the debt sufficient to come within the rule stated in the foregoing decisions. Such expressions are found in *Fairbanks v. Dawson*, supra, *Tuggle v. Minor*, 76 Cal. 101, 18 Pac. 131, and in *Minifie v. Rowley* (Cal. Sup.) 202 Pac. on page 675.

[4] It is clear from all these decisions that no writing is sufficient as an acknowledgment under section 360, unless it contains some reference to a debt, which, either of itself or with the aid of permissible evidence of extrinsic facts in explanation, amounts to an admission that there is a debt existing to the creditor to whom the writing is sent which the debtor is liable to pay and willing to pay. The checks introduced in evidence do not come up to this standard since they contain no reference whatever to any debt, or any language which can be said to be uncertain in its meaning and subject to expla-

nation by the aid of extrinsic circumstances so as to be made to refer to a debt.

Our conclusion is that the court below was correct in holding that the action is barred by the statute of limitations.

The judgment is affirmed.

We concur: WASTE, J.; LENNON, J.; SLOANE, J.; WILBUR, J.

SHURTLEFF, J., being disqualified, does not participate in the foregoing opinion.

189 Cal. 326

BALL et al. v. CALIFORNIA CONSERVING CO. (S. F. 9994.)

(Supreme Court of California. July 13, 1922.
Rehearing Denied Aug. 10, 1922.)

1. Brokers — 60—Broker held not entitled to commission on sale subject to buyer's approval of goods where not given, and contract canceled by agreement.

Where the memorandum of sale negotiated by a broker expressly provided that the goods must meet with the buyer's approval, and the buyer thereafter sent to the seller a sample as to the quality of goods he demanded, which the seller refused to furnish, whereupon the contract was canceled by agreement of the parties, the broker was not entitled to his commission.

2. Brokers — 64(2)—Broker held to have contracted with reference to provision of sale contract allowing pro rata delivery.

Where the memorandum of a sale contract negotiated by a broker stated the terms were to be according to the regular California vegetable contract, and such regular contract included a term that, in case of damage to crop, or for any cause whatsoever, the seller was unable to make full delivery, the buyer would accept pro rata delivery upon all goods packed short, the broker must be held to have contracted with reference to that provision of the contract.

3. Brokers — 69—Held entitled under contract to commission only on goods delivered.

A broker who negotiated a contract for the sale of goods which provided that, in the case of inability to make full delivery for crop failure or other cause, the buyer agreed to accept pro rata delivery of the quantities specified, the broker was entitled to a commission for the sale only of the quantity of goods actually delivered where that was 22 per cent. of the quantity contracted for.

In Bank.

Appeal from Superior Court, City and County of San Francisco; E. P. Shortall, Judge.

Action by F. M. Ball and another, as trustees of F. M. Ball & Co., a dissolved corporation, against the California Conserving Com-

pany, a corporation, to recover a broker's commission. Judgment for plaintiffs, and defendant appeals. Reversed.

Goldman & Altman, of San Francisco, for appellant.

E. J. Torregano, Vincent Surr, and Goldman, Nye & Surr, all of San Francisco, for respondents.

RICHARDS, Justice pro tem. Defendant appeals from a judgment recovered against it in an action instituted by F. M. Ball & Co., a corporation, for commissions for negotiating three sales of what is commercially known as "tomato paste." The complaint contained two counts covering each sale, one predicated upon the agreed compensation and the other upon the reasonable value of the services. The answer, by its failure to deny the same, admitted the allegations of the complaint touching the incorporation of the respective parties to the action, but denied the remaining allegations of each count. The findings were that the allegations of the complaint were true, and, based thereon and upon the conclusion of law, the trial court rendered judgment for plaintiff in the amount prayed for, with interest from the date of sales declared upon in the several counts of the complaint.

Three separate transactions were involved: The first was a sale of tomato paste to A. Russo & Co. of Chicago, upon which the court found and adjudged that plaintiff was entitled as a commission to \$687.50, with interest thereon from October, 1917, the date of the alleged sale, at the rate of 7 per cent. per annum. The remaining two sales were sales of paste to the Natwill Company of New York, upon which the court found and adjudged that plaintiff was entitled to recover as commissions the sum of \$452, with like interest respectively on \$212 thereof from February 2, 1918, and on \$240 thereof from March 22, 1918, the dates, respectively, of such sales. At the time the several orders were secured by plaintiff a sales memorandum was prepared in writing in each case, stating the amount and price of the goods sold. Each was accepted by the defendant. These documents were identical in form except as to the name of the purchaser, the date of the memorandum, the amount and time of shipment of goods. The price of the goods was the same in each case. These memoranda were in abbreviated form as to some of their provisions, among which was a clause reading: "Terms: reg. Cal. veg. contract." These memoranda each contained the following provision: "2½ per cent. brokerage to Ball-Lockhart." These memoranda also contained the following clause: "Subject this year's delivery meeting buyer's approval." Subsequent to the making and execution of these memoranda in abbreviated form a more amplified contract of sale was entered

into during the early part of the year 1918 between the defendant, as seller, and each of the purchasers, which, though executed by the defendant and the latter, was not presented to the plaintiff for either its approval or signature. The record seems to indicate that these later documents followed generally the form of the regular California vegetable contract used by sellers and purchasers of vegetable products. In each of these amplified contracts there was this provision:

"Quality of tomato paste to be superior to last year's crop sold to us by Pacific Vinegar and Pickle Works."

There was also, under the subhead of "terms and conditions," the further provision reading as follows:

"In case of damage to crop, or for any cause or causes whatsoever, the seller is unable to make full delivery of any of the varieties of goods named, the buyer agrees to accept pro rata delivery upon all goods packed short."

These later contracts contained no reference to the broker or its commission, and, as we have seen, were not presented to it, or signed by it. (The Pacific Vinegar & Pickle Works above referred to was the predecessor of the defendant.)

[1] Directing our attention first to the sale to Russo & Co., it appears that on March 29, 1918, after the execution of the amplified contract with it, Russo & Co. wrote the defendant as follows:

"Under separate mail we are sending you a sample of six cans of California tomato paste. The tomato paste received from you last year does not come up to this high grade standard. We wish to state that we must have quality same as sample which we have sent you."

To this letter the defendant, on April 3, 1918, replied:

"The article which we supplied to the trade last year gave universal satisfaction, and it will be made in the same way and of the same standard and grade this year. We take it from your letter that this being the case you will want to cancel your contract with us. If our understanding is correct we then ask you to definitely advise us one way or the other by return mail please."

Russo & Co., on the 8th of the same month, answered:

"If acceptable to you we cancel our contract #94 covering 1,800 cases 200/6 oz. tins of tomato paste. You will, therefore, acknowledge receipt of our cancellation by return mail."

Russo & Co., not content to transmit a reply to this letter through the usual course of mail, on April 16, 1918, wired defendant:

"Please wire at our expense cancellation of our contract"

—to which request defendant replied by wire:

"We accept your cancellation of tomato paste contract."

Appellant herein contends that, as to the Russo & Co. sale, the goods offered by the seller did not meet with the buyer's approval, and hence that, the condition in the contract of sale in that respect not having been fulfilled, and the contract for that reason having been canceled, the plaintiff was not entitled to recover any commissions upon such sale.

We see no answer to this contention. The memorandum of sale upon which the plaintiff relies for a recovery contains the express provision that the goods must meet the buyer's approval. This provision renders it an executory contract of sale upon a condition subsequent, without the fulfillment of which there could have been no completed sale under said contract. The right of the broker to recover commissions must be held to have depended upon a completed sale; and, this not having been consummated, it follows that the right of the plaintiff to recover his commissions under the contract with Russo & Co. must fail.

[2] As to the right of the plaintiff to recover its commissions upon the sales of the Natwill Company, another question is presented. The memorandum of sale in each of said contracts, as we have seen, contains the abbreviated clause reading as follows: "Terms: reg. Cal. veg. contract." This abbreviated clause is conceded, when amplified, to mean: "Terms: Regular California vegetable contract," and this clause thus amplified, when contained in the preliminary agreement between the seller and the buyer, upon which the plaintiff relies for its right to its commissions, must be interpreted as meaning that the parties to said preliminary agreement were contracting with reference to and under the provision of the usual amplified contract for vegetable products in general use among the sellers and buyers of such products at the time, and hence it will be assumed that, when the buyer and seller executed the enlarged contract a few weeks later, such enlarged contract was the regular California vegetable contract which was in the contemplation of all of the parties to the preliminary memorandum of agreement upon which the plaintiff herein relies for the recovery of its commissions. If this assumption is correct, it would necessarily follow that the provisions of the later and enlarged contract are to be read into the preliminary agreement between the parties; and, this be-

ing so, it must be held, in the absence of a showing to the contrary, that the plaintiff at the time of the execution of the said contract was aware of the conditions embraced in the regular California vegetable contract, and hence was aware of the fact that such enlarged contract contained the provision that—

"In case of damage to crop, or for any cause or causes whatsoever, the seller is unable to make full delivery of any of the varieties of goods named, the buyer agrees to accept pro rata delivery upon all goods packed short."

Being thus aware of this condition in the enlarged contract the plaintiff must be held to have itself contracted with reference to it, and hence to have agreed that the amount of its commissions should depend upon the amount of the deliveries of the seller's product, which, as shown by the undisputed evidence herein, was but 22.2 per cent. of the amount of goods provided for in the preliminary contract between the parties.

[3] The foregoing conditions as to the amount of goods to be delivered and accepted, upon which the plaintiff's percentage of commissions was to be computed, appearing upon the face of these contracts, it was necessary for the plaintiff to show that there had been a full delivery of all of the goods provided for in the memorandum of agreement upon which it relies before it would be entitled to the full commissions which it claims. Not having shown this, but, on the contrary, the undisputed evidence being that the seller's pack and delivery was but 22.2 per cent. of the anticipated amount provided for in the preliminary memorandum, it follows that the plaintiff's commissions must be computed upon the actual amount of goods delivered under said contracts.

It follows from the foregoing that, as to the Russo & Co. contract, the plaintiff was not entitled to recover any commissions, and that, as to the two contracts with the Natwill Company, the amount of commissions recoverable by the plaintiff must be computed upon the basis of the actual deliveries made under said contracts, and that the trial court was in error in awarding the plaintiff judgment for commissions in an amount in excess of that indicated by the views above set forth.

Judgment reversed.

We concur: SHAW, C. J.; WASTE, J.; SLOANE, J.; LAWLOR, J.

189 Cal. 317

In re ROSS' ESTATE. (S. F. 9573.)

(Supreme Court of California. July 13, 1922.)

Appeal and error ⇐1218—Remittitur not recalled later than 30 days after judgment, in absence of fraud or mistake.

In the absence of fraud, and where the Supreme Court renders its judgment advisedly on the case as presented by the parties, it cannot, after expiration of the 30 days allowed by the Constitution, after which the judgment is final, recall the remittitur to reconsider the facts and reasons on which the judgment was given.

In Bank.

On motion to recall remittitur. Denied. For former opinion, see 202 Pac. 641.

George D. Collins, Jr., of San Francisco, for appellants.

Thomas G. Crothers, Wm. M. Abbott, K. W. Cannon, and I. M. Golden, all of San Francisco, for respondents.

SHAW, C. J. The respondents move to recall the remittitur, on the ground that it "does not conform to the final judgment of the court, upon the ground that the judgment appealed from was in all substantial particulars affirmed."

The appeal was taken from a decree of partial distribution of the estate of Catherine Ross, deceased. That decree was that the property distributed was a part of the community property of John Ross, deceased, and the deceased, Catherine Ross, during their marriage, that, upon his death, it was distributed to her and that, upon her death, thereafter one-half of such community property descended to the relatives of John Ross, deceased, and the other half to the children of Elizabeth H. Donohue as the next of kin of Catherine Ross. Catherine Ross had two sisters, who died prior to her death, namely, Elizabeth H. Donohue and Bridget H. Quinn, both of whom left descendants who are now living. The decree gave no part of the property to the descendants of Bridget H. Quinn, and some of them appealed therefrom. It was upon the decision of this appeal that the remittitur was issued. The decision of this court was that, as descendants of Bridget H. Quinn, the appellants were entitled to a share in the one-half of the community property included in the distribution to the Donohue children. To that extent the decree was reversed. The briefs show that the heirs of John Ross and the children of Mrs. Donohue filed a joint brief in opposition to the claims of the appellants. Nothing was said to the effect that the John Ross heirs had no interest in the controversy between the descendants of the two sisters of Catherine Ross over the one-half of her property, nor with respect to the John Ross heirs being exempt from costs of appeal. This court, up-

on this condition of the matter, made a general order reversing the case in favor of the appellants. As the respondents made common cause against the appellants the court saw no reason for making a distinction between them on the matter of costs. The error, if any, was due to the oversight of the parties and not that of the court or of the clerk.

In the absence of fraud, and where this court renders its judgment advisedly upon the case as presented by the parties, this court has no power after the expiration of the 30 days allowed by the Constitution and after which our judgment is final, to recall the remittitur for the purpose of reconsidering the facts and reasons upon which the judgment was given. *Oakland v. Pacific, etc., Co.*, 172 Cal. 332-337, 156 Pac. 468, Ann. Cas. 1917E, 259; *Estate of Levinson*, 108 Cal. 459, 41 Pac. 483; 42 Pac. 479; *Granger v. Sheriff*, 140 Cal. 195, 73 Pac. 816; *Herrlich v. McDonald*, 83 Cal. 505, 23 Pac. 710; *Trumpler v. Trumpler*, 123 Cal. 248, 55 Pac. 1008; *Martin v. Wagner*, 124 Cal. 204, 56 Pac. 1023; *Richardson v. Chicago, etc., Co.*, 135 Cal. 311, 67 Pac. 769. This judgment was given on December 2, 1921, and became final on January 1, 1922. In that interval, if the heirs of John Ross had applied therefor, the court might have altered its judgment as to costs. This motion was instituted on March 1, 1922. It was then too late for the court to aid in the matter, even if it were so disposed. The motion is denied.

We concur: SHURTLEFF, J.; SLOANE, J.; WILBUR, J.; LAWLOR, J.; WASTE, J.; RICHARDS, Justice pro tem.

58 Cal. App. 96

CALLAGHAN v. OLSEN et al. (Civ. 4067.)

(District Court of Appeal, First District, Division 1, California. June 5, 1922.)

1. **Appeal and error** ⇐671(3)—Where appeal is on judgment roll alone, only sufficiency of findings to support the judgment will be considered.

Where an appeal is taken on the judgment roll alone, only sufficiency of the findings to support the judgment will be considered.

2. **Principal and surety** ⇐99—Surety for rent for certain months not released by acceptance of amount less than rent for previous months.

Where defendant was surety for the payment of rent for certain months, the fact that a landlord's agent accepted a less amount than that specified for certain months previous to those for whose rent defendant was a surety did not amount to an alteration of the principal obligation, so as to release defendant, in pursuance of Civ. Code, § 2819, nor did it operate as a release on the ground that the landlord thereby waived certain remedies in unlawful detainer to which he might have resorted.

Appeal from Superior Court, City and County of San Francisco; E. P. Shortall, Judge.

Action by P. P. Callaghan against George L. Olsen and another. From judgment for plaintiff, defendant A. Davidson appeals. Affirmed.

Herbert Choynski and James Raleigh Kelly, both of San Francisco, for appellant.

Stanislaus A. Riley, of San Francisco, for respondent.

PREWETT, Justice pro tem. Action on a guaranty. The respondent leased to defendant Olsen certain real property for a period of 12 months at an agreed monthly rental of \$400. At the same time, and as a part of the same transaction, the appellant executed to the respondent a certain written guaranty, wherein he did—

"covenant, promise and agree to and with the party of the second part (the respondent) that the said George L. Olsen shall well and truly pay the rents reserved for the last three months, to wit, for the three months commencing December 1, 1915, and ending February 29, 1916, to perform and execute all covenants therein contained on his part and that in his failure to do so in any particular we will forthwith pay * * * the said rents that may be or become due under said lease for the last three months thereof, to wit, for the months commencing December 1, 1915, and ending February 29, 1916, and all damages that may happen or accrue by reason of such failure not exceeding the aggregate sum of \$1,200."

[1] The defendant Olsen failed to pay the rent for the last three months of the term, and the respondent thereupon brought this action against both parties to recover the same. The trial court rendered judgment as prayed for, and the appellant appeals upon the judgment roll alone. This eliminates all points save the sufficiency of the findings to support the judgment.

The appellant directs our attention to the following finding made by the trial court:

"That for several months during the tenancy of said defendant Olsen, said defendant paid to the agent of the plaintiff and the said agent received and accepted in payment of the rent for said months a sum less than the stipulated rate of rental under said lease; that none of said months is embraced within the period from December 1, 1915, to and including February 29, 1916 (being the period for which the rental herein sued for accrued and became due). That there is no evidence showing that the plaintiff had actual knowledge of the payment and acceptance of said reduced sums. That there was no written agreement between defendant Olsen and plaintiff either in person or by agent for any reduction of said rent or for the modification of any term of said lease; that there was not at any time any written authorization from plaintiff to reduce said rent or to modify any term of said lease."

[2] It is insisted that the acceptance by the respondent of a smaller sum than the agreed rate of rental was an alteration of the principal obligation in a material respect, and that the effect thereof was to release the guarantor. No fault can be found with the soundness of the rule upon which this contention is based (Civ. Code, § 2819), but it has no application to the present case. The appellant does not question the rule that future rentals are not reduced by the acceptance of less than the stipulated sums for a portion of the leased term. In fact, the question is scarcely open for discussion, in view of the many California authorities bearing upon it. In *Sinnige v. Oswald*, 170 Cal. 55, 148 Pac. 203, for a period of nine months the landlord accepted less sums than the stipulated rental, and receipted in full for the said months. The surety in that case, as here, raised the point that these payments of less sums and their acceptance by the landlord operated, by changing the terms of the lease, to release the surety. The Supreme Court, in commenting upon this claim, uses the following language.

"They are not sufficient to establish a change in the written contract so as to affect the amount of future installments of rent where no such change of terms has been made in writing."

From *James Eva Estate v. Mecca Co.*, 40 Cal. App. 515, 181 Pac. 415, we quote:

"The final contention of appellant is that the guarantor was discharged from liability for the reason that the principal obligation of the lessee was changed and altered in a material respect without the consent of the guarantor. The change in the principal obligation relied upon is the fact that the lessor made a rebate, for certain months, from the amount of rent specified in the lease," etc.

To this claim the court replied, in effect, that concessions of the kind in question are not sufficient to establish a change in the written contract so as to affect the amount of future installments of rent. From a number of cases affirming the same doctrine, we will notice but one other. In *Dodge v. Chapman*, 42 Cal. App. 614, 183 Pac. 966, the court gives a very extended and valuable analysis of the point. In one place it says:

"The agreement, then, to receive for a limited time a reduced monthly rental was not in writing, and was supported by no consideration. As an agreement in modification of the lease, it therefore was without * * * effect. * * * Conceding that the obligation to pay the stipulated monthly rental was satisfied by these payments, yet the contract was not altered any more than it would have been if the full amount had been paid. It was no concern of the sureties how these payments were made. The landlord could have taken his pay in 'chips and whetstones' if he saw fit."

While the appellant could scarcely question, and perhaps does not question, the force of these authorities, he insists that an agreement by a surety to pay the last installments of a term is affected by the acceptance of less than the stipulated sums. He argues that the landlord thereby waives certain remedies in unlawful detainer to which he might have resorted. But, at most, he no more waives them than he does when he accepts payment at the full stipulated figure. In either case the transaction as to the past month is closed, and with it every remedy to which he might have resorted. Indeed, it is difficult to discover how the landlord waived anything save the concession which he made in accepting a less sum than the agreed amount. We have seen that such a concession does not operate to release either the principal or surety.

The only remaining point urged by appellant is the alleged failure of the court to find whether or not there was an agreement between respondent and defendant Olsen for a modification of the terms of the lease. Counsel, however, have overlooked finding 21, wherein the court expressly finds that no such alteration was ever made.

We find no error in the record, and the judgment is accordingly affirmed.

We concur: TYLER, P. J.; RICHARDS, J.

57 Cal. App. 647

MAYNES v. GALLIANO. (Civ. 4088.)

(District Court of Appeal, First District, Division 2, California. May 10, 1922. Hearing Denied by Supreme Court July 6, 1922.)

1. Contracts — 354—Finding against plaintiff in language of complaint is sufficient.

Where the complaint was on the common counts, and alleged defendants were indebted to plaintiff for services rendered to defendants by plaintiff's assignor, for which services defendants promised in writing to pay, a finding of the trial court in the exact language that those allegations of the complaint were not true is sufficient to support a judgment for defendants.

On Hearing in Supreme Court.

2. Contracts — 332(2)—Complaint on common counts held to state cause of action on written contract.

A complaint alleging that defendants were indebted to plaintiff in a stated sum for services rendered to defendants by plaintiff's assignor, for which defendants promised in writing to pay, though in the form of a common count for services rendered, in effect stated a cause of action on the written contract.

3. Brokers — 40—Authority to sell lease held not to give commission for sale of subsequent renewal.

Exclusive authority to brokers to sell a lease does not give them authority to sell a

renewal of the lease thereafter obtained by their principal, so that they are not entitled to their commission after the renewal lease was sold to one who had refused to purchase through them the original lease, because it would expire too soon, even though the owner had not taken the steps necessary to terminate the exclusive agency.

Appeal from Superior Court, Alameda County; T. W. Harris, Judge.

Action by W. A. Maynes against J. B. Galliano to recover for services rendered. Judgment for defendant, and plaintiff appeals. Affirmed.

Dunn, White & Aiken, of Oakland, for appellant.

Snook & Brown, of Oakland (George M. Naus, of Oakland, of counsel), for respondent.

NOURSE, J. This is an appeal from a judgment in favor of defendant in an action upon a common count for services rendered. The complaint alleged:

"That the defendants above named are indebted to the plaintiff in the sum of one thousand (\$1,000.00) dollars for services rendered to the defendants by Lubeck's Investment Company, a corporation, within two years last past, for which services the said defendants promised in writing to pay the said Lubeck's Investment Company the said sum of one thousand dollars."

The trial court found, in the exact language quoted, that these allegations of the complaint were not true. The facts appearing at the trial were that defendant and plaintiff's assignor entered into a written contract, whereby the assignor was given the exclusive right to sell certain property belonging to the defendant for the period of one day, or until written notice of revocation was received. By the terms of the contract the defendant agreed to pay plaintiff's assignor all over the sum of \$4,500 for which the property was sold, but, in any event, a minimum compensation of \$500, if—

"before the termination of this agreement a deposit or notice of sale or of intended sale, or agreement, or bill of sale, lease, conveyance, or mortgage, is made of or on said property, or any part thereof, or if the whole or any part of the consideration is paid, or is deposited in escrow, or if, at any time before or after such termination, a sale or transfer of said property or any part thereof is made to any one to whose attention same was brought by said agent during the life of this contract, or if such a person accepts a position with me or enters my employ in respect to the above property or any part thereof, or if any such person to whose attention same was brought as aforesaid by said agent, in any manner or mode, secures any interest in or lien or claim upon, or takes possession of, the said property or any part thereof, directly or indirectly, or by virtue of

one or more transfers within two months after the termination of this contract. Notice of withdrawal must be given by registered mail or by writing receipted for by said agent."

The contract was dated July 15, 1919. It appears that in December of that year the purchaser read an advertisement for the sale of the property published by the plaintiff's assignor, and in response thereto called upon the local agent of plaintiff's assignor and made inquiries regarding the sale of the property. It appears that this agent gave to the purchaser some information which he had regarding this property and similar properties which he had listed for sale. The purchaser informed the agent that he was not interested in this property, because the term of the lease was too short and he was not satisfied with the location. Defendant had no knowledge that even such an inquiry had been made until the middle of May, 1920, when the property had been sold through the efforts of another broker. It appears that when the contract was made the defendant's lease ran only until July, 1920; that on December 24, 1919, he obtained a new lease for a term of five years, beginning July 1, 1920. It does not appear that plaintiff's assignor had knowledge of the new lease, but, in any event, he made no effort to interest the subsequent purchaser in the property after this condition was changed. It is in the testimony that plaintiff's assignor took some "prospects" to view the property, but did not take the one who subsequently purchased it. On March 10, 1920, the defendant informed the agent that his property was off the market, and requested the agent not to come around any more, because the property was not for sale. Defendant testified that in reply to this the agent said: "All right; * * * we won't come again." Nothing further was heard from plaintiff's assignor regarding the property or the contract. Defendant, assuming from the statement of the agent that the contract was abandoned, again offered it for sale through another agent, by whom the sale was made on May 18th of that year. Plaintiff attacks the judgment upon the grounds that the exclusive right to sell conferred upon his assignor could not by the terms of the contract be terminated, except upon 10 days' notice in writing, and no such notice was given, and insists that, because the contract was not terminated in the manner provided therein, plaintiff was entitled to judgment.

[1] The finding of the trial court in the terms of the complaint is sufficient to support the judgment. Appellant having elected to sue upon a common count, and not upon the contract, it was essential, of course, to prove rendition of the services and a promise to pay for them. In finding that the respondent is not indebted to appellant in any sum for services rendered, the trial court

must be presumed to have found that no services were rendered. If this is so, the appellant, of course, is not entitled to judgment. In reaching this conclusion, the trial court had before it the testimony relating to the advertising of the property for sale in December, 1919, the inquiries made by the purchaser at that time and his refusal to further consider the property, and the fact that after a new lease had been obtained, and the property was presented to him through an independent source, he for the first time became interested. In reaching the conclusion that no services were rendered, the court no doubt found that the advertising in the newspaper had no connection with the subsequent sale. The contract was manifestly drawn with great cunning, to enable the agent to insist upon payment without turning a hand for the benefit of the owner. We are not prepared to say what should have been the result if the suit had been on the contract. But in this action on a common count for services rendered we cannot say that the evidence is insufficient to support the finding of the trial court. Judgment affirmed.

We concur: LANGDON, P. J.; STURTEVANT, J.

Opinion of Supreme Court in Bank Denying Rehearing.

PER CURIAM. [2] The petition for a rehearing of this cause in the Supreme Court is denied. We are of the opinion that the fact that the complaint was in the form of a common count for services rendered, instead of a special declaration on the contract introduced in evidence, is immaterial to the decision, and we do not approve the opinion of the District Court of Appeal so far as it leaves that question open. The only support of the common count was the contract introduced in evidence, and in effect the complaint stated a cause of action on that contract.

[3] We regard the essential fact upon which the judgment should be affirmed to be that the contract of agency to sell the interest of the defendant in the property related exclusively to a lease which expired on July 1, 1920. The purchaser from the defendant positively refused to buy that lease, and the efforts of the plaintiff did not bring about a sale thereof. Consequently the plaintiff's services produced no benefit to the defendant. The purchaser refused to negotiate until after defendant had procured an additional lease beginning July 1, 1920, and running five years, and it was the procurement of that lease which induced the sale and not the efforts of the plaintiff.

SHAW, C. J., LAWLOR, WILBUR, SLOANE, and WASTE, JJ., and RICHARDS, Justice pro tem.

58 Cal. App. 143

BURKS v. BRONSON et al. (Civ. 3865.)

(District Court of Appeal, Second District, Division 2, California. June 16, 1922.)

1. Judgment ⇨203—Court cannot render another judgment after rendering judgment of nonsuit.

Where the court in an action for specific performance rendered a judgment of nonsuit, such judgment was final, and the court had no jurisdiction to later render a judgment dismissing the complaint.

2. Appeal and error ⇨882(2)—Rule that party cannot assign as error a ruling which he requested does not apply where trial court lacked jurisdiction.

The rule that a party cannot assign as error a ruling which he invited the trial court to make does not apply where the trial court lacked jurisdiction to make the ruling.

3. Appeal and error ⇨790(3)—Appeal will be dismissed where controverted question has been determined by another order in same action.

An appeal will be dismissed where the question in controversy has been determined by another order in the same action or by another action.

Appeal from Superior Court, Orange County; Z. B. West, Judge.

Action by Dana Burks against L. B. Bronson and another. From a judgment dismissing the complaint, plaintiff appeals. Appeal dismissed.

Claud B. Andrews, of Los Angeles, and Charles D. Swanner, of Santa Ana, for appellant.

Clyde Bishop, of Santa Ana, and Goodwin & Morgrage, of Los Angeles, for respondents.

CRAIG, J. This action is one for specific performance of a contract for the sale of a lot. The defendants and respondents ask that the appeal be dismissed and base their contention in this regard upon the following facts:

Upon the date of the trial, to wit, February 23, 1921, and when the plaintiff had closed his case, a motion for a nonsuit was made by the defendants, was ordered granted by the court; on the same day this order was entered on the minutes and noted in the register of actions by the clerk. From this judgment no appeal has been taken. On March 22, 1921, the trial court entered a second judgment, this being one to dismiss the action. From this judgment the plaintiff has appealed, and it is this appeal which we are now asked to dismiss.

[1] The judgment of nonsuit was a final judgment. *Clark v. Superior Court*, 37 Cal. App. 732, 174 Pac. 681. This being so, the court was without jurisdiction to make any other judgment. *Darlington v. Butler*, 3 Cal. App. 448, 86 Pac. 194.

[2] From the dilemma of this situation the appellants seek to be relieved by invoking the rule that a party cannot successfully assign as error a ruling which he has himself invited the trial court to make. Several decisions are cited in support of this proposition. In none of the cases referred to was the error committed of such a character as to render the action of the court void because of want of jurisdiction. Lack of jurisdiction is not waived under the rule relied upon by appellant. 4 *Corpus Juris*, 586.

[3] It will be observed, further, that in the instant case a second reason exists for dismissal of the appeal aside from the fact that the judgment of dismissal is void. Suppose we were to hold that since respondent invited the trial court to commit the error of entering a second judgment he should not be heard to assert its invalidity. It yet remains a fact, as shown by the record on appeal, that a judgment of nonsuit was regularly entered. A reversal of the judgment of dismissal would not affect the force or finality of the judgment of nonsuit. It would therefore be a useless thing for this court to pass upon the merit of the appeal or to order a reversal of the judgment of dismissal. The questions presented would be entirely moot. Under such circumstances the appeal should be dismissed. *Mendocino County v. Peters*, 2 Cal. App. 34, 82 Pac. 1124. It is a settled principle that an appeal will be dismissed where the question in controversy has been determined either by another action or by another order in the same action. *Amorisia v. Rando* (Sup.) 88 N. Y. Supp. 356.

The appeal is dismissed.

We concur: **FINLAYSON, P. J.; WORKS, J.**

58 Cal. App. 134

HARBOUGH v. ENLARGED BAXTER CREEK IRR. DIST. (Civ. 2364.)

(District Court of Appeal, Third District, California. June 16, 1922.)

Waters and water courses ⇨225—In suit to restrain inclusion of land, complaint which failed to allege under what law irrigation district was organized held insufficient.

A complaint, in an action to restrain an irrigation district from including plaintiff's land in an enlargement thereof, which failed to allege under what law the irrigation district was organized, whether plaintiff's land was a part of the original district or subsequently included therein in the enlargement thereof, whether the enlargement was affected by the reorganization of the district or by a change of its boundaries, and whether plaintiff's objection to the inclusion of his land was made in the manner prescribed by law or whether he was granted a hearing and his objection overruled contrary to the facts proved at the hearing, was insufficient to authorize a temporary injunction.

Appeal from Superior Court, Lassen County; George H. Thompson, Judge.

Application for injunction by P. E. Harbough against the Enlarged Baxter Creek Irrigation District. From an order denying an application for temporary injunction, plaintiff appeals. Affirmed.

F. A. Kelley, of Susanville, for appellant.
Pardee, Hardy & Pardee, of Susanville, for respondent.

FINCH, P. J. Plaintiff applied to the trial court for a temporary injunction, basing his application on the complaint alone. This appeal is from the order denying the application. The allegations of the complaint are as follows:

"That said defendants are a corporation duly organized and existing under and by virtue of the laws of the state of California.

"That for several years last past plaintiff has been and now is the owner of the following described lands, situate, lying and being in said county and state, and more particularly described as follows, to wit: S. $\frac{1}{2}$ of S. E. $\frac{1}{4}$ and E. $\frac{1}{2}$ of S. W. $\frac{1}{4}$, section 13, township 29 north of range 13 east M. D. B. and M.

"That said defendants have enlarged or are attempting to enlarge said irrigation district and have incorporated and embraced all of said lands of plaintiff therein, but that plaintiff objected to any and all of his said lands being incorporated or included in said district and now objects to any or all of his said lands being included in said district upon the following grounds and reasons: That all of his lands are so situated and lie in such a shape that he would not receive any benefits in irrigation or otherwise from the proposed enlargement of said irrigation district; that plaintiff has never voted at any election for said proposed bonds and has from the commencement objected to his lands or any part thereof being included or incorporated into said irrigation district, but the defendants, disregarding his objections and requests, have included all of plaintiff's lands within said district.

"That said defendants have voted bonds covering all of said lands of plaintiff, and, unless enjoined and restrained, will sell all of said bonds covering all of the lands of plaintiff and thereby cast a cloud upon plaintiff's title to all of his said lands and will cause a multiplicity of lawsuits to divest and clear the title to said lands and thereby will cause irreparable injury to plaintiff by reason of the sale of such bonded indebtedness."

It seems clear that the complaint does not state facts sufficient to authorize an injunction. Without attempting to point out all the defects of the complaint, it may be said that it does not appear under what law the district was organized, whether the plaintiff's land was a part of the original district or subsequently included therein in the alleged enlargement thereof, whether the enlargement was effected by a reorganization of the district or by a change of its bound-

aries, whether plaintiff's objection to the inclusion of his land was made in the manner provided by law, or whether he was granted a hearing and his objection overruled contrary to the facts proved at the hearing. The granting of a temporary injunction is usually within the sound discretion of the court, and it certainly cannot be said in this case that the trial court abused its discretion.

The court sustained defendant's demurrer to the complaint and granted plaintiff 15 days within which to amend. Plaintiff attempted to appeal from the order sustaining the demurrer. Since the order is not appealable, the appeal therefrom is dismissed.

The order denying the application for a temporary injunction is affirmed.

We concur: BURNETT, J.; HART, J.

57 Cal. App. 680

JENSEN v. INDUSTRIAL ACCIDENT COMMISSION OF CALIFORNIA et al.
(Civ. 4171.)

(District Court of Appeal, First District, Division 2, California. May 18, 1922.)

Master and servant §367—Brick mason held contractor's "employee" within Compensation Act, and not independent contractor.

A brick mason, employed by a building contractor furnishing all the materials to build fireplaces of a specified size, who furnished his own tools and engaged the men working with him and charged only union scale of wages and the usual foreman's fee, held an "employee" within the Workmen's Compensation Act, and not an independent contractor.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Employé.]

Application of Antone Jensen against the Industrial Accident Commission of the State of California and another for certiorari to review an order awarding compensation for injuries under Workmen's Compensation Act (St. 1917, p. 831). Award affirmed.

Ralph C. McComish and Fry & Jenkins, all of San Jose, for petitioner.

A. E. Graupner, of San Francisco, for respondent Industrial Accident Commission.

C. W. Davison, of San Jose, for respondent Scott.

LANGDON, P. J. This matter comes before us upon a writ of review. We are asked to annul an award of the Industrial Accident Commission granting to G. E. Scott, the applicant before said Commission, \$2,666.24 for injury to his eye, sustained while he was plastering a chimney, together with an allowance for medical expenses, etc.

The only question before us is as to the status of Scott and the relation between him and petitioner with respect to the work out of which the injury grew. The Industrial Accident Commission has concluded that Scott was an employee of Jensen, our petitioner. Petitioner, however, contends that Scott was either an independent contractor, or an employee of Dr. Tooker, the owner of the house in Los Gatos upon which the work was being done. Dr. Tooker was before the Industrial Accident Commission, contending that Scott was an employee of Jensen and that no liability of any kind arose on the part of said Tooker. This view was accepted by the Commission, which held Dr. Tooker free from liability and awarded Scott compensation as an employee of Jensen.

The record shows that Dr. Tooker requested Jensen to furnish him with an estimate of the cost of the alterations and repairs which he desired to have made to his home; that Jensen submitted an estimate of the cost, which was apparently satisfactory to Dr. Tooker, and thereupon Dr. Tooker directed Jensen to proceed with the work upon the basis that Dr. Tooker would pay Jensen the cost of labor and material, plus 10 per cent. Dr. Tooker testified that he had no direct relation to Scott and had nothing whatever to do with his employment, or the direction of his work. This testimony is corroborated by Scott.

Jensen was a contractor and builder. He testified that, in the course of the work, it became necessary to build two fireplaces and chimneys. Jensen, not being a brick mason, employed Scott to do this work. He had no specific agreement as to the terms of payment for this bricklaying work, but he furnished Scott with all materials for the work. Mr. Jensen testified:

"I just gave him the size of the fireplaces, what was needed, and then he built the chimneys accordingly. I know I left that entirely to Mr. Scott. I knew he knew what was to be done. I gave him the size of the fireplaces that I wanted, and he built the chimneys accordingly."

Mr. Scott furnished his own personal tools, as he stated was the custom with all bricklayers, and Mr. Jensen furnished all materials, the mixing block, and "hod to take the stuff in." Jensen had requested Scott to engage the men necessary to do this work, and accordingly Scott did so and acted as superintendent of the operations on the brickwork, as well as working manually himself. He stated that it was customary for a foreman to collect from the contractor the wages of his men and to pay the men directly. Ac-

cordingly, Scott charged Jensen for his services and the services of the men working with him as follows: \$12 a day for Scott as foreman; \$11 a day for one journeyman bricklayer; \$8.50 a day for two helpers; and \$1 a day per man paid to another person for transporting all of the men to and from San Jose each day.

Scott charged no percentage and received no other compensation for his work than the union scale of wages, which was \$11 a day, plus the usual charge of \$1 a day for the duties performed by him as foreman. He stated that in the absence of an express agreement between himself and Jensen as to compensation, he assumed that the wages would be the union scale of wages. This was also what was in the mind of Mr. Jensen, evidently, because he made no objection to Scott's charges based upon said union scale of wages for himself and the men working with him.

While Scott was engaged in plastering a flue, mortar splashed in his eye, burning it badly and causing a permanent injury, according to the medical testimony before the Commission.

Scott stated that he sometimes did work by the "job" and sometimes by the day. While it is true that in this instance he engaged the men who were working with him, he was told to do so by Mr. Jensen.

We think, under these facts, the finding of the Industrial Accident Commission that Scott was an employee of Jensen and not an independent contractor at the time of his injury is sustained by the evidence.

Petitioner directs our attention to the evidence in the record that Scott was not a member of the brick mason's union and that the rules of the said union prohibited union men from working with a nonunion journeyman bricklayer; that under the rules of said union its members could only work with Scott if Scott was acting as a contractor. The men who worked with Scott were union men and understood these rules. However, all the witnesses stated that these rules were often violated, and their existence and observance were not matters binding upon the Industrial Accident Commission in reaching its conclusions. The testimony regarding these matters was doubtless given due weight, but was found not to offset the other matters in the record which support the finding of the Commission regarding the status of Scott.

The award of the Industrial Accident Commission is affirmed.

We concur: NOURSE, J.; STURTEVANT, J.

(58 Cal. App. 70)

LEWIS v. McNEAL. (Civ. 3893.)

(District Court of Appeal. Second District, Division 1, California. June 1, 1922. Hearing Denied by Supreme Court July 31, 1922.)

1. Payment $\Leftrightarrow$ 65(6)—Defendant who admits original indebtedness required to prove payment.

In an action for services, defendant, having admitted the original indebtedness, had the burden of proving payment thereof, except in so far as admitted by the complaint.

2. Evidence $\Leftrightarrow$ 354(17)—Creditor's books not admissible to show that payments had not been made.

In an action involving an issue as to whether certain payments had been made, books kept by the creditor *held* not admissible to show that payments had not been made, under Code Civ. Proc. § 1946, providing for admission of writings as "prima facie evidence of the facts stated therein" in certain cases.

Appeal from Superior Court, Los Angeles County; John M. York, Judge.

Action by Margaret I. Lewis, special administratrix of the estate of George E. Lewis, deceased, against Mabel McNeal. Judgment for plaintiff, and defendant appeals. Reversed.

Minor Moore, of Los Angeles, for appellant.

James H. Pope and A. G. Ritter, both of Los Angeles, for respondent.

SHAW, J. In this case plaintiff, as administratrix of the estate of George E. Lewis, her deceased husband, sued for the recovery of a balance alleged to be due his estate upon a contract made by defendant with deceased whereby he was employed to furnish labor and materials in the construction of a house of the admitted cost of \$8,394.50, upon which, as alleged in the complaint defendant paid \$5,587.86, leaving a balance unpaid of \$2,806.64. It was also alleged that defendant was indebted to plaintiff in said sum upon a mutual, open and current book account. By her answer defendant admitted her employment of deceased, and that he furnished material and labor and made expenditures in the construction of said house in the sum of \$8,394.50, all as stated in the complaint, but alleged that she had paid all of said sum due under the employment, save and except the sum of \$284.44, which was the balance due to plaintiff, and likewise denied any indebtedness in excess of \$284.44 upon the alleged open, mutual, and current book account. The court found the allegations of the complaint to be true, and that plaintiff was entitled to judgment as prayed for, from which judgment so entered defendant has appealed.

While defendant attacks the findings for want of sufficient support, her chief contention is that the court erred in the admission of evidence.

[1] Having admitted the original indebtedness of \$8,394.50, the burden of proving payment thereon of other than the sum of \$5,587.86, admitted in the complaint to have been made, devolved upon defendant. In her own behalf she testified that on September 15th she paid the sum of \$2,000 to George E. Lewis on account of said indebtedness, which payment was in cash from money which she had, some six weeks prior thereto, taken from her safe deposit vault and kept in her house until the time of making said payment; that it was paid to him in front of the Hollywood Bank, at which place she met Lewis, and upon receiving it she gave to him a typewritten statement, dated July 29th, showing the condition of her account, and which statement he had delivered to her about August 1st, and, going into the bank, while she went shopping, he indorsed thereon in his own handwriting, under date of September 15th, the payment of the \$2,000, and as so indorsed returned the same to her. She also testified that she on April 16, 1920, paid Lewis \$500 in cash, credit for which \$500 was given by him in the typewritten statement delivered to her on August 1st wherein he acknowledged payment of the gross sum of \$4,587. It is admitted that on July 21st defendant paid Lewis by check \$500, and on August 16th paid him \$500; that on said last date Lewis in his own handwriting made the following indorsements on said typewritten statement: "July 21, received by check \$500.00; August 16, received by check \$500.00"—and that thereafter, to wit, on October 26th, she gave Lewis a check for \$500, upon which she says was written, in the lower left-hand corner, "Balance due, \$305," which was intended to exhibit to him the balance due on her account. The contention of plaintiff is that the typewritten statement rendered under date of July 29th, and showing payment of \$4,587, was intended to include the \$500 paid on July 21st, and that the indorsement thereon as to such payment made by Lewis August 16th was an error and in fact a duplicate receipt of the \$500 paid in July; whereas defendant claims that, having erroneously omitted the same from the typewritten statement, he made the indorsement to cover it.

The subject of the controversy, then is, as to these two cash payments, one of \$500, claimed by defendant to have been paid in cash on April 16th, and the other of \$2,000, claimed by defendant to have been paid in cash on September 15th, to the making of which payments at the times mentioned she in positive terms testified. There is nothing to sustain plaintiff's contention that the in-

dorsement upon the typewritten statement of the payment of \$500 made on July 21st was an error, other than the fact that the typewritten statement rendered defendant was made after the date of said payment. Neither the typewritten statement with the indorsements thereon so made by Lewis nor the check for \$500 dated October 26th, which defendant claimed was indorsed, "Balance due, \$305," was produced at the trial. The defendant claimed that both documents had been lost, prior to which loss, however, she had exhibited them to plaintiff and her daughter, who had inspected the same, and both plaintiff and her daughter testified there was no indorsement, as claimed, upon the check dated October 26th, showing a balance due of \$305 only; and they also testified the indorsement upon the typewritten statement, under date of September 15th, "Received by cash \$2,000," was not in the handwriting of Lewis. The fact that all other payments save and except those in controversy were made by check, that defendant had lost not only the statement containing the disputed indorsement, but likewise the check of October 26th upon which she claimed to have indorsed the balance due to Lewis, together with the irregularity of defendant's act as stated in drawing the \$2,000 from her safe deposit box and keeping it in her house for some six weeks and then paying it to Lewis on the street, together with other circumstances connected with the transaction as related by her, when added to the testimony of plaintiff and her daughter, Mabel Lewis, to the effect that the purported receipt upon the typewritten statement was not in the handwriting of deceased, George E. Lewis, and the check dated October 26th for \$500, which had been seen by them at the time of its delivery, contained no indorsement showing a balance due of \$305, were well calculated to raise a doubt in the mind of the trial judge as to the truth of defendant's statements. While defendant's testimony as to such facts of payment was positive, and assuming it was not and owing to decedent's death could not be contradicted, the court by reason of the circumstances connected with the transaction, as shown by defendant's own testimony, in connection with that of plaintiff in denying that the indorsement was in the handwriting of deceased, might well have deemed it sufficient to discredit her story and justify the conclusion that defendant had not established the fact of payment. *Davis v. Judson*, 159 Cal. 129, 113 Pac. 147; *Cox v. Schnerr*, 172 Cal. 371, 156 Pac. 509; *Travis Glass Co. v. Ibbetson* (Cal. Sup.) 200 Pac. 595. As said in the case last cited:

"The most positive testimony of a witness may be contradicted by inherent improbabilities as to its accuracy contained in the witness' own statement of the transaction; or there may be circumstances in evidence in connection with

the matter, which satisfy the court of its falsity; the manner of the witness in testifying may impress the court with a doubt as to the accuracy of his statement, and influence it to disregard his positive testimony as to a particular fact; and, as it is within the province of the trial court to determine what credit and weight shall be given to the testimony of any witness, this court cannot control its finding or conclusion denying the testimony credence, unless it appears that there are no matters or circumstances which at all impair its accuracy."

Hence, if the court upon such conflicting testimony, considered in the light of the circumstances shown and the conduct of defendant in relating matters in connection with the transaction, had made the finding, this court, upon a review thereof, would not be warranted in holding it without support of sufficient evidence.

[2] Plaintiff, however, did not rest her case upon such testimony, but, over defendant's strenuous objections, introduced the day book kept by her deceased husband and a ledger to which the daughter, Mabel Lewis, had transcribed the entries therefrom, and wherein all payments claimed to have been made by defendant, other than the payment of \$500 on April 16th and \$2,000 on September 15th, were made to appear. Since defendant admitted the original indebtedness and plaintiff conceded the making of all payments other than the two in controversy, the books could have been pertinent to no facts other than those in controversy, and hence they must be deemed to have been received and by the court considered for the purpose of showing that defendant had not made the payments as she stated; in other words, to establish, not an affirmative fact shown by an entry in the books, but a negative fact from the absence thereof. Section 1946, Code of Civil Procedure, provides that:

"The entries and other writings of a decedent, made at or near the time of the transaction, and in a position to know the facts stated therein, may be read as prima facie evidence of the facts stated therein, in the following cases: 1. When the entry was made against the interest of the person making it. 2. When it was made in a professional capacity and in the ordinary course of professional conduct. 3. When it was made in the performance of a duty specially enjoined by law."

While under this provision the entries in the books, not the absence thereof, would be evidence against his estate, they would constitute no evidence of negative facts as to which no entry was made, since the omission might have been due to mere negligence or forgetfulness and without motive, either good or bad. *Schwarze v. Roessler*, 40 Ill. App. 474. Not only is there no statutory provision under which the books were admissible, but it is the general rule that books of account are never deemed evidence to rebut a presumption by showing there is nothing contained

in them in reference to the claim set up by the adverse party. The entries made upon a proper showing are competent evidence of the facts shown thereby, but the fact that no entries were made by the deceased constitutes no proof of the omitted fact in dispute. *Lawhorn v. Carter*, 11 Bush (Ky.) 7; *Mattocks v. Lyman*, 18 Vt. 98, 46 Am. Dec. 138; *Winner v. Bauman*, 28 Wis. 563; *Ladd & Bush v. Sears*, 9 Or. 244; *Kerns v. McKean*, 76 Cal. 87, 18 Pac. 122; *Morse v. Potter*, 70 Mass. (4 Gray) 292; *Riley v. Boehm*, 167 Mass. 183, 45 N. E. 84. The books were received, not as containing entries relating to the cash payments in controversy, but as showing from the omission thereof that the money was not paid as defendant said it was, and upon the assumed fact that, had it been paid, deceased would have entered it as a credit, it is argued that its absence therefrom is proof that it was not received, and apparently the court in reaching its conclusion entertained this view of the matter. In our opinion, the books were incompetent for such purpose, and the court should have sustained the objection to their admission.

Respondent insists the books were not received in evidence, for which reason her counsel claims that defendant is not entitled to have the question reviewed. There is no merit in this contention. While copies of the books themselves are not brought up in the record, plaintiff's witness, over defendant's objection that the same was incompetent, testified fully as to the contents of the books, reading, the entries; whereupon her counsel offered the ledger and day book in evidence, and an objection thereto by defendant was by the court overruled.

Our conclusion renders it unnecessary to discuss other objections urged by appellant in support of her contention.

The judgment is reversed.

We concur: CONREY, P. J.; JAMES, J.

(58 Cal. App. 84)

SOUTHERN CALIFORNIA COMMERCIAL
CO. v. ALBERTI et al. (Civ. 3782.)

District Court of Appeal, Second District, Division 1, California. June 2, 1922. Hearing Denied by Supreme Court July 31, 1922.)

4. Evidence §20(1)—Court may take judicial knowledge of method of final carrier's paying initial and intermediate carriers.

Where a consignee is to pay freight, a court may take judicial knowledge of the method usually employed for the final carrier to pay the initial and the intermediate carriers their part.

2. Carriers §193 — Payment by final carrier to initial and intermediate carriers held to constitute an assignment of their rights to the final carrier.

Where a final carrier was to collect freight due on a shipment from a consignee, payment by it to the initial and the intermediate carriers of their part of the freight by operation of law constituted an assignment to the final carrier of the right of the initial and intermediate carriers to recover for the services rendered by them.

3. Carriers §196—Defense of loss of goods through delay in transportation cannot be set up unless pleaded.

In an action by a carrier against a shipper to recover freight, failure to plead the defense that the goods were destroyed through negligence in transportation prevents setting up the defense.

4. Carriers §196—Evidence held sufficient to justify a finding that delivery was duly made at destination.

In an action by a carrier against a shipper to recover freight charges, evidence that a car was delivered at a place about a mile from its destination, the usual place of delivery of cars consigned to the destination, justified a finding that the car was duly delivered to the destination.

5. Carriers §194 — Consignor who consigns to himself primarily liable for freight.

Where a shipper consigned goods to himself, he was primarily liable to the carrier for the freight, and this obligation was not affected by the fact that the freight was not prepaid, nor by the shipper's transfer of the bill of lading, subject to the lien for freight charges, to a third party with whom the carrier had no contractual obligation.

6. Trial §397(4)—Finding as to allegation unsupported by affirmative evidence not necessary.

In an action by a carrier against a shipper to recover freight, where an allegation that the carrier permitted the buyer of the goods to inspect them contrary to directions of the shipper was supported by no affirmative evidence, a finding thereon was unnecessary.

7. Carriers §194—Permitting buyer to inspect goods held not to relieve consignor of liability for payment of freight.

Where goods were consigned to a shipper, the fact that a carrier permitted a buyer to inspect them contrary to directions of the shipper did not operate to relieve the shipper from the liability to pay freight.

Appeal from Superior Court, Los Angeles County; Frederick W. Houser, Judge.

Action by the Southern California Commercial Company against Aleardo Alberti and others. From a judgment for plaintiff, defendants appeal. Affirmed.

H. A. Massey, of Los Angeles, for appellants.

R. A. Morton and Mulford & Dryer, all of Los Angeles, for respondent.

SHAW, J. This action is by plaintiff as assignee of the Kansas City Southern Railway Company, which was the final carrier, to recover freight charges for the transportation of a carload of grapes from Los Angeles, Cal., to Frontenac, Kansas. Judgment for plaintiff, from which defendants appeal.

The issues tendered by the verified pleadings are simple. It is alleged in the complaint that on October 14, 1916, defendants delivered to the Los Angeles & Salt Lake Railway Company, in the county of Los Angeles, a carload of wine grapes under an agreement for the transportation thereof to Frontenac, Kan., where V. Brunetti should be notified of its arrival, and the same delivered to the order of defendants; that the carload of grapes was by said Salt Lake Railway Company and its connecting lines delivered to plaintiff's assignor, the Kansas City Southern Railway Company, by which as final carrier it, on October 23d, arrived at Frontenac, Kan., whereupon a notice in writing of such fact was duly given by the agent of such last-named railway company to V. Brunetti, who presented a bill of lading therefor, but refused to accept said carload of grapes or pay plaintiff's assignor as final carrier the lawful charges thereon; that upon such refusal of Brunetti, plaintiff's assignor immediately communicated with defendants, and requested instructions for the disposal of the goods, but they refused to instruct plaintiff's assignor in the premises, whereupon, for \$30, the grapes were lawfully sold for freight charges, which sum was credited upon the through freight charges for the transportation of said carload of grapes, which amounted to \$374.90; that plaintiff's assignor, as the final carrier, advanced to the initial and intermediate carriers their respective proportions of said freight charges; that the balance due thereon of \$344.90 has not been paid; that prior to the commencement of this action the Kansas City Southern Railway Company duly assigned to plaintiff all its right, title, and interest in and to its claim for said freight charges.

By their answer defendants denied that the grapes were transported, as alleged in the complaint, from Los Angeles county to Frontenac, or that Brunetti was notified of the arrival of the car at its destination, or that he refused to accept the same and pay the freight charges thereon, or that such charges were \$374.90 or any sum whatsoever, or that said sum, other than \$30, has not been paid, or that the final carrier, plaintiff's assignor, paid the intermediate carriers their proportion of said freight, or that the claim for such freight had been assigned to plain-

tiff; as to all of which issues the court, upon ample evidence establishing such facts, found adversely to defendants. Further answering, defendants, while admitting they ordered the car of grapes shipped to Frontenac and delivered to their order, alleged their act in so doing was not for their account, but for and on behalf of V. Brunetti, who as provided in the agreement, should not be permitted to inspect the grapes; that plaintiff's assignor did permit an inspection thereof by Brunetti, and that he paid said freight charges. The court made no finding as to whether or not plaintiff's assignor permitted an inspection of the grapes by Brunetti in violation of the terms of the agreement, as alleged.

[1, 2] There is no merit in appellants' contention that the evidence is insufficient to establish the alleged assignment. The evidence conclusively shows the proportion of the total freight charges earned by the initial and intermediate lines of road over which the car was transported, and that plaintiff's assignor paid the respective amounts earned to each of them, which was in accordance with the method usual in cases of this character, as the court may judicially know. *Atlantic Coast Line R. Co. v. Riverside Mills*, 219 U. S. 186, 31 Sup. Ct. 164, 55 L. Ed. 167, 31 L. R. A. (N. S.) 7. Such act, by operation of law and in consideration of the payment so made, constituted an assignment to the final carrier of the rights of the initial and intermediate carriers to recover for the services rendered by them. *Hutchinson, Carriers*, § 828; *Bissel et al. v. Price*, 16 Ill. 408; *Chicago & A. R. Co. v. Hall*, 69 Ill. App. 497. The rule appears to be founded upon commercial necessities, and without the application of which both carriers and public concerned would be subjected to great inconvenience and unnecessary trouble and expense.

[3] Appellant's chief contention, and that to which the larger part of their argument is devoted, is that the agencies which undertook the transportation of the car of grapes were guilty of negligence, by reason of which fact the grapes were spoiled in transit and valueless when they reached their destination. A sufficient answer to this contention is that no issue as to delay of the carriers in transporting the car, negligence, or want of proper care in handling the grapes was tendered by the pleadings or tried by the court; hence the purported finding that the grapes upon the arrival of the car were, due to no fault of the carriers, in a condition of fermentation and decay, even if unsupported by the evidence, must be disregarded.

[4] That the evidence shows the car to have been delivered at Pittsburg, Kan., which is about one mile from Frontenac, and that the former was the usual place for the delivery of freight consigned to the latter

place, justified the finding of the court that the car was duly delivered at Frontenac.

[5] The agreement was to deliver the car of grapes at Frontenac to the order of defendants as consignors thereof. As such consignors they were primarily liable for the freight charges, which, as to them, could be discharged only by payment. "The consignor with whom the contract of shipment is made is primarily liable for the payment of the freight charges, whether he is the owner of the goods or not" (10 Corpus Juris, p. 445; Hutchinson, Carriers, § 810; Railroad Co. v. MacCartney, 68 N. J. Law, 165, 52 Atl. 575; Wells Fargo & Co. v. Cuneo [D. C.] 241 Fed. 727; Atlas S. S. Co. v. Colombian Land Co., 102 Fed. 358, 42 C. C. A. 398), and this obligation as to the carrier was not affected by the fact that the freight was not prepaid, nor by defendants' transfer of the bill of lading, subject to the lien thereof for freight charges, to a third party with whom the carrier had no contractual relation (Cincinnati, etc., R. Co. v. Vredenburg Sawmill Co., 13 Ala. App. 442, 69 South. 228).

[6] Finally, it is contended that the carrier permitted the consignee to inspect the grapes contrary to the express direction of defendants indorsed on the bill of lading, and as to which the court made no finding. A finding was unnecessary, for the reason there was no evidence in support of such affirmative allegation. Spader v. McNell, 130 Cal. 500, 62 Pac. 828; De Tolna v. De Tolna, 135 Cal. 575, 67 Pac. 1045.

[7] Conceding, however, that the evidence shows the granting of such permission by plaintiff's assignor, such fact was immaterial, since, even though defendants might be entitled to recover damages for such act, it could not excuse them from their obligation to pay the freight charges. In 10 Corpus Juris, title "Carriers," page 253, it is said:

"The consignee has the right to examine the goods before accepting delivery; and this doctrine applies to interstate as well as intrastate shipments, there being nothing in the Carmack Amendment which restricts this right."

See, also, Earnest v. Delaware, L. & W. R. Co., 149 App. Div. 330, 134 N. Y. Supp. 323; Yuille-Miller Co. v. Chicago, I. & L. Ry. Co., 164 Mich. 58, 128 N. W. 1099; Hutchinson, Carriers, § 733. Moreover, the direction was, "No inspection of car allowed by consignee." For aught that appears to the contrary, Brunetti, if he inspected the car, did so as agent of the consignors, who, as owners, had the right to examine it.

We find no merit in any of the points urged by appellants for a reversal.

The judgment is affirmed.

We concur: CONREY, P. J.; JAMES, J.

58 Cal. App. 7

PEOPLE v. REED. (Cr. 861.)

(District Court of Appeal, Second District, Division 2, California. May 25, 1922. Hearing Denied by Supreme Court July 24, 1922.)

1. Burglary $\S$ 41(1)—Evidence held sufficient to justify conviction.

In a prosecution for larceny and burglary, evidence held sufficient to justify verdict of guilty of burglary, although acquitting of larceny.

2. Burglary $\S$ 42(1)—Mere possession of stolen property not sufficient to fasten conviction of theft.

Mere possession of stolen property, even if unexplained, is not alone sufficient to fasten a conviction of the theft upon the possessor.

3. Jury $\S$ 133—Juror's voir dire, although having contradictions, supported denial of challenge.

Voir dire, although showing mess of contradictions, justified trial court's finding as to juror's proper qualification and supported denial of challenge for cause.

4. Jury $\S$ 103(14)—Juror's opinion from general discussion and newspaper report not disqualification per se.

Where a juror was examined on his voir dire, notwithstanding that the opinion, which some of the answers, when taken alone, indicated that he held concerning defendant's guilt, was based on general discussion and newspaper report, he was not disqualified to act if his examination showed that he would set aside his opinion and give defendant a fair trial upon the evidence.

Appeal from Superior Court, Los Angeles County; Frank R. Willis, Judge.

James Reed was convicted of burglary, and he appeals. Affirmed.

Morfoot & McCroskey, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Arthur Keetch, Deputy Atty. Gen., for the People.

WORKS, J. Defendant and one Michael J. Malone were jointly informed against in two counts. One of these charged grand larceny and the other charged burglary, the two alleged offenses arising out of the same transaction. Defendant was tried alone and was acquitted on the grand larceny charge, but was convicted on the burglary charge. He appeals from the judgment of conviction and from an order denying his motion for a new trial of the cause.

Appellant contends that the evidence against him was insufficient to sustain the verdict holding him guilty of the burglary charge. There was no evidence directly connecting appellant with the burglarizing of the house which is shown by the record to have been feloniously entered by some per-

son, the testimony also showing that property of considerable value was taken from the place at the time. The evidence did show that appellant, a day or two after the burglary, attempted to sell certain of the stolen property then in his possession. The person to whom the offer was made communicated with the police, and appellant and Malone were arrested. No explanation was then given as to how appellant came into possession of the stolen articles, nor, in fact, did he present any evidence upon the subject at the trial. Upon the arrest being consummated, appellant asked the arresting officer if he could see the owner of the house which had been burglarized, saying in effect that he could locate all the stolen property and would return it if the owner would not prosecute him. He also denied to the police officers that he had attempted to sell any of the stolen articles. At the time of his arrest appellant gave his name as James Reed, but there was testimony at the trial to show that the appellation was not his true name.

[1] We are convinced that this array of evidence was amply sufficient to justify the verdict of guilty rendered against appellant.

[2] It is undoubtedly the law that the mere possession of stolen property, even if unexplained, is not alone sufficient to fasten a conviction of the theft upon the possessor (*People v. King*, 8 Cal. App. 329, 96 Pac. 916; *People v. Lang*, 142 Cal. 482, 76 Pac. 232); but the cases establishing that rule are also to the effect that the fact of such possession, if unexplained, is an item to be taken into consideration by the jury, together with other incriminating circumstances, in arriving at a verdict. When the facts shown in this case are compared with the facts of the two cases cited above, and are measured by the law as stated in those cases, there is no doubt left in our minds as to the propriety of the conviction of appellant.

Appellant takes the position that the evidence was insufficient to uphold the conviction of the crime of burglary because the jury declared his innocence of the charge of grand larceny. We cannot ascribe any weight to this argument. The jury might very well have convicted appellant on the larceny charge, but that it did not do so cannot operate to overturn the verdict finding appellant guilty of the other offense. The fact that the jury could split its verdict as it did upon the two charges, while it may inspire speculation in the minds of the curious, gives us no concern in determining the appeal. Having reached the conclusion that the evidence would have supported a verdict of guilty on both charges, we are bound to uphold the conviction which actually resulted upon one of them.

Several other points are stated by appellant, but only one of them is argued. That point, therefore, is the only remaining one

to which it is necessary to address ourselves under the many decisions of the courts of review of the state to the effect that points not argued on appeal are points not to be considered, none of which decisions need be cited.

[3] The question now to be determined is whether the trial court erred in denying a challenge for cause interposed by appellant as to one of the jurors who was sworn in the case and who sat in judgment against appellant. Appellant exercised all the peremptory challenges allowed him by law, and the question of the propriety of the denial of the challenge for cause is therefore directly before us. The juror as to whom this challenge was presented testified on his voir dire, in response to questions by counsel for appellant, that he had heard the case discussed; that he had read about the facts of the case in the newspapers; that he was inclined to think that what he read in the newspapers had created an impression on his mind or an opinion "about this case," his opinion being, "I thought if they had hold of the right man there couldn't be any doubt about his guilt," but that he did not know whether appellant was the right man. Then followed these questions and answers:

"Q. You realize it is a fact that these officers have brought him in here, and the district attorney's office filed an information against him? Do you think that they have got the right man by reason of that fact? A. I don't know until I hear the evidence. Q. Well, have you got any opinion at this time? A. Not as to his identity; no. * * * Q. Well, does that discussion that you had, does that leave you with any fixed impression about this case? A. Yes; I think it does.

"The Court: Did you discuss as to the guilt or innocence of this defendant? A. No; it was about the details of the alleged crime.

"The Court: Well, that is not controverted, the fact that the house was robbed—that is not controverted.

"Mr. Morfoot: No; there is no controversy about that. * * * Do you feel that you could fairly try this case as to the guilt or innocence of this defendant? A. I doubt if I can, because I thought it was a particularly heinous offense. * * * Q. So that you feel that you are prejudiced against this defendant in this case? A. Well, to be perfectly frank, I feel that I would be. Q. Could you not give him a fair and impartial trial? A. No. Well, I might be able to do that. Q. * * * Now, if you were on trial under such circumstances, and you had a man sitting there feeling as you do, would you be willing to have a man of that opinion that you have at this time try you? A. No. Q. Then you would admit, wouldn't you, that you are prejudiced towards the defendant? A. I am prejudiced against the person who committed this offense, yet he may be— Q. You don't feel that you can try James Reed in this case with a fair, impartial, and open mind? A. I don't believe I could."

Here the challenge was interposed. It was resisted by the district attorney, who then

conducted the following examination of the prospective juror:

"* * * You heard the details of a burglary that occurred * * * in Mr. Lewis' home? * * * A. Yes. Q. Now, at that time did you hear anybody's name mentioned in connection with the commission of that burglary? A. No; that made no impression upon me at all. Q. You don't know anything about this defendant? A. No. Q. Never saw him before? A. No. Q. Or heard of him? A. No. Q. You don't know whether he committed this crime or not? A. No; I haven't any idea. Q. Notwithstanding this opinion about this house being burglarized in the manner in which it was, do you feel you could hear the evidence and weigh the evidence fairly and impartially and give this defendant a fair and impartial trial, just the same as you could anybody else? A. Well, Mr. McCartney, I am placed in a position where the burden of proof would be on the defendant."

The trial judge then subjected the talesman to the following examination:

"The Court: If you were a defendant, arrested for an offense, would you consider that you ought to prove yourself not guilty or that the state ought to prove you guilty? A. No. Q. What evidence do you have that this defendant is guilty? A. I haven't any at all. Q. Why do you say that you would want him to prove himself innocent? A. Well, I would try to differentiate between this defendant and the man who committed this crime, if I make myself clear. Q. Well, that is what you are impaneled for, to determine who committed the crime, not whether a crime has been committed; that is conceded in this case, that this house was burglarized; now, the question to be submitted to you is whether this defendant is the man. Now, you say that you would expect the defendant to prove that he was innocent? A. I would not go quite that far, your honor, to say that I would expect him to prove it, but I would go into the case with a feeling that it was perhaps, in a ways, up to him. Q. Why? A. Because I was very much struck at the details of this alleged crime as I heard it. I thought it was absolutely an unpardonable thing. Q. * * * Now, what is there in that to show that the defendant is guilty? A. Nothing at all. Q. Well, then, why couldn't you try the defendant and give him a fair, impartial trial? A. I intended to say that I felt that I could, but that I would not like to be tried by a jury that had the same mental attitude that I have. Q. Well, you say you haven't any mental attitude against the defendant; you don't know him, never heard of him. Suppose they had Mr. McCartney up for it; would you be prejudiced against him? A. Not at all. Q. Well, you haven't any more evidence that the defendant committed it than you have that Mr. McCartney committed it? A. Not in the least. Q. Why couldn't you try the defendant just as well as you could try Mr. McCartney? A. Well, it is possible that I

could, your honor. Q. Is there any reason why you could not, I say, is there any reason why you could not try this defendant? A. Oh, I believe I could set aside what prejudice I have, and give the man a fair trial. Q. By Mr. McCartney: The question is, would you? A. Oh, yes; I certainly would."

On its face, this examination shows a mess of contradictions, but we have grave doubts whether these apparent contradictions actually reflect the condition of mind of the talesman at the time. The phrasing of his answers shows him to have been a man of considerable intelligence, in fact, of a degree of intelligence which could not harbor the confusion which his words appear to exhibit between a prejudice or feeling against the nature of the crime and a prejudice against the man who was merely charged with its commission. We greatly fear that this juror was one of those men who so far forget the duties and obligations of their citizenship as to attempt to escape them when put to the test, and that he entered the jury box with a determination to escape jury service in this case if he could possibly do so. Unfortunately that manner of man is not a *rara avis*. If, however, this position is not tenable, it is enough to say that the trial judge was better qualified than are we, he having had the talesman under his eye, to resolve the apparent contradictions in his statements and to determine whether he would make an impartial juror. There is surely enough evidence among the varying statements in the record to support the ruling of the trial court in denying the challenge, and the finding of a trial court upon such a question as is here presented is, as to its finality, like any other finding of fact made upon conflicting evidence. *People v. Ruef*, 14 Cal. App. 576, 114 Pac. 48, 54.

[4] It is to be observed, also, that the opinion which some of the answers of the talesman, when taken alone, indicate that he held concerning the guilt of appellant, was based upon general discussion and newspaper report. It has been held in this state, both frequently and uniformly, that where a juror has formed such an opinion upon such a basis, he is not disqualified to act if his examination shows, as the examination in this instance did show, that he will set aside his opinion and give the defendant a fair trial upon the evidence. *People v. Warner*, 147 Cal. 546, 82 Pac. 196; *People v. Brown*, 148 Cal. 743, 84 Pac. 204; *People v. Ruef*, *supra*.

The judgment and the order denying motion for a new trial are affirmed.

We concur: FINLAYSON, P. J.; CRAIG, J.

57 Cal. App. 779

BRYAN v. PRESCOTT et al. (Civ. 3833.)

(District Court of Appeal, Second District, Division 1, California. May 24, 1922. Hearing Denied by Supreme Court July 20, 1922.)

1. Deeds $\hookrightarrow$ 196(3)—Conveyance by wife, in which husband gains advantage, is presumed to have resulted from undue influence.

Under Civ. Code, § 158, authorizing either husband or wife to enter into any transaction with the other subject to the general rules governing actions of persons occupying confidential relations, as defined in the title on trusts, section 2235, providing that all transactions between a trustee and his beneficiary by which the trustee obtains any advantage are presumed to be entered into under undue influence, and section 2219, providing that every one who voluntarily assumes a relation of personal confidence with another is a trustee, a conveyance by the wife to the husband, from which the husband obtained a large advantage for himself, is presumed to have been obtained by undue influence, and that presumption prevails until overcome by evidence clearly showing the contrary.

2. Trusts $\hookrightarrow$ 103(3)—Purchase of outstanding interest in land with proceeds of mortgage on interest secured from wife by undue influence held void.

Under Civ. Code, § 853, as to resulting trusts, where a husband procured by undue influence a conveyance from his wife to her undivided half-interest in property, and then mortgaged the property, and with the proceeds purchased the other half-interest therein, the invalidity of the purchase from the wife affects also the purchase of the other interest.

3. Adverse possession $\hookrightarrow$ 62(3)—Evidence held not to show possession of surviving husband was adverse.

Where a wife devised her home premises to her daughter, who resided in another state, and the daughter requested the husband to care for the property for her, not knowing of a void deed by the wife to the husband, the husband's possession of the property, without informing the devisee of the deed, was not adverse to the devisee's interest, especially where he yielded possession to her when she came to the state and demanded possession several years after the death of testatrix.

Appeal from Superior Court, Los Angeles County; J. P. Wood, Judge.

Action to quiet title by T. P. Bryan, trustee, against Elizabeth J. Prescott, individually and as administratrix of the estate of Ruhamah Bryan, deceased, and others. Judgment for defendants, and plaintiff appeals. Affirmed.

W. H. Bowers, of Sawtelle, for appellant.
Victor Watkins, of Los Angeles, for respondents.

CONREY, P. J. Action to quiet title to a lot described in the complaint. The premises

are also referred to as 2130 Vallejo street, in the city of Los Angeles. The plaintiff appeals from the judgment entered against him.

In the year 1904 the lot was conveyed by one Palmer to Ruhamah Young and her daughter, Emma Brown, as tenants in common; the consideration therefor being paid by Mrs. Young. At some time between the date of that deed and the year 1910 Mrs. Young married the plaintiff, T. P. Bryan. In the year 1911 Emma Brown died, and it is conceded that whatever interest she had in the property passed to her husband, Woods G. Brown. On the 13th day of May, 1913, Ruhamah Bryan died. At the trial of this action it was stipulated that Mrs. Bryan left a will under which any interest that she had in this property at the time of her death passed to the defendant Elizabeth J. Prescott. On the 15th day of January, 1912, Mrs. Bryan signed and acknowledged a deed purporting to convey the lot to the plaintiff, and he caused the same to be recorded. According to his testimony, the deed was delivered to him by his wife. Mr and Mrs. Bryan were living on the premises at that time and until her death. After that time he continued in undisturbed possession, under circumstances hereinafter stated, until the year 1919. The complaint in this action was filed May 10, 1920.

The deed of Mrs. Bryan to the plaintiff recites a consideration of \$100. The plaintiff testified that his wife did not make a gift to him of the property, but that the transaction was a matter of business; that he did not pay her any money at the time of execution of the deed; that he loaned her \$30 before they were married; that he afterwards paid for her a \$100 note to a physician, which note had been given for professional services rendered to her before the marriage. He testified that he had an understanding and agreement with his wife that she would give the deed for \$100, but he was unable to state any of the words used in their conversations on the subject. Within a few weeks after the date of this deed, the plaintiff obtained a loan of \$1,000 by mortgaging this property. With \$850 of this borrowed money he purchased from Woods G. Brown his interest in the property. This transaction is evidenced by a deed of date March 25, 1912, from Brown to the plaintiff. The admitted value of the property in dispute is at least \$2,000. Plaintiff testified that at the time when Mrs. Bryan signed the deed to him, her mind was "as good as I ever saw her," and that it continued the same until a few days before her death. Yet in a letter written at some time during that period, by the plaintiff to the defendant, referring to Mrs. Bryan, he said:

"I suppose you see by her letters that she is off on her mind. * * * She is not well by a long ways, that with her mind and age put her mind in bad form. * * * Her old age, and mind out of balance on many things, and from what I can learn, has always been so to some extent."

At the time of the death of Mrs. Bryan, the defendant Mrs. Prescott was living in the state of New York. She did not come to California until the 1st of January, 1919. Three weeks later she obtained from the plaintiff the key to the house, and went into possession of the property. Ever since that time she has occupied the same as her residence. She had been prevented by the death of her son and by other circumstances from coming to California until 1919. The plaintiff and another witness testified that plaintiff gave Mrs. Prescott the key on her representation that she wanted to rent the property from him. She denies this. She went to see him at the Soldiers' Home, where he was staying at that time, although some of his furniture remained in the house on the premises that are here in litigation. She says that she asked him for the keys, and he gave them to her. "He told me the things were all gone out of the home, and he didn't know where they had gone to or who had taken them, and he gave me the keys to the home to move in, and I moved in with my little daughter, and we lived there." After the commencement of this occupancy by the defendant, she for the first time learned that plaintiff had a deed to the property. Three or four weeks after the defendant moved into the premises, the plaintiff called there, and a conversation took place between him and the defendant. She said:

"I asked him how it was that my mother had willed me this property and deeded it to him. He said, 'As it is, she didn't know it was a deed she was signing. She was ignorant on business.'"

On the 6th day of April, 1913, Mrs. Bryan wrote to the defendant that she had given to Mr. Bryan "the deeds and receipts for this property. Mr. Bryan will keep them for you dear Bessie." The findings of the court state:

"That at the time said deed was so signed by said Ruhamah Bryan, now deceased, said Ruhamah Bryan was over the age of 80 years, and very infirm and feeble in health, and did not know or realize the purport of said instrument, and said instrument or said deed was never delivered by said Ruhamah Bryan to the plaintiff herein, with the intention of conveying her said property to the plaintiff herein as his property, but said Ruhamah Bryan thought she was conveying and intended by said deed or instrument to convey said property to plaintiff in trust for her said daughter, Elizabeth J. Prescott, one of the defendants herein. That at the time said plaintiff procured his said wife, Ruhamah Bryan, now deceased, to sign said in-

strument or deed, the said plaintiff and his said wife were living together as husband and wife in said property hereinbefore described, and continued to live there together until the death of said Ruhamah Bryan, to wit, on or about the 13th day of May, 1913. That no adequate or sufficient consideration was given to the said Ruhamah Bryan, or received by her for the signing of said instrument or deed, and the only consideration that was given to said Ruhamah Bryan or received by her, if any at all, was given to her or received by her for such, was the cancellation of an alleged debt in the sum of \$110, which the plaintiff claims was owing to him by his said wife at that time, by reason of the payment by him several years previous to that time of a doctor's bill, in about the sum of \$100, and previously owed by his said wife, and the advancement of about \$10 by the plaintiff to his said wife, or for her benefit, some years previous to said January, 1912."

[1] Appellant contends that no evidence was produced in support of any charge of fraud, misrepresentation, duress, threat, or undue persuasion on the part of appellant to obtain his deed from Mrs. Bryan, and that without such evidence the effect of the deed was to convey to him both the legal title and the entire beneficial interest in the property. In support of this proposition he relies upon section 158 of the Civil Code, and the decision in *Tillaux v. Tillaux*, 115 Cal. 663, 47 Pac. 691. The gist of the decision in *Tillaux v. Tillaux* is that the marriage relation does not ipso facto raise the presumption that a deed of conveyance from the husband to the wife has been the result of undue influence. It is summarized to this effect in *White v. Warren*, 120 Cal. 322, 325, 49 Pac. 129, 52 Pac. 723. Nevertheless, in *White v. Warren*, where the question at issue was whether moneys advanced by the wife to the husband were received by him as a loan or as a gift, it was held that—

"It devolved upon the husband, who claimed to have received the gift, to prove that such gift was made without any undue influence on his part, the presumption being that, in the absence of proof to that effect, there was such undue influence used."

This decision was based upon a construction of sections 158, 2235, and 2219 of the Civil Code. These sections are as follows:

Sec. 158. "Either husband or wife may enter into any engagement or transaction with the other, or with any other person, respecting property, which either might if unmarried; subject, in transactions between themselves, to the general rules which control the actions of persons occupying confidential relations with each other, as defined by the title on trusts." Sec. 2235. "All transactions between a trustee and his beneficiary during the existence of the trust, or while the influence acquired by the trustee remains, by which he obtains any advantage from his beneficiary, are presumed to be entered into by the latter without sufficient

consideration, and under undue influence." Sec. 2219. "Every one who voluntarily assumes a relation of personal confidence with another is deemed a trustee, within the meaning of this chapter. * * *

The court said:

"Here, conceding what is claimed by the defendant as to the nature of the transaction, it is evident that he was greatly advantaged thereby, and, such being the fact, the burden rested upon him of disproving the presumption of undue influence created by the law under such conditions."

So here, since it appears from the evidence that the plaintiff obtained a great advantage from the transaction with his wife, the presumption of undue influence must prevail unless overcome by evidence clearly showing that undue influence was not used by him to obtain that advantage. On the evidence which came before the court in this case, we think that the court was justified in finding, as in effect it did, that the conveyance was not made freely or with knowledge of its effect, and that the plaintiff obtained an unfair advantage thereby.

In *Magee v. Brenneman*, 206 Pac. 37, considering the effect of section 2235 of the Civil Code, in a transaction between attorney and client, the Supreme Court said:

"This does not mean that a trustee may not deal with his beneficiary. But if he does deal with him in such manner as to obtain an advantage, the trustee has the burden of showing by evidence that the transaction was fair. * * * To place the burden on the beneficiary would be to put such contracts in the same category as those between parties occupying no relation of trust, to ignore the provisions of section 2235 of the Civil Code, and to deny this added protection to one whose confidence has been abused."

See, also, *Cox v. Schnerr*, 172 Cal. 371, 378, 156 Pac. 509.

[2] The conclusions above stated apply to the undivided half interest in the property obtained by the deed from Brown as well as to the interest which was vested in Mrs. Bryan. This results from the fact that the entire consideration paid to Brown was obtained by using the proceeds of a mortgage loan on Mrs. Bryan's property. Civ. Code, § 853.

[3] Appellant next contends that he has become the owner of this property by adverse possession; that he held and possessed the same adversely to the defendant for a period of more than five years prior to the commencement of this action. There is no merit in this claim. The plaintiff never entered into possession under the deed. He never did any act to direct the attention of the defendant to the fact that he repudiated the obligation of his trust. On the contrary, the testimony of the defendant is to the ef-

fect that she, by correspondence, requested him to take care of the property for her until she came to California, and that she knew of no adverse claim by him. His subsequent conduct, in surrendering possession to her on her arrival here, is confirmatory of that evidence.

The judgment is affirmed.

We concur: SHAW, J.; James, J.

57 Cal. App. 674

WINGARD v. INDUSTRIAL ACC. COMMISSION et al. (Civ. 3831.)

(District Court of Appeal, Second District, Division 2, California. May 17, 1922. Hearing Denied by Supreme Court July 13, 1922.)

1. Evidence §20(1)—Court takes judicial notice of employment of men of certain trades in certain places.

The court will take notice that both riveters and rivet passers had been employed continuously for many years in Los Angeles in the erection of steel structures for large buildings, and that such workmen had been continuously employed for several years in building ships at Long Beach and at San Pedro.

2. Master and servant §385(1)—Compensation for injuries held computed on correct basis.

Compensation awarded to an employé injured after working a week in an employment calling for a weekly wage which was less than the wages in his ordinary employment, interrupted by illness, held computed on the proper basis under Workmen's Compensation Act, § 12, subd. (a), par. 4, the rate of wages paid at time of injury; there being no showing on the question as to earnings to bring him within paragraph 2.

Proceeding by A. E. Wingard before the Industrial Accident Commission against the Los Angeles Shipbuilding & Drydock Company for an award. From a decision awarding petitioner less than he asked, petitioner brings certiorari. Affirmed.

Courtney A. Teel, of Los Angeles, for petitioner.

A. E. Graupner and W. H. Pillsbury, both of San Francisco, for respondents.

WORKS, J. An award was made in petitioner's favor under an application to respondent Accident Commission for an allowance of compensation under the Workmen's Compensation, Insurance, and Safety Act because of injuries received by petitioner on April 16, 1921, and while working as an employee of respondent Shipbuilding & Drydock Company, hereinafter referred to as the employer. Petitioner by the present proceeding asks us to review the action of the Accident

Commission on the ground that the compensation allowed by the award was less than petitioner should have received under the law.

One of the contentions of petitioner is that a certain weekly benefit allowed by the award was computed upon an improper basis. For a long time petitioner had been in the service of the employer as a riveter at a daily wage of \$6.40. This employment was interrupted by an illness which was suffered by petitioner, and which kept him away from the plant of the employer for a week. On the Monday following this absence he appeared at the place, but asked, on the ground that his strength was not fully restored, that he be put to work temporarily as a rivet passer, that employment paying a daily wage of but \$4.16. Petitioner's request was granted, and he immediately began work in the capacity which called for this lesser wage. He continued in that line of work until Saturday of the same week, by which time it had become understood that he was to return to his ordinary employment as a riveter on the succeeding Monday. On that last day of his service as a rivet passer, however, that is, on the Saturday mentioned, petitioner suffered the injury because of which he asked respondent Accident Commission to allow him compensation. In awarding him a weekly benefit that body computed it upon the basis of his daily wage of \$4.16 instead of upon the daily wage of \$6.40, as petitioner contends should have been done.

The solution of this question depends upon a construction of portions of section 12 of the Workmen's Compensation, Insurance, and Safety Act. Stats. 1917, p. 831; Deering's Consolidated Supplement to Gen. Laws 1917-1921, Act 2143c. The section provides, under subdivision (a), as follows:

"(1) If the injured employee has worked in the same employment, whether for the same employer or not, during at least two hundred sixty days of the year preceding his injury, his average weekly earnings shall consist of ninety-five per cent. of six times the daily earnings at the time of such injury where the employment is for six full working days a week. Where his employment is for five, five and one-half, six and one-half or seven working days a week, the average weekly earnings shall be ninety-five per cent. of five, five and one-half, six and one-half or seven times the daily earnings at the time of the injury, as the case may be.

"(2) If the injured employee has not so worked in such employment during at least two hundred sixty days of such preceding year, his average weekly earnings shall be based upon the daily earnings, wage or salary of an employee of the same class working at least two hundred sixty days of such preceding year in the same or a similar kind of employment in the same or a neighboring place, computed in accordance with the provisions of the preceding subdivision.

"(3) If the earnings be irregular or specified to be by the week, month, or other period, then the average weekly earnings mentioned in subdivisions (1) and (2) above shall be ninety-five per cent. of the average earnings during such period of time, not exceeding one year, as may conveniently be taken to determine an average weekly rate of pay.

"(4) Where the employment is for less than five days per week or is seasonal or where for any reason the foregoing methods of arriving at the average weekly earnings of the injured employee cannot reasonably and fairly be applied, such average weekly earnings shall be taken at ninety-five per cent. of such sum as shall reasonably represent the average weekly earning capacity of the injured employee at the time of his injury, due consideration being given to his actual earnings from all sources and employments during the year preceding his injury; provided, that the earnings from other occupations shall not be allowed in excess of the rate of wages paid at the time of the injury."

[1, 2] The parties to this proceeding agree that neither paragraphs (1) nor (3) apply to the question we now consider, petitioner insisting that the point is controlled by paragraph (4), and respondents contending that paragraph (2), the one followed by respondent Accident Commission in making its award, is to govern our decision. We are convinced that the view of respondents is the correct one, if all factors contemplated by paragraph (2) may be found in the record. It is obvious that the clauses, "If the injured employee has worked in the same employment" and "If the injured employee has not so worked in such employment," which are the opening words of paragraphs (1) and (2), respectively, refer to the employment in which an employee is engaged at the time of his injury. That employment in the present instance, as we have already observed, was that of a rivet passer. Taking the meaning which we have ascribed to the quoted clauses as a premise and looking now to paragraph (2) in an endeavor to ascertain its applicability to the present situation, we have only to determine, except for a consideration hereafter to be mentioned, whether rivet passers worked at the city of Long Beach, where petitioner was injured, or in a neighboring place, at least 260 days of the year preceding petitioner's injury. We are pointed to nothing in the record on this question, but that fact need give us no concern, for the particular point may be settled under the law of judicial notice. We know that both riveters and rivet passers have been employed continuously for many years in Los Angeles, which is less than 25 miles distant from Long Beach, in the erection of steel structures for large buildings. Even if there be a difference between that employment and the work of riveters and rivet passers in shipbuilding, a fact as to which we are not actually in-

formed, we know that such workmen have been at work continuously for several years in the building of ships at Long Beach itself and at San Pedro, distant less than 10 miles from the former city. That we may take judicial notice of such facts as these is attested by the opinion of the Supreme Court in *Ex parte Kohler*, 74 Cal. 38, 15 Pac. 436. Having progressed so far we come now to another matter—and this is the consideration to which we have referred above. Paragraph (2) contemplates the basing of the average weekly earnings of an injured employee upon the daily earnings of an employee of the same class in the same or a neighboring place, extended over the period of time mentioned in the statute. The record here shows nothing upon the question as to what the daily earnings of such an employee were during 260 days within the year preceding the injury to petitioner, either in Los Angeles, San Pedro or Long Beach. To this extent, then, respondents have failed to bring the case within the terms of paragraph (2). On account of this fact neither paragraphs (1), (2), nor (3) apply, and we are bound to fall back upon paragraph (4). It will be observed that under the last-mentioned paragraph, "where for any reason the foregoing methods"—that is, those defined in paragraphs (1), (2) and (3)—"of arriving at the average weekly earnings of an injured employee cannot reasonably and fairly be applied," certain average weekly earnings shall be taken as a basis for the computation, "provided, that the earnings from other occupations shall not be allowed in excess of the rate of wages paid at the time of the injury." The language of this proviso undoubtedly refers to the wages paid at the time of the injury to the injured employee. As the finding of respondent Accident Commission was based upon the exact wage paid to petitioner at the time of his injury, the requirement of the proviso seems to have been met precisely. We are satisfied that the finding of respondent Accident Commission, fixing the weekly benefit allowed petitioner, was computed upon the proper basis.

The next contention made by petitioner arises under section 9 of the Workmen's Compensation Act. The section provides that—

Where liability for compensation exists, the employer shall furnish "such medical, surgical and hospital treatment * * * as may rea-

sonably be required to cure and relieve from the effects of the injury."

The section also provides that—

"In case of his neglect or refusal reasonably to do so, the employer to be liable for the reasonable expense incurred by or on behalf of the employee in providing the same."

Some time after petitioner was injured his parents removed him from the hospital in which he had been placed by the employer, that hospital being the place to which the employer regularly sent its injured employees for treatment, to another hospital, and there placed him under medical care other than that which had been provided for him by the employer at the first hospital. The reason assigned for the removal was that petitioner had not received proper care and attention up to the time of the removal. Respondent Accident Commission refused to allow petitioner his medical and hospital expenses after the removal on the ground that there was a conflict of the evidence as to conditions existing in the hospital in which the employer had placed him; that conflict being resolved against petitioner. We have read carefully all the evidence heard by the Accident Commission and referred to by counsel as bearing on the point presented—and it comprises a great part of the entire evidence taken in the proceeding—and conclude that the commission arrived at a correct solution of the question. The major parts of the evidence which petitioner aimed at the hospital management and at the conduct of the hospital physicians and nurses met with direct contradiction in the opposing testimony.

We cannot say from the uncontradicted items of the evidence on the subject that the removal of petitioner from the first hospital in which he was placed was justified; that is, we cannot say that those items show that the employer either neglected or refused to furnish to petitioner such medical, surgical, and hospital treatment as was reasonably required to cure and relieve from the effects of the injury which he had suffered. The propriety of this conclusion seems so manifest to us that we do not feel called upon to recite the somewhat voluminous evidence bearing upon the question.

Award affirmed.

We concur: FINLAYSON, P. J.; CRAIG, J.

58 Cal. App. 59

LUTHER v. CLARK et al. (Civ. 3900.)

(District Court of Appeal, Second District, Division 1, California. May 31, 1922. Hearing Denied by Supreme Court July 27, 1922.)

1. Vendor and purchaser ⇨299(3)—Complaint held not insufficient as failing to allege a valid reason for failure to convey perfect title.

In an action by a vendor against a purchaser to recover possession of land, a complaint, alleging that plaintiff's predecessor in title was to convey a perfect title and furnish a certificate of title showing it to be perfect, and from which it appeared that a corporation supplying water to the public had a right of way across the property for its pipe line, and alleging that plaintiff tried to obtain a release of the easement without success, and because of this fact he was unable to obtain a certificate showing perfect title, was not insufficient as failing to allege a valid reason excusing plaintiff from conveying a perfect title and furnishing a certificate showing such condition of the title.

2. Judgment ⇨248—Letter written after decision could not affect judgment.

In an action by a vendor against purchasers for possession of property sold, in which the vendor's predecessor in title had contracted to convey perfect title and to furnish a certificate showing such condition of the title, which the vendor was unable to do because a right of way for a water pipe line across the property was held by a public service corporation, on the purchaser's refusing at the trial to accept a deed so long as the easement remained and to pay the purchase price, refusal to enter an interlocutory judgment setting a time within which the purchasers should pay the purchase price was not error, regardless of a letter written by the purchasers after the decision offering to accept the deed and pay the purchase price.

3. Vendor and purchaser ⇨296—Purchaser may not retain possession refusing to pay purchase price for failure to convey title according to contract.

Where a vendor's predecessor in title contracted to sell land and to convey a perfect title and to furnish a certificate showing such condition of title, which he was unable to do because of an easement for a pipe line across the land, the purchaser had no right to retain possession of the property and to refuse to pay the purchase price for failure to convey title according to the contract, and, on refusal to accept a conveyance subject to the easement, a decree returning possession to the vendor was proper.

Appeal from Superior Court, Los Angeles County; J. P. Wood, Judge.

Suit by Sidney Luther against Stephen A. D. Clark and others. From judgment for plaintiff, defendants appeal. Affirmed.

C. Franklin Baxter, of Los Angeles, for appellants.

Muhleman & Crump, of Los Angeles, for respondent.

SHAW, J. It appears from the complaint herein that plaintiff is the owner of certain real estate described therein, the net area of which is 7.521 acres, which property is, and at all times mentioned was, subject to an easement and right of way across the same for a pipe line owned by the Hermosa Beach Water Corporation for the conveyance of water for public use; that plaintiff acquired title to said property from one Henry Krotzer, who, prior to plaintiff's acquisition thereof, had executed a contract for its sale to Stephen A. D. Clark. By the terms of the contract, dated June 11, 1912, Krotzer agreed that the tract of land consisted of 8 acres and was free and clear of all easements or incumbrances whatsoever, and that the purchase price to be paid by Clark was \$500 per acre, net measurement, and that he would furnish the purchaser with an unlimited certificate of title by the T. I. & T. Co. of Los Angeles, Cal., showing measurement of the land, names and width of streets and roads touching the same, and a perfect title. The terms of payment were \$50 cash, the balance to be paid as follows: \$950 on or before September 1, 1912, \$600 on or before March 1, 1913, and \$2,500 on or before September 1, 1913; the last two payments to be evidenced by promissory notes secured by a mortgage upon the property. It provided further that Clark should have immediate and full possession of the land; that the conveyance should be by grant deed; and that Clark and his wife should, within five days after the certificate as provided was written, place in escrow the mortgage to secure the last two payments, and complete the cash payments September 1, 1912. It further provided that should any defect appear in the title that could not be removed to the satisfaction of Clark, then, at his option, all payments made should be returned to him. It is alleged that Clark made the \$50 cash payment referred to, went into possession of the property about June 11, 1912, and has at all times since been and now is in possession thereof; "that plaintiff has heretofore attempted and endeavored to obtain a release of the easement and right of way of the Hermosa Beach Water Corporation over and across said property, and to obtain an unlimited certificate of title from the Title Insurance & Trust Company, referred to in said agreement as the 'T. I. & T. Co. of Los Angeles, California,' showing the measurement of the land, names and width of all streets and roads touching the same, and a perfect title as provided in said contract, but said Hermosa Beach Water Corporation has refused and does refuse to consider any proposition to relinquish said

easement and right-of-way owned by them, and said Title Insurance & Trust Company has refused and does refuse to issue such unlimited certificate of title, stating that it is impossible for it to do so in accordance with said contract; that plaintiff is unable to have said easement and right of way removed or said certificate of title issued through no fault of plaintiff or of said Henry Krotzer," who executed the contract and subject to which plaintiff acquired title to the property and the rights of Henry Krotzer therein; and further "that plaintiff is unable to comply with the terms of said contract on his part; that plaintiff is willing to and does hereby offer to restore to defendants everything of value which plaintiff has received under said contract, and hereby tenders unto defendants said sum of \$50, being the first payment on the purchase price of said land under said contract as alleged"; that defendants have refused and do now refuse to receive back said payment of \$50 and cancel said contract and restore possession of the property to plaintiff, or to accept such title as plaintiff is able to convey, which title plaintiff hereby offers to convey, with a reduction in the purchase price proportionate to the difference between 8 acres and 7.521, as provided in said contract, but insist upon and do retain both the balance of the purchase price of said land and the possession thereof.

The prayer of the complaint is that defendants be required to either accept such title as plaintiff can convey and pay the purchase price thereof as agreed, or to accept back the sum of \$50, paid by Clark to plaintiff's predecessor, Henry Krotzer, and cancel said contract and restore possession of the property to plaintiff; and in case of their refusal so to do, that said contract by decree of court be canceled, annulled, and declared to be of no effect, and that plaintiff's title be quieted against defendants, and that he be let into immediate possession of the property.

By their answer defendants denied that plaintiff, as alleged, was unable or had endeavored to comply with the contract by obtaining a release of the easement and right of way of the Hermosa Beach Water Corporation over and across said property, or that he had endeavored to or was unable to obtain an unlimited certificate of title from the Title Insurance & Trust Company, referred to in said agreement as the T. I. & T. Co. of Los Angeles, Cal., as provided in said contract, or that said T. I. & T. Co. has refused to issue such certificate of title, or has stated that it was impossible for it to do so in accordance with said contract; -and further alleged that since the commencement of the action defendant George T. Clark had purchased from defendant Stephen A. D. Clark all of his right, title, and interest in and to

said contract and the land described therein.

Upon these issues the court found that plaintiff was the owner of and entitled to possession of the property, the area of which was as alleged in the complaint; that it was at the time of the execution of the contract and ever since had been and was subject to an easement or right of way for a pipe line across the southwest corner thereof in favor of the Hermosa Beach Water Corporation, as well as to other public easements for street and highway purposes; that defendants claim an interest and title in the property by virtue of said contract so executed by Henry Krotzer to Stephen A. D. Clark on June 11, 1912; that plaintiff has attempted and endeavored to obtain a release of the easement and right of way of the Hermosa Beach Water Corporation over and across the property, but that said corporation has refused to and does refuse to relinquish said easement or consider any proposition for the release thereof, and said Title Insurance & Trust Company refuses to issue an unlimited certificate of title, stating that it is impossible for it to do so in accordance with said contract; that plaintiff, without his fault or that of Henry Krotzer, has been and is unable to have said easement and right of way removed or said certificate of title issued, and is unable to fully comply with the terms of said contract on his part, but is willing and offered in open court at the trial of this cause to restore to defendants everything of value which plaintiff or his assignor received under said contract, and in open court at the trial tendered to defendants a grant deed conveying the property, subject only to the incumbrances aforesaid, which plaintiff has been unable to have removed, and offered to reduce the purchase price thereof in proportion to the difference between 8 acres and 7.521, as provided in said contract, but that defendants, and each of them, have at all times refused to exercise the option to receive back said payment of \$50 and cancel said contract and restore to plaintiff possession of the property, or to accept such title as plaintiff is able to convey, but insist upon, and do retain the balance of the purchase price of said land and the possession thereof; "that defendants in open court at the trial of this cause, unqualifiedly refused to accept a deed to said property subject to any easement or right of way for a pipe line across said land, or anything other than a perfect title." And as a conclusion of law the court found that defendants, and neither of them, had any interest or estate whatever in or to said premises or any part thereof, that they be debarred from asserting any claim to said land, and that plaintiff was entitled to the possession thereof. Final judgment followed as prayed for in the complaint, from which defendants have appealed.

[1] Appellants insist the complaint is insufficient in that no valid reason is alleged excusing plaintiff from conveying a perfect title and furnishing the certificate of the T. I. & T. Co. showing such condition of the title, and hence the court erred in overruling the general demurrer interposed. There is no merit in this contention. It appears from the complaint that the Hermosa Beach Water Corporation had an interest in the property, to wit, a right of way across the same for its pipe line, through which it conducted water for a public use, which fact, since it is obvious that one cannot convey a perfect title to real estate which he does not own, was a sufficient excuse for plaintiff's failure to comply with his contract. Assuming a duty devolved upon plaintiff, under the terms of his contract, to clear the land from such burden, he alleges and proves by competent evidence that he has in good faith endeavored to obtain from said corporation a release of the easement and right of way, and that it has refused to relinquish the same or entertain any proposition therefor, by reason of which fact he has been unable to obtain a certificate showing a perfect title. Since in our opinion the complaint was sufficient as against the general demurrer, it follows that the court did not err in denying defendant's motion for judgment on the pleadings, based upon the fact that the complaint did not state a cause of action, nor in overruling their objection to the introduction of evidence thereunder.

[2] It appears that the court at the close of the trial gave its decision in favor of plaintiff and ordered a final judgment entered, of which fact appellants complain. The evidence clearly shows that, as found by the court, defendants without qualification announced in open court that they would not accept the purchase of the property, nor pay for the same, until the property was free from the rights of the Hermosa Beach Water Corporation and the delivery to them of a certificate showing such fact, as called for by the contract, which was a condition impossible of performance under the circumstances shown to exist. In response to the question asked by the court, "You won't accept a deed so long as that easement remains?" defendants replied, "That is right," to which the court said:

"That being the case, there is no occasion to enter an interlocutory judgment. The defendant says he will not accept the offer (of the deed tendered in open court), and the judgment will be—"

After some further colloquy, the court asked:

"No point is made, Mr. Baxter, that these deeds do not run to the persons to whom you would have them run?"

"Mr. Baxter: No, only they do not satisfy us, and we won't accept them."

"The Court: Very well. Judgment will be for the plaintiff."

It is apparent that upon these facts defendants are in no position to complain because of the failure of the court to enter an interlocutory judgment extending the time within which defendants should pay the purchase price of the property. To do so under the circumstances would have been a futile act and no purpose could be served thereby.

The fact, as stated by appellants, that after the decision defendants, by a letter to plaintiff, offered to accept the deed and pay the purchase price, is immaterial, for the reason that it was a private communication and no part of the proceedings at the trial. It constitutes no part of the record and cannot be considered as affecting the judgment. While appellants claim that before the judgment was entered they made a motion before the court to be permitted to pay the purchase price, the record contains nothing whatsoever in relation thereto.

[3] Upon the findings, added to which, as shown by the evidence, is the fact that during the 10 years that defendants had the use and occupation of the property plaintiff was compelled to and did pay all the taxes, it would be difficult to conceive of a more inequitable position than that assumed by them. Their contention is that they may indefinitely keep possession of the property so received from the vendor and refuse to make payment of the purchase price; in other words, that they may keep both the property and the purchase money. They have refused to pay anything or comply with their part of the contract, save and except when plaintiff can convey a clear title, which, under the circumstances, he can never do, for the reason that another party owns an outstanding interest and title in the property; hence a conveyance in accordance with the terms of plaintiff's contract is impossible. As said in *Garvey v. Lashells*, 151 Cal. 526, 91 Pac. 498:

"A purchaser cannot retain possession of property delivered to him under a contract of sale without complying with the terms of the contract as to payment for the reason that the title of his vendor is not satisfactory. If a perfect title was to be conveyed, and the vendor is unable to give such a title, the vendee has appropriate remedies, but he cannot keep both the property and the purchase money."

In *Haile v. Smith*, 128 Cal. 415, 60 Pac. 1032, the court, supported by *Worley v. Nethercott*, 91 Cal. 512, 27 Pac. 767, 25 Am. St. Rep. 209, states the rule to be that—

"A purchaser of land in possession thereof under a contract of sale, by the terms of which the vendor is to give a warranty deed of the property conveying a good and perfect title thereto, cannot, upon the vendor's failure and inability to convey a good and perfect title, re-

tam both the land and the purchase money until a perfect title shall be offered him, but he must pay the purchase price according to the contract, and receive such title as the vendor is able to give if he chooses to retain the possession of the land."

The judgment is affirmed.

We concur: CONREY, P. J.; JAMES, J.

58 Cal. App. 1

SMITH v. QUESTA. (Civ. 3642.)

(District Court of Appeal, Second District, Division 2, California. May 24, 1922.)

1. Appeal and error ⚡1024(5)—**Order refusing motion to set aside judgment based on conflicting evidence will not be disturbed on appeal.**

Where an order refusing a motion to set aside a judgment was founded on conflicting evidence, it will not be disturbed on appeal.

2. Appeal and error ⚡339(5)—**Appeal from order denying motion to vacate judgment held too late.**

Under Code Civ. Proc. § 939, providing that an appeal from an order denying a motion to vacate a judgment must be taken within 60 days after the entry of the order in the minutes, where an order denying defendant's motion to vacate a judgment was entered in the minutes February 18th, a notice of appeal filed April 25th following was too late.

3. Appeal and error ⚡792—**Appellate court will of its own motion dismiss appeal not taken in time.**

Statutory time for taking an appeal is jurisdictional, and, where an appellant has made no attempt to appeal until after the time prescribed by the statute, the appellate court is without jurisdiction, and will of its own motion dismiss the appeal.

4. Appeal and error ⚡113(1)—**Order refusing to hear application for rehearing of motion to vacate judgment is not appealable.**

Where defendant's motion to set aside a judgment was overruled, an order refusing to hear defendant's application for a rehearing of his motion to vacate the judgment is not appealable, and will be dismissed, since an appeal will not lie from an order refusing to set aside a former appealable order made regularly and advisedly.

5. New trial ⚡153—**Notice of intention must be filed within ten days after notice of entry of judgment.**

Notice of intention to move for a new trial, not being filed within 10 days after receiving notice of entry of judgment, is too late.

6. New trial ⚡153—**Application of appellant for order vacating judgment held a waiver of formal written notice of entry of judgment.**

Where a judgment was entered in favor of plaintiff December 10th, and defendant on Janu-

ary 22d following filed a notice of intention to move to set aside the judgment, accompanied by an affidavit, such application to vacate the judgment amounted to a waiver of a formal written notice required to be served on the attorney for defendant in order to start the running of the 10 days' time allowed after receiving notice of the entry of judgment within which the losing party may move for a new trial.

7. Appeal and error ⚡345(1)—**Failure to take appeal from judgment within 60 days held to cause loss of right to appeal.**

Where a notice of intention to move for a new trial was not filed until 77 days after the entry of judgment, so that no proceeding on motion for new trial had been inaugurated or was pending at the expiration of 60 days after the entry of judgment, within which an appeal might be taken from the judgment in absence of any pending proceeding for a new trial, an appeal from the judgment taken more than 60 days after its entry was too late.

Appeal from Superior Court, Imperial County; Franklin J. Cole, Judge.

Action by W. R. Smith against Manuel Questa. From judgment for plaintiff, defendant appeals. Affirmed.

Joseph F. Seymour, of El Centro, for appellant.

Hill & Lee, of El Centro, for respondent.

FINLAYSON, P. J. In this action for the restitution of leased premises, and for damages alleged to have been sustained by reason of defendant's breach of certain covenants, plaintiff recovered judgment in the absence of defendant from the trial, and the latter now appeals from the judgment, and likewise from an order denying his motion to set it aside. He also appeals from an order sustaining an objection to hearing his motion for a new trial and his motion for a rehearing of his motion to set aside the judgment.

The action was commenced October 14, 1920. Defendant, appearing by an attorney who has since been superseded by present counsel, filed an answer and likewise a cross-complaint. In due time plaintiff answered the cross-complaint. On October 29, 1920, the case being then at issue, the court, on motion of plaintiff's counsel, set the cause for trial on December 1, 1920. On October 31, 1920, defendant's counsel received notice of the setting of the case for trial. Notwithstanding the receipt of such notice by defendant's counsel, neither he nor his client appeared in court when the case came on for trial December 1, 1920. Plaintiff, therefore, in the absence of defendant and his counsel, put in his evidence, and a judgment in his favor was rendered and entered December 10, 1920. Shortly before the opening of court on the morning of the day for which the case was set for trial, defendant's counsel called plain-

tiff's counsel on the telephone and asked for a short continuance of the case on account of his client's absence. Plaintiff's counsel refused to accede to the request, and defendant's counsel concluded that it was useless for him to appear in court without his client.

On January 22, 1921, defendant, who in the meantime had substituted his present counsel for his former attorney, served and filed a notice that he would move the court to set aside the judgment on the ground that it had been taken against him through inadvertence, surprise, and excusable neglect. He accompanied his notice with an affidavit made by himself, wherein, after admitting that his former attorney had received due notice that the cause was set for trial December 1, 1920, he deposed that he himself knew nothing about the trial or of the date set therefor, and that if his attorney had notified him that the case had been set for trial he would have been present with his witnesses. Counter affidavits were filed by plaintiff, as well as additional affidavits on behalf of defendant. In one of the counter affidavits, an affidavit made by defendant's former counsel, it is positively affirmed by the affiant that he did notify his client, the defendant here, that the case was set for trial on December 1, 1920, but that defendant failed to keep his promise to appear at the trial and bring his witnesses with him, and that the only reason why affiant did not appear was that he could not try the case without the presence of his client and his witnesses.

[1] The affidavits are quite voluminous, but from what we have set forth it sufficiently appears that there was a substantial conflict in the evidence upon which the court denied defendant's motion to set aside the judgment. So that, even if the appeal from the order denying defendant's motion to vacate the judgment had been taken in time—a matter which we presently shall consider—it would be our duty to affirm the order, for the reason that, there being a substantial conflict in the affidavits, the action of the trial court in determining whom to believe is conclusive on the appeal to this court. The statements in the affidavits that favor respondent must control. *Patterson v. Keeney*, 165 Cal. 465, 132 Pac. 1043, Ann. Cas. 1914D, 232.

On February 18, 1921, the court denied defendant's motion to set aside the judgment. Thereafter, namely, on February 25, 1921, defendant filed a notice that he would move the court to grant him a rehearing of his motion to set aside the judgment. At the same time he filed a notice of his intention to move for a new trial. The record before us is silent as to any service upon plaintiff of either of the last-mentioned notices. Plaintiff objected to any hearing of defendant's motion for a rehearing of his application to set aside the judgment. Plaintiff likewise objected to any hearing of defend-

ant's motion for a new trial. On March 10, 1921, the trial court sustained plaintiff's objection to hearing defendant's motion for new trial, and likewise sustained the objection to hearing defendant's motion for a rehearing of his application to vacate the judgment. The notice of appeal was filed April 25, 1921.

[2] The appeal from the order denying defendant's motion to vacate the judgment was taken too late. That order was entered in the minutes of the court on February 18, 1921. The notice of appeal was filed April 25, 1921, or 66 days after the entry of the order. An appeal from such an order must be taken within 60 days after its entry in the minutes. Code Civ. Proc. § 939.

[3] The statutory time for taking an appeal is jurisdictional and mandatory; and, where an appellant has made no attempt to appeal until after the time prescribed by the statute, the court is without jurisdiction. *Estate of Brewer*, 156 Cal. 90, 103 Pac. 486; *Lancel v. Postlethwaite*, 172 Cal. 326, 156 Pac. 486. Respondent has made no motion to dismiss the appeal. Indeed, he has made no appearance in this court by printed brief or otherwise. But, since this court is without jurisdiction of the appeal, we, of our own motion, and notwithstanding respondent's failure to appear and move a dismissal, are bound to dismiss the appeal from the order denying defendant's motion to set aside the judgment. *Langan v. Langan*, 89 Cal. 186, 26 Pac. 764; *McLaughlin v. Menotti*, 89 Cal. 355, 26 Pac. 880; *People v. Walker*, 132 Cal. 137, 64 Pac. 133.

Moreover, the transcript before us has not been authenticated by the judge's certificate. The record here consists of a clerk's typewritten transcript containing the judgment roll, together with certain papers and records purporting to have been used on the proceedings had subsequent to the entry of the judgment. This transcript is certified by the clerk, but not by the judge. In *Barnabee v. Hunstock*, 42 Cal. App. 659, 183 Pac. 951, and *Reed v. Clark* (Cal. App.) 206 Pac. 1018, it was held that, where the order appealed from is subsequent to the judgment, and arises on a record outside of the judgment roll, it is not for the clerk, but for the judge who determined the motion, to certify the papers and proceedings on which the order appealed from was made, and that, in the absence of a record so certified the order should be affirmed. Here the order cannot be affirmed, because, the appeal not having been taken in time, the court is without jurisdiction, and the appeal must be dismissed.

[4] The order refusing to hear defendant's application for a rehearing of his motion to vacate the judgment is not appealable, and therefore must be dismissed. The first order, that made on defendant's original motion to set aside the judgment, was an appealable

order. An appeal will not lie from an order refusing to set aside a former appealable order, made regularly and advisedly. Such subsequent order is the mere negative action of the court declining to disturb its first decision. It is the first decision, and not the refusal to alter it, which is the proper subject of complaint. *Henly v. Hastings*, 3 Cal. 341; *Harper v. Hildreth*, 99 Cal. 285, 33 Pac. 1103; *Doyle v. Republic Life Ins. Co.*, 125 Cal. 15, 57 Pac. 667.

[5] In sustaining the objection to hearing defendant's motion for a new trial the court did not err. There is some doubt whether a new trial is the proper remedy when the defendant has not appeared at the trial. See *McKinley v. Tuttle*, 34 Cal. 235, and *Hayne on New Trial and Appeal*, § 9. But, regardless of whether a new trial was an appropriate remedy, defendant's notice of intention to move for a new trial was filed too late, and for that reason alone the court was warranted in refusing to entertain the motion. The party intending to move for a new trial must file and serve his notice of intention "within ten days after receiving notice of entry of the judgment," when the case is tried by the court without a jury. In this case the judgment was entered December 10, 1920. Defendant's notice of intention to move for a new trial was filed February 25, 1921.

[6] The record before us is silent as to any service on defendant of a formal written notice of the entry of the judgment. But, though the statute requires written notice of the entry of judgment to be served upon the attorney for the adverse party, such formal written notice may be waived. Such waiver may appear, as declared in *Mallory v. See*, 129 Cal. 356, 359, 61 Pac. 1123, from some act of acquiescence of the party in open court or in the proceedings in the case as disclosed by the records, or files of the case or the minutes of the court, when the conduct of the party in the case, as appears from such records or minutes, is inconsistent with any theory other than that he had notice of the entry of the judgment. Under such circumstances he is deemed to have waived written notice. A written admission by a party entitled to notice of knowledge that the judgment had been entered would supersede the necessity of giving such notice; and a motion to the court or other proceeding by a party with reference to the judgment, which presumes his knowledge that it has been made and entered, and by which he seeks to protect his own interests against the rights of the other party under the judgment, will be regarded as a waiver of his right to a notice of the entry of the judgment. *Gardner v. Stare*, 135 Cal. 118, 67 Pac. 5. In the present case the appellant, on January 22, 1921, or 34 days before he filed his notice of intention to move for a

new trial, filed a notice of motion to set aside the judgment, accompanied by his affidavit. The contents of the papers which appellant thus placed upon the files of the court leave no room to doubt that, as early as January 22, 1921, his counsel knew that the judgment had been entered. We hold, therefore, that the application of appellant for an order vacating the judgment was a waiver by him, as of that date, of a formal written notice of the entry of judgment. And, since the notice of intention to move for a new trial was not filed until February 25, 1921, the court had no jurisdiction to hear the motion, and therefore the objection to hearing it was properly sustained.

[7] The appeal from the judgment was taken more than 60 days after its entry. The notice of intention to move for a new trial was not filed until 77 days after the entry of the judgment, with the result that no proceeding on motion for new trial had been inaugurated or was pending at the expiration of the 60 days after entry of the judgment within which an appeal might be taken from the judgment in the absence of any pending proceeding for a new trial. The right of appeal from the judgment was therefore lost. *Ransome-Crummey Co. v. Beggs* (Cal. Sup.) 196 Pac. 487.

The appeal from the judgment is dismissed; the appeal from the order denying defendant's motion to set aside the judgment is dismissed; the appeal from the order refusing to hear defendant's motion for a rehearing of the order denying his motion to vacate the judgment is dismissed; the order sustaining plaintiff's objection to a hearing of defendant's motion for a new trial is affirmed.

We concur: WORKS, J.; CRAIG, J.

(53 Cal. App. 14)

HOYT v. THOMAS et al. (Civ. 3897.)

(District Court of Appeal, Second District, Division 1, California. May 26, 1922. Hearing Denied by Supreme Court July 24, 1922.)

Specific performance ~~§~~ 86—Not granted of contract to make will for ordinary service susceptible of pecuniary measurement.

Specific performance will not be granted of deceased's contract to will to plaintiff deceased's property, in consideration of plaintiff taking care of and managing it, and during illness of deceased rendering such aid and assistance as was in his power, conceding fairness of the contract, the services being ordinary and susceptible of pecuniary measurement, and it being immaterial that plaintiff has kept no memoranda and is unable to testify to the time devoted thereto or the value thereof.

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Action by Frank C. Hoyt against Belle Thomas and others. From a judgment for defendants, plaintiff appeals. Affirmed.

Charles J. Kelly, of Los Angeles, for appellant.

Lloyd W. Moultrie, of Los Angeles, for respondents.

SHAW, J. Plaintiff appeals from a judgment entered in favor of defendants upon an order of court sustaining a general demurrer to the second amended complaint for the specific performance of a contract, without leave to amend.

The case stated by the complaint, so far as material, is in substance as follows: Hattie McIntire died in September, 1917, leaving an estate the value of which, as distributed to defendants as the heirs of deceased under an order of court, was \$3,469.12. It is alleged that in March, 1903, a contract was entered into between plaintiff and said Hattie McIntire "by the terms and conditions whereof this plaintiff promised and agreed to and with the said Hattie McIntire that he would render to the said Hattie McIntire from that time during the remainder of the term of her natural life such care and personal services as she might require of him, and particularly that he would attend to the business affairs of the said Hattie McIntire both in connection with her real property and otherwise, and that he would endeavor to so manage and conduct her affairs in such manner if it were possible that the said Hattie McIntire would, during the remainder of her lifetime, be assured of and provided with a suitable and proper home and sufficient income to provide for her a suitable and proper living, and that whatever sickness, misfortune, or losses she might suffer he would render to her such comfort, aid, and assistance within his power or ability as she might require or request of him, and that during the remainder of the term of her natural life he would, and in consideration thereof the said Hattie McIntire then and there promised and agreed to and with this plaintiff that upon her death all of the property and estate of which she died possessed should be and become the property of this plaintiff, and that prior to her death she would execute a last will and testament or such other papers as might be necessary to transfer, set over, and secure to this plaintiff such property and estate of which she might die possessed"; that plaintiff, during the lifetime of Hattie McIntire fully performed his part of the contract so made, notwithstanding which fact the said Hattie McIntire did not, as she agreed, execute a will in favor of plaintiff, nor execute any papers transferring to plaintiff the property which she possessed at the time of her death, nor any part thereof, the legal title to all of which was, under said order of distribution, acquired by defendants, who are

alleged to hold the property in trust for plaintiff under and by virtue of the terms of said contract so made between plaintiff and deceased. It is further alleged that plaintiff, in reliance upon the terms of said agreement and promise so made by Hattie McIntire, neglected to keep any account or memoranda in writing of the numerous services rendered by him in the performance of said contract or the time devoted to her care and comfort, without which plaintiff has no recollection or knowledge of the total time so devoted by him to the performance of said agreement, and hence during the administration of the estate of Hattie McIntire was not and is not now able to produce satisfactory evidence to establish the value of the services so rendered by him under the terms of the agreement; that the greater part thereof had, at the time of their rendition, no fixed market value, and as to such thereof upon which a value could have been fixed it is now impossible, upon the evidence which he could produce, for a jury to determine the measure thereof in money.

The prayer of the complaint is that defendants be required to transfer and convey the property so received by them to plaintiff.

The case has heretofore been before this court upon an appeal had by the defendants from a judgment of specific performance rendered upon the original complaint in favor of plaintiff, and the opinion reversing the judgment therein is reported in *Hoyt v. Thomas*, 195 Pac. 260. The decision on the former appeal should be deemed determinative of the question here presented. In the opinion referred to we had occasion to quote at length from the contract as alleged in the original complaint and from the testimony of plaintiff as to the character of the agreement and what he did thereunder. Reference to this contract and testimony shows the contract then under consideration to have been identical with that now declared upon, save and except that in the original complaint plaintiff alleged and at the trial had thereon testified that the services performed under the contract were of the value of \$4,000; whereas in the amended complaint now presented he alleges that he kept no account or memoranda in writing of the numerous services rendered to deceased and has no recollection or knowledge thereof, by reason of which fact he cannot even approximate the time so devoted to the services rendered under the terms of the agreement or fix the value thereof so as to enable a jury or court of law to determine his damage. Nevertheless, as said in the former appeal, "the plaintiff himself seems to have had it in his mind that the services had a particular and definite money value, for he testified, without apparent hesitation and without qualification, so far as the record shows, that in his opinion the services were worth, as stated, about \$4,000." Waiv-

ing plaintiff's apparent willingness to meet the exigencies of the case arising from the former decision and conceding a loss of memory as to the facts upon which he so readily based his sworn statements in obtaining the former judgment, we are of the opinion that the complaint fails to state a cause of action for the equitable relief demanded.

The action is one for the specific performance of the alleged contract whereby Hattie McIntire agreed that she would by will, in consideration of the performance of the alleged contract on plaintiff's part, devise her property to him. That courts of equity will under special circumstances enforce such contracts seems to be the settled law. *Pomeroy on Specific Performance*, p. 263; *Morrison v. Land*, 169 Cal. 580, 147 Pac. 259. To warrant such action, however, it must not only be made to appear that the contract is fair and just (*Flood v. Templeton*, 148 Cal. 374, 83 Pac. 148), but that the services called for and performed, by reason of their peculiar character, are such that they cannot be measured by a pecuniary standard (*Morrison v. Land*, supra), and hence cannot be compensated for in money (*Owens v. McNally*, 113 Cal. 444, 45 Pac. 710, 33 L. R. A. 369). Most of the cases where contracts of the nature here involved have been enforced appear to have been those where home ties were broken and new domestic or filial relations created, as where a minor goes to live with an adult upon his promise that he will stand in loco parentis and will devise to such minor his property in return for filial services during his lifetime. *Healey v. Simpson*, 113 Mo. 340, 20 S. W. 881. In the instant case no personal and domestic ties were severed by plaintiff and no peculiar personal relation created between the parties pursuant to which Hattie McIntire would be the recipient of plaintiff's society and filial affection. No such relation was contemplated by the contract. This being true, and conceding the contract is not obnoxious to the rule that it must be fair and just, it follows that plaintiff's right to specific performance of the contract must be based upon the fact that the services called for by the same were, by reason of their peculiar and unusual character, not susceptible of pecuniary measurement, for, as said in *Stellmacher v. Bruder*, 89 Minn. 507, 95 N. W. 324, 99 Am. St. Rep. 609:

"If the consideration for the contract be labor and services which may be estimated, and their value liquidated in money, so as reasonably to make the promisee whole, specific performance will not be decreed."

The contract as made was that plaintiff during the period specified should care for and render to deceased such personal services as she required of him; that he should give attention to her business affairs in an

effort to successfully manage the same to her interest and profit, and during her illness render her such aid and assistance as should be within his power, to the extent that she requested the same. We are unable to perceive anything unusual or out of the ordinary in the character of the services which plaintiff agreed to perform for deceased, or why, upon proper proof, they could not be adequately compensated for in money. In character they are such as are of everyday occurrence and usually performed upon an express or implied contract for an agreed or implied pecuniary compensation. Hence, since it appears that no relation of a filial or like personal character was created or contemplated by the contract due to and incidental to which plaintiff discharged duties the nature of which made it impossible to estimate their value, but, on the contrary, the services called for thereby, if rendered, were susceptible of measurement and plaintiff compensated in money on account of the breach thereof, specific performance should not be decreed. The fact that plaintiff kept no memoranda and is unable, as he says, to testify as to the time devoted by him in rendering the services, or value thereof, is immaterial. His is the misfortune suffered by any plaintiff who performs services which may be measured in money and is unable to produce evidence of such value, but it furnishes no reason for equitable jurisdiction.

The judgment is affirmed.

We concur: CONREY, P. J.; JAMES, J.

58 Cal. App. 51

McKEEVER v. LOCKE-PADDON CO.
(Civ. 3889.)

(District Court of Appeal, First District, Division 1, California, May 31, 1922. Hearing Denied by Supreme Court July 27, 1922.)

1. Fraud — 11(2)—False representations regarding land value held actionable.

False representations as to the value of land made by a party to a trade are alone sufficient to constitute fraud where the party to whom the representations were made is not acquainted with conditions and land values in the locality where the land is situated, has no opportunity to investigate, and relies upon the representations.

2. Fraud — 59(2)—Finding of value of plaintiff's land exchanged held unnecessary under rule of damages.

In an action for false representations made by defendant in an exchange of land, it was unnecessary for the court to find on the value of the land plaintiff traded; his measure of damages being the difference between the ac-

tual value of the property received and its value had it been as represented.

3. Trial ☞391—Separate findings as to ratification of an exchange of land held unnecessary.

Where, in an action for false representations made by defendant in an exchange of land, the court found that plaintiff did not ratify the exchange, it was unnecessary to further find on each reason on which defendant claimed the ratification was predicated.

4. Appeal and error ☞1011(1)—Findings of trial court based on conflicting evidence conclusive.

Where the findings of the trial court on matters of fact are based on conflicting evidence, the appellate court cannot interfere.

5. Appeal and error ☞1033(9)—One cannot complain of value placed on his land by the court, where the value fixed was more than the value he conceded.

Where defendant, in an action for false representations made in a trade of land, conceded that his land was worth no more than \$16 per acre, and where the evidence showed that the land was worth no more than \$5 per acre, defendant could not complain of the value of \$28.75 per acre fixed by the court.

Appeal from Superior Court, City and County of San Francisco; George H. Cabaniss, Judge.

Action by Frank M. McKeever against the Locke-Paddon Company, a corporation. Judgment for plaintiff, and defendant appeals. Affirmed.

J. L. Smith, of San Francisco, for appellant.

Reisner & Honey, of San Francisco, for respondent.

KNIGHT, Justice pro tem. In this action the plaintiff, Frank M. McKeever, recovered a judgment against the defendant, Locke-Paddon Company, a corporation, for damages sustained in connection with a real estate trade into which plaintiff was induced to enter through the fraudulent representations of the defendant. On stipulation of the parties the action was tried before a jury, sitting in an advisory capacity, and a general verdict was rendered in favor of plaintiff for \$3,500. The trial judge failed to file any written decision, findings of fact, or conclusions of law, or any order adopting the verdict, but merely entered judgment on the verdict. An appeal was taken by defendant, and the judgment was reversed and the cause remanded, with directions to the trial court to give its decision in writing, as provided in section 633 of the Code of Civil Procedure, and to enter judgment accordingly. McKeever v. Locke-Paddon Co. (Cal. App.) 193 Pac. 258. Thereafter the trial court adopted the verdict of the jury, filed its decision containing its findings of fact and conclusions of law, and judgment was entered in accordance

therewith. The defendant has again appealed from the judgment.

Appellant's grounds of appeal are in effect an attack upon the entire record in the case. Among the numerous grounds urged are that the amended complaint is fatally defective; that the findings are insufficient in form and incomplete in substance, and do not support the judgment; that the evidence is insufficient to support the findings; that the court erred in the exclusion of evidence offered by defendant, and that the amount of damages allowed by the jury was arrived at in an illegal manner.

The record discloses that on December 23, 1916, the plaintiff McKeever agreed to exchange certain real property situate in Palo Alto, Santa Clara county, for two pieces of real property, represented as belonging to the defendant Locke-Paddon Company, one being situate in Alameda county and the other in Yolo county. The exchange was consummated on January 18, 1917.

During the trial the court withdrew from the jury the issues as to the Alameda county property, and afterwards found against the plaintiff on those issues, upon the ground that that transaction was free from fraud. We are therefore concerned here only with the transaction involving the Yolo county property.

In this respect it is alleged in the amended complaint that the defendant fraudulently represented to plaintiff:

"That said Yolo county property contained 80 acres of comparatively level farming land and 80 acres of pasture and woodland, said woodland being timbered with large oak trees, which were very valuable when cut; that said Yolo county property was worth \$60 per acre, and was accessible by a good road."

Appellant contends, first, that because of the allegations in the amended complaint, to the effect that it was represented by defendant that part of the Yolo property was "timbered with large oak trees, which were very valuable when cut," the trees must be considered separately from the land and dealt with as personal property, and that, since there is no allegation in the amended complaint as to the value of those trees "when cut" independent of the allegation as to value of the real estate, the amended complaint fails to state a cause of action. The allegation in question will not, we think, bear such technical construction. It is elementary that growing timber is part and parcel of the land. Section 658, Civ. Code; *Sears v. Ackerman*, 138 Cal. 583, 72 Pac. 171. There is no claim made that any part of the timber here was severed from the soil. The parties assumed to deal with land, and the apparent reason that timber was mentioned at all was by way of description of the character of the land as represented by defendant. The point, we think, does not merit further discussion.

The findings, if substantially supported by the evidence, are sufficient in law, in our opinion to uphold the judgment. The trial court found that the defendant made the representations as alleged by plaintiff, and that the same were false, and were known by defendant to be false when made; that they were made for the fraudulent purpose of procuring the exchange of the properties, and that they were the controlling influence and inducement for the consummation of the transaction by plaintiff. The court further specifically found that said property did not contain 80 acres of comparatively level farming land nor 80 acres of pasture and woodland, and that said land was not worth any more than \$28.75 per acre, and "that said land was inaccessible, there being no roads to the same; that said land lies upon the summit of a high and inaccessible range of hills." It was further found that at the time of making said exchange plaintiff resided in Oakland; was totally unacquainted with conditions and land values in Yolo county, and "did not have sufficient opportunity to investigate the value thereof"; that plaintiff confided in the truth of said representations, and trusted, believed, and relied upon the statements so made, and that had it not been for such statements and representations he would not have made said exchange.

[1] The misrepresentations concerning the land values alone are sufficient, under the circumstances here shown, to constitute fraud. *Winkler v. Jerrue*, 20 Cal. App. 555, 129 Pac. 804; *Bonnarjee v. Pike*, 43 Cal. App. 502, 185 Pac. 479. In the latter case it is said:

"That a representation as to the value of property is often a representation of fact, and actionable if false, is well established, especially where the vendee to whom the representation is made is so situated as to have no means of investigating the question for himself, and therefore relies on the statements of value made by the vendor or his agent. *Crandall v. Parks*, 152 Cal. 772, 93 Pac. 1018; *Phelps v. Grady*, 168 Cal. 73-77, 141 Pac. 926."

Appellant further contends that the findings ignore material issues, in that they do not negative certain allegations contained in the answer to the effect that plaintiff made independent investigations of the Yolo property before he made the trade; that he was familiar with the property, and that he was an experienced real estate dealer. We find no merit in the point. All of the issues above mentioned, even conceding them to be material, are adequately covered by the findings. It was found by the court that plaintiff at the time of the exchange "was totally unacquainted with the actual conditions and value of said Yolo county property, and did not have sufficient opportunity to investigate the value thereof"; that said defendant had much experience in handling real estate, and was familiar with conditions and land values in Yolo county. And the court further found that plaintiff "believed, trusted, and relied

upon" said representations, and that they were the controlling influence which induced plaintiff to make the exchange, and, had it not been for said representations, plaintiff would not have done so. In the recent case of *Koblick v. Larson*, 207 Pac. 929, it is held that the failure to find specifically on the issue of investigation is not ground for reversal, when the evidence shows that no real investigation was made, and that the party who was victimized relied implicitly and solely upon the representations of the selling agents, who he considered and believed to be his friends. In view of the evidence on this point it cannot be successfully contended that the plaintiff made any independent investigations. There was some testimony given by the witness Paddon and his agent Ausmus, who were charged with perpetrating the fraud on behalf of the defendant, to the effect that plaintiff had stated that he had communicated by phone with a friend who was familiar with Yolo property, and that as a result of such communication he, the plaintiff, was satisfied with the Yolo property. This conversation was positively denied by plaintiff, however, and in view of the fact that the court found that plaintiff did not have opportunity to investigate, and that he relied wholly upon the representations made by defendant, no further finding was necessary, we think, on the matter of independent investigation.

[2] Appellant also contends that the findings are incomplete because the court did not fix the value of the Palo Alto property. That contention cannot be sustained. In the case of *Hines v. Brode*, 168 Cal. 507, 143 Pac. 729, in a comprehensive and clear opinion written by Mr. Justice Henshaw, the Supreme Court held it to be the law of this state that where one sues for damages for fraud and deceit upon an executed contract for the sale or exchange of land, and where there has been no rescission, the measure of damages is the difference between the actual value of the property received and its value had the property been as represented, and that the measure of plaintiff's recovery is not affected by the price paid. This rule is based upon the principle that the vendee is obliged to accept the burden of the contract with its benefits, according to its terms, with the right to a recovery for the fraud based upon the fact that the benefits which he receives are not those which under the representations of the vendor he was entitled to receive. The rule contended for by the appellant here seems to be the one mentioned in *Cross v. Bouck*, 175 Cal. 253, 165 Pac. 702, which is therein quoted from the case of *Rockefeller v. Merritt*, 76 Fed. 909, 22 C. C. A. 608, 35 L. R. A. 633, namely that the "measure of the damages suffered by one who is fraudulently induced to make a contract of * * * exchange of property is the difference between the actual value of that which he parts with and the actual value of that which he

receives under the contract." But, as pointed out by Mr. Justice Henshaw in *Hines v. Brode*, supra, the courts of this state do not follow the federal rule. He says, in speaking of the rule adopted and followed in this state:

"This is not only the rule in California, but it is declared to be the rule under the great weight of authority. The opposing rule is that which obtains in England and in the courts of the United States. That rule refuses to recognize * * * the prospective profits which the vendee expected to make by his transaction."

Later, in the case of *George Cople Co. v. Hindes*, 34 Cal. App. 576, 170 Pac. 155, the Supreme Court, in denying a petition for a hearing before that court, criticized the rule mentioned in *Cross v. Bouck*, supra, declaring the correct rule to be the one stated in *Hines v. Brode*, and held that only the peculiar facts of *Cross v. Bouck* justified the application of the exceptional rule, in that case.

It was therefore not only unnecessary for the court to find on the value of the Palo Alto property, but the evidence rejected, if any there was, on this point was properly excluded. It could not have been received on the theory of recoupment for the simple reason that no recoupment was pleaded or prayed for by the defendant. In fact, the answer contains no allegation as to the value of the Palo Alto property. We do not consider the case of *Herdan v. Hanson*, 182 Cal. 538, 189 Pac. 440, cited by appellant, in point, for the reason that the situation there was different from the one presented here. There the evidence of the value of the property traded by plaintiff was offered and received in support and as a part of plaintiff's case, over the objections of the defendant, on the main issue of fraud charged against the defendant.

[3] As an affirmative defense it was alleged in the answer that plaintiff ratified the exchange in various ways, among them being by a settlement or agreement of compromise. Defendant contends that in order to sustain the judgment there must be a specific finding that there was no such compromise. This objection may be dismissed with the statement that the trial court, in its findings, did specifically negative the very wording of the allegation itself. The ultimate fact alleged was the ratification, and the court found that there was no ratification. It was unnecessary to further find on each reason upon which the defendant claimed the ratification was predicated.

[4] The question of the sufficiency of the evidence to support the findings on the main issue of fraud is one we are not permitted to inquire into, under the well-determined rule, because of the conflict of proof on the essential elements constituting the fraud. Appellant has quoted testimony extensively in its brief for the purpose of showing that the representations plaintiff claims were

made by the selling agents of the defendant were not in fact made, and that whatever was said by them was mere matter of opinion and stated as such. But, in view of the positive testimony given on the part of the plaintiff that the representations were made, it is evident that the testimony quoted by appellant merely raises a conflict, and under such circumstances we are not at liberty to interfere with the findings of the trial court. The question of whether the statements were expressions of opinion was likewise one for the trial court. In *Stockton v. Hind* (Cal. App.) 196 Pac. 122, it is said:

"Where there is any doubt as to whether or not a representation was intended and understood as a mere expression of opinion or a statement of fact, the question is one not of law but of fact for the court or jury. 20 Cyc. 15, et seq.; *Spreckels v. Gorrill*, 152 Cal. 395, 92 Pac. 1011; 14 Am. & Eng. Ency. of Law, 36."

This conflict in the evidence was first passed upon by a jury and then by the trial court. Both found adversely to the defendant. In that state of the record the decision of the trial court must prevail.

[5] The defendant, we think, is not in a position to complain about the value of the land as fixed by the court, for the reason that the defendant conceded the land to be worth no more than \$2,500, which would be less than \$16 per acre, whereas the court allowed \$28.75 per acre. By what method the court arrived at this figure is immaterial, so long as the amount fixed was within the limits of the evidence. There was evidence received to the effect that the land was hilly and inaccessible, with no road at all to the property; that there were only two or three acres "on top of the hill" fitted for agriculture; that the soil was "gravelly and rocky" with some clay land; that the only timber on the place was a small quantity of "scrub oak"; and that the rest of the land was practically covered with "buck" and "chamise" brush, and that the whole property was worth no more than \$5 per acre. From this evidence it would appear that the value fixed by the court was liberal.

Defendant has also made the points that the wrong party has been sued, and that the court erred in its rulings on the admissibility of proof. We have examined those points, and find that they are without support in the record. Equally untenable is the objection that the jury arrived at the amount of its verdict illegally. The jury was an advisory one. Its verdict was not binding upon the court, and so far as the judgment in the action is concerned it makes no difference what system the jury adopted in arriving at its verdict.

Finding no error in the record, the judgment is affirmed.

We concur: TYLER, P. J.; RICHARDS, J.

MEMORANDUM DECISIONS

57 Cal. App. 399

PEOPLE v. RYAN. (Cr. No. 610.) (District Court of Appeal, Third District, California. April 20, 1922.) Appeal from Superior Court, Sacramento County; Malcolm C. Glenn, Judge. William Ryan was convicted of assault with intent to commit murder, and he appeals. Affirmed. Thomas J. Horan, of Vallejo, and L. R. Jacobson, of San Francisco, for appellant. U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

BURNETT, J. The defendant was charged in an information filed by the district attorney of Sacramento county with the crime of assault with intent to murder one W. R. Cook, a deputy sheriff of said county. He was regularly tried and convicted, he moved for a new trial, which was denied, and has appealed from said order and the judgment sentencing him to the penitentiary. There has been no appearance for him in this court, but we have examined the record and find that he was fairly tried and justly convicted. The judgment and order are therefore affirmed.

We concur: **FINCH, P. J.; HART, J.**

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(189 Cal. 187)

JANSSON v. NATIONAL S. S. CO.
(S. F. 9611.)

(Supreme Court of California. June 26, 1922.)

1. Exceptions, bill of ☞51—No specific time for judge to act on bill of exceptions presented for settlement.

When once in the hands of the clerk for the judge or court, the law does not specifically declare the time within which the judge must act upon a proposed bill of exceptions presented for settlement.

2. New trial ☞93—Delay of judge in settling bill of exceptions cannot be attributed to moving party when he has complied with law in presenting it.

When Code Civ. Proc. § 650, regarding the preparation, service, and presentation for settlement of a proposed bill of exceptions, had in all respects been complied with, the delay of the judge in acting upon it cannot be attributed to the moving party for a new trial, or his attorney, and he should not be made to suffer by reason thereof; it being the duty of the movant to present the proposed bill and amendments.

3. Appeal and error ☞977(2) — Question of laches of movant for new trial in securing settlement of statement for trial court.

The question as to whether the moving party has been guilty of laches in securing a settlement of a statement on motion for new trial is primarily a question for the trial court, and the appellate courts should not be called on originally to determine whether a movant has been derelict in securing the due diligence of such settlement.

4. Appeal and error ☞222—Failure to urge objection below deemed waiver.

Where a valid objection might have been interposed to a settlement of a bill of exceptions, on the ground that in securing it movant for new trial was guilty of laches, failure to urge it must be deemed a waiver.

5. Appeal and error ☞933(6)—On failure to pursue proper remedy to dismiss motion for new trial, time for settlement of bill of exceptions presumed properly extended.

Where, if movant for new trial was guilty of laches in presenting bill of exceptions for settlement, plaintiff's proper remedy was by application to the trial court to dismiss the motion, if he fails to pursue it, it must be presumed by appellate court that the time for settlement was properly extended.

6. Appeal and error ☞933(6)—Bill of exceptions on motion for new trial presumed either given or waived where record silent as to notice of settlement.

Where the action of the trial court in settling a bill of exceptions on motion for new trial was attacked on the ground that plaintiff was not notified by the clerk of the time designated by the judge for settlement of the bill, the absence from the record that such notice was not given justified the presumption that it was either given or waived.

7. Appeal and error ☞1072—Hearing of motion for new trial before bill of exceptions settled where issue understood by counsel and court immaterial.

Where a bill of exceptions had been approved and was on file at the date of making an order for new trial, the hearing thereon before settlement of bill of exceptions at most was a mere irregularity, and in no way injurious to plaintiff, the issue being perfectly understood by both counsel and court as to the grounds of the motion.

8. Negligence ☞136(9) — Question for jury though evidence is not conflicting.

Negligence is a question of fact for the jury, even where there is no conflict in the evidence, as reasonable men might differ as to whether or not the facts constitute negligence.

9. Negligence ☞136(9) — Question for jury where different conclusions can be drawn from evidence.

The fact that a party has a right to have his theory of the case presented to the jury in the form of an instruction provided there is evidence to support it does not justify the court in giving instructions that certain facts constitute negligence where different conclusions can be necessarily drawn from the evidence.

10. New trial ☞40(4)—Instruction constituting error at law, ground for new trial, although not objected to.

Under Code Civ. Proc. § 647, where instructions were improperly given, it constituted an error which could be made the ground for a new trial under Code Civ. Proc. § 657, subd. 7, and reviewed by appellate court upon appeal from the order granting it, although no objection was made below.

In Bank.

Appeal from Superior Court, City and County of San Francisco; John L. Hudner, Judge.

Action by Hjalmar A. Jansson against the National Steamship Company. From an order granting defendant's motion for a new trial, plaintiff appeals. Affirmed.

W. C. Cavitt, of San Francisco, for appellant.

Chickering & Gregory, of San Francisco, for respondent.

SHURTLEFF, J. This is an action for damages for personal injuries alleged to have been sustained by plaintiff. The jury returned a verdict in favor of plaintiff, upon which verdict a judgment was entered; thereafter defendant moved for a new trial, which was granted, and it is from such order that this appeal is prosecuted.

The facts are as follows: On the date of the accident resulting in the injury complained of plaintiff was in the employ of the defendant as a member of the crew of a steamer which was discharging a cargo of lumber at the Army street wharf, in San

Francisco. When unloading, it was the duty of plaintiff to make up piles of lumber from such cargo. These piles were made up on deck in a wire sling, which sling plaintiff would attach to a hook suspended from the gaff of the vessel, and it would then be hoisted by a steam winch above the deck and clear of the vessel, and ashore. Attached to the gaff was a guy rope, by which the gaff could be stopped at the proper place, and the contents of the sling unloaded, and thereafter "dragged" back aboard ship. At the time of the accident the crew of the steamer had just finished their accustomed 3 o'clock coffee, and were returning to their work of unloading the vessel, which work had been temporarily suspended. Plaintiff was near the rail on the inshore or starboard side of the steamer. A sling load of lumber, which had been prepared by other members of the crew on the port side of the vessel, was hoisted over the plaintiff's head. The guy rope, usually in charge of the second officer, had been attached to a cleat on what is termed a "sampson post" at the time he left to have his coffee, and he had not returned to his post when the sling in question was lifted from the deck of the steamer. The sling load of lumber was stopped in its course inshore by reason of the guy rope being thus fastened to the cleat, with the result that two heavy planks slipped from the sling and fell to the deck, striking and breaking plaintiff's leg.

In due time, after the entry of judgment, the defendant moved for a new trial upon several grounds, but those relied upon were:

(1) "Insufficiency of the evidence to justify the verdict. (2) The verdict is against law. (3) Errors in law occurring at the trial, and excepted to by the defendant."

The motion also stated that said grounds specified "will be made upon a statement of the case to be hereafter prepared, served and allowed, settled and filed as is provided by law." Plaintiff presents the preliminary objections that no statement on motion for new trial had been prepared, settled, and filed at the time the motion for a new trial was heard by the trial court, and that the statement subsequently settled and filed was of no legal efficacy, because, at the time it was so settled and filed, due to the laches of defendant, the court was without jurisdiction to settle the same. We think, however, that the record establishes that each of these contentions is lacking in merit.

There is no claim that defendant's notice of intention to move for a new trial was not served in time. Section 650 of the Code of Civil Procedure, when the proceedings under review were initiated, provided, and in that respect it was not changed by the amendment of 1915, that a party desiring a bill of exceptions could at any time, within "ten days after the entry of judgment, if

the action was tried with a jury, * * * or such further time as the court in which the action is pending, or a judge thereof, may allow, prepare the draft of a bill, and serve the same, or a copy thereof, upon the adverse party." Stats. 1911, p. 400; Stats. 1915, p. 207. The record discloses that the defendant's time to serve its proposed bill of exceptions was properly extended to March 29, 1915, and that a copy thereof was served upon plaintiff prior to the expiration of such extension; that thereafter, on April 30, 1915, plaintiff served on defendant a copy of his proposed amendments to defendant's proposed bill; that on May 8, 1915, and within time, defendant notified plaintiff that it rejected the latter's amendments, and that on said day the proposed bill and amendments were presented to the court for settlement. It therefore definitely appears that the defendant in all respects complied with the law in the preparation, service, and presentation for settlement of his proposed bill of exceptions.

[1, 2] When once in the hands of the clerk for the judge or court, the law does not specifically declare the time within which the judge must act upon it. The delay of the judge, if any, in settling the bill of exceptions, cannot, under circumstances such as are present here, be attributed to the moving party or his attorney, and he should not be made to suffer by reason thereof. It is the duty of the moving party to present the proposed bill and amendments (*Doon v. Tesh*, 131 Cal. 406-409, 63 Pac. 764), and that is exactly what was done here.

[3-5] Moreover, as said by the District Court of Appeal, from which this case was transferred to this court, in its opinion (35 Cal. App. Dec. 883, 884) affirming the order appealed from, and which language we adopt as a correct expression of the rule:

"The question as to whether the moving party has been guilty of laches in securing a settlement of a statement on motion for a new trial is primarily a question for the trial court. Appellate courts should not be called on originally to determine whether a movant has been derelict in securing with due diligence such settlement. *Curtin v. Ingle*, 155 Cal. 53. Here there is nothing in the record to show that any objection was ever made in the court below to the settlement of the bill on this ground. Even if a valid objection might have been interposed, the failure to urge the same must be deemed a waiver. *Sheppard v. Sheppard*, 15 Cal. App. 614. Plaintiff's proper remedy, if defendant was guilty of laches, was by application to the trial court to dismiss the motion for a new trial for want of prosecution. No such motion having been made, it must be presumed by this court that the time for settlement was properly extended. *Churchill v. Flournoy*, 127 Cal. 355."

[6] We find no merit in plaintiff's claim that defendant was guilty of laches. Equally untenable is the contention that the bill

of exceptions was never settled, allowed, and approved as required by law. The record recites that this was done on June 7, 1917, but plaintiff attacks such action of the judge upon the ground that he (plaintiff) was not notified by the clerk of the time designated by the judge for the settlement of the bill. We find nothing in the record indicating that such notice was not given, and such absence justifies the presumption that it was either given or waived.

It is true that the bill of exceptions recites that the plaintiff objected to its settlement, or the settlement or allowance of "any statement on motion for new trial," but the enumerated objections do not include the one now relied upon by plaintiff, namely, want of notice of the date upon which the judge would settle the bill. The record is silent concerning the nature or contents of plaintiff's proposed amendments; nowhere therein are they set forth; so far as appears, all of them may have been allowed and incorporated in the bill; we have no means of determining from the record that such is not the fact.

[7] Plaintiff makes the further objection to the order under review that the motion resulting in the same was heard before the bill of exceptions was settled. But, inasmuch as the bill had been approved and was on file at the date of the making of the order, such hearing at most was a mere irregularity, and in no way injurious to plaintiff. As said by the appellate court in its opinion already alluded to (35 Cal. App. Dec. 884):

"The issue was perfectly understood both by counsel and the court as to the grounds of the motion."

The error of law occurring at the trial mainly relied upon by defendant consists of the giving of three instructions, which it contends, and the learned judge of the trial court declared, were erroneous and prejudicial. It is unnecessary to state these instructions in their entirety. They were in substance and effect that, if the jury found the facts, as previously stated herein, and which were practically without contradiction, to be true, their verdict should be for the plaintiff. Referring to these instructions, the trial judge, after stating that he was reluctant to give them, correctly said:

"If they do not expressly hold and direct that the certain acts of defendant therein detailed constitute negligence, they certainly do so by

necessary implication. Whether these acts did constitute negligence was the very question involved in the case, and that was for the jury to pass upon. The instructions, by characterizing as negligence the acts mentioned, took from the jury that question."

[8, 9] Quoting again from the opinion of the appellate court, which we also adopt as a correct statement of the law and its application to the facts appearing here:

"It has been frequently declared by the appellate courts of this state that negligence is a question of fact for the jury even where there is no conflict in the evidence, as reasonable men might differ as to whether or not the facts constituted negligence. *Wahlgren v. Market St. Ry. Co.*, 132 Cal. 656; *Carlson v. Cucamonga Water Co.*, 7 Cal. App. 382; *Burr v. United Railroads*, 163 Cal. 663; *Kimic v. San Jose, Los Gatos, etc., Ry. Co.*, 156 Cal. 379. Appellants seek to uphold the giving of the instructions upon the ground that they set forth his theory of the case. The fact that he had the right to have his theory of the case presented to the jury in the form of an instruction, provided there is evidence to support it, does not justify a court in giving instructions that certain facts constitute negligence where, as here, different conclusions can be rationally drawn from the evidence."

While we express no opinion one way or the other touching the fact, yet it must be conceded that, even though the evidence is substantially without conflict, reasonable men might differ as to whether or not it showed the plaintiff was himself guilty of contributory negligence, which was one of the issues raised by the answer.

[10] Plaintiff makes the point that defendant, having failed to object to said instructions, was precluded from doing so on motion for a new trial. The Code of Civil Procedure (section 647) provides that—

"Giving an instruction, although no objection to such instruction was made, * * * (is) deemed to have been excepted to."

If the instructions in question were improperly given, it constituted an error at law, which could be made, as it is here, the ground for a new trial (Code Civ. Proc. subd. 7, § 657), and reviewed by this court upon an appeal from the order granting the same.

The order is affirmed.

We concur: SHAW, C. J.; LENNON, J.; SLOANE, J.; WILBUR, J.; LAWLOR, J.

(189 Cal. 278)

POULTRY PRODUCERS OF SOUTHERN CALIFORNIA, Inc., v. BARLOW.
(L. A. 5774.)

(Supreme Court of California. July 11, 1922.)

1. Specific performance ⇨6—Not specifically enforced unless remedy is available to both parties.

A contract cannot be specifically enforced unless such remedy is available to both parties, under Civ. Code, § 3386.

2. Monopolies ⇨17(2) — Contract between corporation organized to market products of stockholders and stockholder held not to create an unlawful combination in restraint of trade.

A contract between a corporation organized by poultry producers for the co-operative marketing of their poultry, and a stockholder thereof, requiring the latter to sell all of his products to the corporation, and requiring the corporation to resell such products at the best prices obtainable, and pay over to the stockholder the proceeds after deducting therefrom the cost of transportation and an amount for selling costs to be determined by the corporation, held not to create an unlawful trust or combination in restraint of trade in contravention of the Cartwright Act (St. 1907, p. 984, § 1, subds. 3, 5), in view of the proviso thereto added by St. 1909, p. 593, making the act inapplicable to associations organized for the purpose of marketing the products of its members.

3. Contracts ⇨137(1)—Invalidity of provision of subscription contract held not to invalidate agreement of stockholder to sell all his products to the corporation.

Invalidity of provision of subscription contract between corporation organized by poultry producers for the purpose of marketing their products, and a poultry producer, giving the corporation the optional right to purchase its own stock from any of its shareholders, did not invalidate the stockholder's agreement to sell all of his products to the corporation, made in consideration of the corporation's promise to find a good market therefor and turn over the proceeds after deducting certain costs to the stockholder; the corporation's right to purchase its stock not being a part of the consideration for the stockholder's agreement to sell products to corporation.

4. Injunction ⇨60—Specific performance ⇨73—Contract for services requiring special knowledge, skill, or ability generally not specifically enforceable in suit therefor or to restrain breach.

With the exception of such special, unique, and extraordinary personal services as are within Civ. Code, § 3423, as amended by St. 1919, p. 328, and Code Civ. Proc. § 526, as amended by St. 1919, p. 325, a contract for services generally will not be specifically enforced either directly by means of a decree directing the defendant to perform it, or indirectly by injunction restraining him from violating it, especially where the relation between the parties is one of mutual confidence, and the contract stip-

ulates for acts requiring special knowledge, skill, or ability, or the exercise of judgment, discretion, integrity, and like personal qualities, under Civ. Code, § 3390, subds. 1, 2.

5. Specific performance ⇨75—Contracts providing for succession of acts whose performance cannot be consummated by one transaction not specifically enforceable.

Equity will not decree the specific performance of contracts which by their terms stipulate for a succession of acts the performance of which cannot be consummated by one transaction, but will be continuous and require protracted supervision and direction.

6. Injunction ⇨59(1) — Specific performance ⇨68—Agreement by stockholder of co-operative marketing corporation to sell all his products to the corporation held not specifically enforceable.

Contract between co-operative marketing corporation and stockholder, requiring the stockholder to sell all his products to the corporation and the latter to use its best efforts to resell at the best prices obtainable and pay over the proceeds less certain costs to the former, will not be enforced either by injunction or by specific performance decree at the instance of the corporation, since Civ. Code, § 3386, requires mutuality of remedy, and an injunction will not be granted to prevent breach of contract under section 3423, subd. 5, unless performance of the contract can be specifically enforced, and since the obligation of the corporation calls for service involving the exercise of judgment and discretion and a repose of confidence, and involves a continuous supervision, requiring special knowledge, skill, and judgment, cannot be specifically enforced.

7. Specific performance ⇨6—Want of mutuality in right to specific performance removed by special performance by party who seeks specific performance.

A want of mutuality in the right to specific performance existing at the inception of the contract, precluding specific performance under Civ. Code, § 3386, is removed when there has been a full and substantial performance of the contract by the party who seeks specific performance.

8. Specific performance ⇨6—Defendant's refusal to perform does not make contract enforceable against him, where there is want of mutuality of remedy.

Where a contract cannot be specifically enforced against the defendant because of such nature that defendant could not compel the plaintiff to perform it, the defendant's refusal to perform his part of the contract does not make the contract specifically enforceable against the defendant.

9. Specific performance ⇨6—Plaintiff's willingness to perform what otherwise he could not be required to perform does not entitle him to specific performance as against defendant.

Plaintiff's offer and willingness to do what otherwise he could not be specifically required to do does not confer upon him the right to spe-

cific performance against defendant, where the contract is not specifically enforceable because of a want of mutuality of remedy.

In Bank.

Appeal from Superior Court, Los Angeles County; Dana R. Weller, Judge.

Action by the Poultry Producers of Southern California, Incorporated, against L. F. Barlow. Judgment for plaintiff, and defendant appeals. Reversed, with directions.

F. R. Baker, Marshal Stimson, and Noel Edwards, all of Los Angeles, for appellant.

Oliver B. Wyman, of San Francisco, *amicus curiae*.

Willis I. Morrison, of Los Angeles, for respondent.

Aaron Sapiro, Milton D. Sapiro, and Lawrence L. Levy, all of San Francisco, *amici curiae*.

SLOANE, J. The plaintiff is a corporation organized by poultrymen of Southern California for co-operative effort in marketing their products. The stockholders of the corporation are all producers, holding one share of stock each for every 1,000 hens owned. Each stockholder is obligated, under what is termed a produce sale agreement, to sell all eggs produced from his poultry through the corporation. In this action plaintiff recovered judgment in the superior court of the county of Los Angeles against the defendant, one of the contracting stockholders, for \$230, stipulated damages for breach of contract by reason of sale of eggs to other purchasers, and for specific performance of the contract to sell and deliver eggs to plaintiff during the unexpired term covered by the contract, and enjoining defendant from making sales of his product to other persons. Defendant appealed.

A hearing was granted before this court on respondent's petition therefor after judgment of reversal by the District Court of Appeal. The latter court affirmed the judgment of the trial court for recovery of damages, but granted a reversal as to injunction and specific performance. In taking the matter over for rehearing we were in accord with the part of the decision affirming the judgment for damages, but were not satisfied at the time that plaintiff was not also entitled to the equitable relief by injunction and specific performance. On further consideration of this part of the judgment we have reached a conclusion in accord with that of the District Court of Appeal.

[1] Both of these remedies are subject to the same limitation. Neither can be enforced unless there is mutuality of remedy between the parties. It is provided by section 3425 of the Civil Code that an injunction cannot be granted restraining the violation of contract, "the performance of which would not be specifically enforced," and the doctrine is

elementary and impregnably fortified by authority that a contract cannot be specifically enforced unless this remedy is available to both parties. Equity will not enforce a specific performance of a contract when the party asking its enforcement cannot, from the nature of the obligation assumed, be compelled to perform on his part.

While there is, perhaps, nothing in the obligation assumed by the defendant under the contract in question which binds him to sell and deliver to plaintiff all the eggs produced from his poultry during a given period of time that could not be specifically enforced, if it were a simple sale for cash to be paid on delivery, a different condition is presented when the reciprocal obligation of the plaintiff calls for a future performance, and consists of the exercise of personal skill, diligence, and discretion in finding the best market for the eggs, selling them for a suitable price, and paying to the defendant a certain percentage of the proceeds, and where the transaction is to be repeated at frequent intervals throughout a number of years.

So far as this marketing contract is concerned, it is, on the part of the plaintiff, a contract of agency calling for services of the corporation of a highly personal nature, requiring the exercise of skill and discretion, and covering repeated transactions to extend over a number of years. It has not been the practice of courts of equity to attempt to enforce such complicated personal obligations, or to burden themselves with the supervision of frequently recurring duties of contracting parties.

We adopt the following exhaustive opinion, written by Mr. Justice Finlayson of the District Court of Appeal, as fully covering the facts and the law of this case:

"In addition to damages for breach of contract, plaintiff, by the auxiliary force of an injunction, seeks to prevent the further breach of that provision of defendant's contract whereby he expressly undertakes to sell to plaintiff such of the eggs produced by his poultry during the years 1917, 1918, and 1919 as he intends to sell in any event. The breach complained of is that, since about May 17, 1917, defendant has sold to others than plaintiff all the eggs produced by his flocks. The action was tried January 11, 1918, and judgment, which passed for plaintiff, was entered March 11, 1918. The lower court found that up to the date of the commencement of the action, plaintiff had been damaged in the sum of \$230 by reason of defendant's failure to sell and deliver eggs to it exclusively. It was adjudged that plaintiff recover that sum as damages, and likewise that defendant be enjoined from marketing, delivering, or selling to any one other than plaintiff, during the remainder of the calendar year 1918 and all of the calendar year 1919, any of the eggs produced by his flocks, and which he intended in any event to sell or market. From this judgment defendant appeals. The appeal is on the judgment roll alone. Plaintiff, a California corporation, was or-

ganized in December, 1916, for the purpose of promoting the raising of poultry and the production of eggs in Southern California, through and by means of co-operative methods that had been suggested by the state market director. To that end defendant, and a number of others engaged in raising poultry in Southern California, executed a document bearing the caption 'Subscription Agreement,' whereby they agreed that a corporation should be organized, to be known as the 'Poultry Producers of Southern California, Inc.,' for the purpose of promoting and fostering the business of raising poultry and marketing eggs in the state of California. Each of the incorporators, one of whom was this defendant, subscribed for and agreed to purchase one share for every 1,000 hens owned by him. Defendant, whose flock did not exceed 1,000 hens, subscribed for one share. Pursuant to the agreement thus executed by defendant and the other poultrymen, plaintiff was brought into existence as a legal corporate entity. This 'Subscription Agreement' contains a provision whereby it is attempted to give to the corporation to be organized thereunder the right, at its option, to purchase its shares from any of its stockholders, at any time, at a price equal to the current book value of the shares.

"Contemporaneously with the execution of the so-called 'Subscription Agreement,' and as a part of the entire contract, defendant and the other poultry raisers each executed a second document entitled 'Produce Sale Agreement,' whereby defendant and his co-operating fellow poultry raisers undertook to sell and deliver their eggs to plaintiff, upon the latter's organization as a going concern. So far as its terms are material here, the 'Produce Sale Agreement' so executed by defendant is as follows: 'This agreement, made as of the first day of February, 1917, between the Poultry Producers of Southern California, Inc., a California corporation, to be incorporated, with its office at Los Angeles, California, hereinafter called the buyer, first party, and the undersigned [the defendant], hereinafter called the seller, second party: Witnesseth that: In consideration of the mutual obligations herein and of the agreements by each of the parties hereto and of the agreement of all the original subscribers to stock in said 'Buyer' corporation, the buyer agrees to purchase and market and the seller agrees to sell and to deliver to the buyer—for the price to be secured by the buyer as hereinafter mentioned—such of the eggs produced by the seller, his lessors, assignors or successors, during the years 1917, 1918 and 1919, as he intends to sell or market in any event. The buyer agrees to use its best efforts to resell said eggs at the best prices obtainable under market conditions, and, after deducting therefrom the seller's cost of transportation and an amount for selling costs (to be determined by the buyer, in its sole and exclusive discretion), not to exceed two cents per dozen eggs, to pay over the amounts received thereby as payment in full to the seller. * * * The eggs delivered by the seller hereunder may be mingled and sold with other eggs of like grade and like quality purchased by the buyer under contracts similar to this contract, and the amount to be paid to the seller weekly, as herein stated, shall be based on the proportional value in eggs delivered by him to the buyer out of the total

weekly receipts of moneys from the sale or other disposition of the eggs according to quality and grade, less the deductions hereinabove mentioned. At the discretion of the board of directors the buyer may itself purchase from seller eggs of a quality satisfactory to itself at a price equal to the net price to seller under this contract, which eggs it may warehouse and sell at such future time as the board of directors may direct, without making further accounting to seller therefor. * * * This agreement shall be binding upon the seller for the full term hereof, and he shall be obligated hereby for all eggs produced for him whether he produces the same directly or lets or leases or in any way exercises ownership or control or has the legal right to so exercise ownership or control of said egg production during the term of this contract.'

"Appellant contends: (1) That the contract evidenced by the two documents signed by him—the Subscription Agreement and the Produce Sale Agreement—is void and unenforceable, because: (a) It violates the act commonly known as the Cartwright Law (Stats. 1907, p. 984, and Stats. 1909, p. 593); (b) it gives to the corporation to be created under the Subscription Agreement the optional right to purchase its own stock from its stockholders. And (2) For lack of mutuality of remedy, and other reasons which we deem unnecessary to mention in view of our conclusion, defendant's agreement to sell his eggs to plaintiff is not one that will be specifically enforced.

[2] "1. We see no reason for holding that the contract creates an unlawful trust or combination in restraint of trade in contravention of the Cartwright Act. Appellant contends that the contract violates subdivisions 3 and 5 of section 1 of that act. It may be assumed, for the purpose of this decision only, that the contract would be contrary to subdivisions 3 and 5 of section 1, but for the proviso that was added in 1909 reading: 'Provided that no agreement, combination or association shall be deemed to be unlawful or within the provisions of this act, the object and business of which are to conduct its operations at a reasonable profit or to market at a reasonable profit those products which cannot otherwise be so marketed, provided further, that it shall not be deemed to be unlawful, or within the provisions of this act, for persons * * * engaged in the business of selling * * * commodities of a similar or like character, to employ, form [or] organize * * * any * * * corporation, having for its object or purpose the * * * marketing * * * of such commodities.' We think it fairly inferable from the findings that the object of the agreement executed by defendant and the other poultry raisers, as a result of which plaintiff was incorporated and organized, and the object and business of the combination or association thus formed were to market the poultry raisers' eggs at a reasonable profit; also that only by the formation of some such co-operative association, and the organization of a common sales agency, such as plaintiff, can their eggs be marketed at a reasonable profit. Moreover, it further appears from the trial court's findings that defendant and the other poultry raisers who signed similar agreements are persons engaged in the business of selling commodities of like character, to wit, eggs;

that they organized plaintiff as a corporation entity and employed it as their common sales agency; and that plaintiff's object and purpose is the marketing of such eggs. Thus is the clause of the proviso of 1909, whereby certain agreements, combinations, and associations are recognized as lawful and are expressly declared not to be within the inhibitory provisions of the Cartwright Act.

[3] "2. It may be conceded that, as appellant contends, the clause in the Subscription Agreement purporting to give to the corporation to be formed thereunder the optional right to purchase its own stock from any of its shareholders, is illegal and void, and consequently unenforceable. See *Schulte v. Boulevard Gardens, etc., Co.*, 164 Cal. 464, 129 Pac. 582, 44 L. R. A. (N. S.) 156, Ann. Cas. 1914B, 1013. The defendant, as well as each of the other poultrymen who joined with him in the execution of the Subscription Agreement and the Produce Sale Agreement promised to do several things, one of which was to give to the corporation about to be incorporated and organized the optional right to purchase its own stock at any time that it elected so to do. The corporation was not obligated to buy its own shares. It could do so or not at its option. It is here seeking to recover damages for the breach of and to specifically enforce one only of several promises made by defendant—a promise that, considered by itself, is legal and valid. The exercise by the corporation of its optional right to purchase any of defendant's stock is no part of the consideration for any of the promises made by defendant. The option was intended for the benefit of the corporation, not defendant. Each of the valid promises made by defendant is supported by a legal consideration. Defendant's illegal and unenforceable promise to give to the corporation, when formed, the optional right to purchase any of his stock at any time after its issuance to him is not so mingled and bound with his other and valid promises that they cannot be separated. All of the consideration moving from the corporation to defendant for his legal promises is legal and valid. * * * If one gives a good and valid consideration, and thereupon another promises to do two things—one legal, and the other illegal—he shall be held to do that which is legal, unless the two are so mingled and bound together that they cannot be separated, in which case the whole promise is void.' *Hanauer & Co. v. Gray*, 25 Ark. 350, 99 Am. Dec. 226, citing *Parsons on Contracts*, 380. 'Where an agreement founded on a legal consideration contains several promises, or a promise to do several things, and a part only of the things to be done are illegal, the promises which can be separated, or the promise, so far as it can be separated, from the illegality, may be valid. The rule is that a lawful promise made for a lawful consideration is not invalid merely because an unlawful promise was made at the same time and for the same consideration, and this rule applies, although the invalidity is due to violation of a statutory provision, unless the statute expressly or by necessary implication declares the entire contract void.' 13 C. J. § 470, p. 512.

"For these reasons we are satisfied that the contract between plaintiff and defendant, the resultant of the Subscription Agreement and

the Produce Sale Agreement executed by defendant and the other poultry raisers, and which plaintiff, upon its creation and organization, accepted as its own, was and is a valid contract in so far, at least, as plaintiff is here seeking its enforcement, and that plaintiff, therefore, is entitled to its damages for defendant's breach thereof. We think, however, that, for the reasons we are about to state, plaintiff is not entitled to a specific performance of defendant's unperformed obligation to sell and deliver eggs.

"3. Our Code expressly provides that an injunction cannot be granted to prevent the breach of a contract where its performance 'would not be specifically enforced.' Civ. Code, § 3423, subd. 5. But for this express statutory limitation upon the court's power to grant injunctive relief, it is possible that the part of the decree which enjoins defendant from selling eggs to others than plaintiff might be upheld, notwithstanding the lack of mutuality of remedy. For it appears to be the rule in some jurisdictions that where a contract confers on one party an exclusive right or privilege, a breach of the contract through conduct of the other party inconsistent with the exclusiveness of the right or privilege may be enjoined, subject to the general principle as to the inadequacy of the legal remedy for the breach, and it is immaterial that such inconsistent conduct is not prohibited by the express terms of the contract; also that, notwithstanding a lack of mutuality of remedy, it is possible to secure performance of the plaintiff's stipulations, indirectly, by making the injunction conditional on continued performance by him, and dissolving the injunction when a breach on his part appears. *Pom. Eq. vol. 5*, § 296, and volume 6, § 775; *Standard Fashion Co. v. Siegel-Cooper Co.*, 157 N. Y. 60, 51 N. E. 408, 43 L. R. A. 854, 68 Am. St. Rep. 749. In this jurisdiction, however, the express statutory inhibition above referred to—subdivision 5 of section 3423 of the Civil Code—prohibits the granting of an injunction to prevent the breach of any contract, 'the performance of which would not be specifically enforced.' The result is that in this state the courts may not enter a conditional decree in order to avoid the effect of a lack of that mutuality of remedy which is an essential to the right to specific performance. *Anderson v. Neal Institutes Co.*, 37 Cal. App. 174, 173 Pac. 779.

"It is elementary that mutuality of remedy is an indispensable prerequisite to the specific performance of a contract. The remedy must be mutual, as well as the obligation, and when the contract is of such a nature that it cannot be specifically enforced as to one of the parties, equity will not enforce it against the other. *Cooper v. Pena*, 21 Cal. 404; *Stanton v. Singleton*, 126 Cal. 657, 59 Pac. 146, 47 L. R. A. 334; *L. A., etc., Development Co. v. Occidental Oil Co.*, 144 Cal. 528, 78 Pac. 25; *Pacific, etc., Ry. Co. v. Campbell-Johnston*, 153 Cal. 106, 94 Pac. 623. 'Neither party to an obligation can be compelled specifically to perform it, unless the other party thereto has performed, or is compellable specifically to perform, everything to which the former is entitled under the same obligation, either completely or nearly so, together with full compensation for any want of entire performance.' Civ. Code, § 3386.

[4] "With the exception of such special, unique, and extraordinary personal services as fall within the purview of the amendments of May 6, 1919 (St. 1919, pp. 328, 325) to sections 3423 of the Civil Code and 526 of the Code of Civil Procedure, the general rule is that a contract for service will not be specifically enforced, either directly by means of a decree directing the defendant to perform it, or indirectly by an injunction restraining him from violating it. Especially is this the rule where the relation between the parties to the contract is one of mutual confidence, and the contract stipulates for acts that require special knowledge, skill, or ability, or the exercise of judgment, discretion, integrity, and like personal qualities. This rule is codified in subdivisions 1 and 2 of section 3390 of our Civil Code.

"The rule that equity will not specifically enforce an obligation to render personal service has been assigned three distinct reasons for its existence. Some courts have based the rule upon the fact that it would be an invasion of one's statutory liberty to compel him to work for, or to remain in the personal service of, another. It would place him in a condition of involuntary servitude—a condition which the supreme law of the land declares shall not exist within the United States, or in any place subject to their jurisdiction. Another reason assigned for the rule, according to some of the authorities, is that, in view of the peculiar personal relation that results from a contract of service, it would be inexpedient, from the standpoint of public policy, to attempt to enforce such a contract specifically. It is said by the judges who base the rule upon this consideration of public policy that, where one of the contracting parties is to act as the confidential agent of the other, it is necessary, not only for the parties, but for the sake of society at large, that there should be entire harmony and a spirit of co-operation between the contracting parties. The third reason for the rule, as given by other authorities, is that it is inconvenient, or, as others express it, impossible, for a court of justice to conduct and supervise the operations incident to and requisite for the execution of a decree for the specific performance of a contract which involves the rendering of personal services. For a discussion of these three bases of the rule, see the note to *H. W. Gossard Co. v. Crosby*, 6 L. R. A. (N. S.) pp. 1125 et seq.

* * *

[5] "Growing out of the last of the three enumerated reasons for the rule that equity will not specifically enforce a contract for services that are of a strictly personal nature is the cognate rule that courts of equity will not decree the specific performance of contracts which by their terms stipulate for a succession of acts whose performance cannot be consummated by one transaction, but will be continuous and require protracted supervision and direction. *Stanton v. Singleton*, supra, 126 Cal. 665, 59 Pac. 146, 47 L. R. A. 334; *Pacific, etc., Ry. Co. v. Campbell-Johnston*, supra; *Crane v. Roach*, 29 Cal. App. 587; *Anderson v. Neal Institutes Co.*, supra. 'Courts of equity,' says the court in *Pacific, etc., Ry. Co. v. Campbell-Johnston*, supra, 153 Cal. 117, 94 Pac. 628, 'only decree specific performance where the subject-matter of the decree is capable of being embraced in one order and is immediately en-

forceable. It will not decree specific performance when the duty to be performed is a continuous one, extending possibly over a long period of time and which, in order that the performance may be made effectual, will necessarily require the constant personal supervision and oversight of it by the court.'

"Turning now to the contract in question here, and considering it in the light of the foregoing principles: By the terms of their contract, defendant agrees to 'sell and deliver' to plaintiff, and the latter 'agrees to purchase and market,' such of the eggs produced by defendant's poultry during the years 1917, 1918, and 1919 as he intends to sell or market in any event; and, further, plaintiff expressly agrees 'to use its best efforts to resell said eggs at the best prices obtainable under market conditions.' It is of prime importance to defendant, as one of the poultrymen for whom plaintiff is acting as sales agent—for that is practically what the relationship amounts to—that plaintiff should market the eggs at the times when and in the markets where the best possible prices can be obtained—in other words, that it should indeed exercise 'its best endeavors' in an honest effort to resell the eggs at the best market prices; for defendant and the other poultry owners for whom plaintiff has agreed to act are to receive for the eggs that they sell and deliver to plaintiff such sums as plaintiff, in its turn, may succeed in reselling the eggs for, less the expenses incurred by it for transportation and other necessary marketing and selling costs, not exceeding a maximum of two cents per dozen.

[6] "The exercise by plaintiff of 'its best efforts to resell the eggs at the best prices obtainable under market conditions' involves some degree of personal services, knowledge, judgment and skill, and a repose of confidence. Defendant's agreement to sell and deliver, and plaintiff's undertaking to use its best efforts to resell the eggs at the best prices obtainable under market conditions, is more than a mere contract of purchase and sale. Plaintiff has been made the common agent of all the subscribing poultry owners to perform the very services that they themselves would have had to do individually had they not created plaintiff as their common agent for the furtherance of their co-operative enterprise. That is, they themselves, individually, would have had to go into the most favorable markets, reasonably accessible to them as individuals, and there have sought the best obtainable prices. This personal service, involving the exercise of judgment and discretion, plaintiff has undertaken to perform for defendant and the other poultry raisers engaged with him in the co-operative marketing of eggs.

"Moreover, a decree of specific performance enforcing plaintiff's obligation to resell the eggs at the best prices obtainable during the years 1918 and 1919 would involve a continuous and long series of acts of supervision, requiring special knowledge, skill, and judgment, and repeated examinations and new directions by the court, and, as we have seen, a court of equity will not undertake to frame a decree for the specific performance of a contract the performance of which cannot be consummated by one transaction, but will be continuous and require protracted supervision and direction, with the

exercise of special knowledge, skill, or judgment in such oversight.

"It is suggested that the rule that specific performance will not be decreed where such performance would require the constant supervision of the court is not an absolute rule, but one of discretion only, and therefore is not a limitation of the jurisdiction of the court; otherwise courts of chancery could not recognize an exception to the rule when considerations of public policy intervene, as, for example, where contracts have been made by railway companies obligating them to build side tracks, extensions, etc. This statement of the law appears to find support in some of the cases. See *Standard Fashion Co. v. Siegel-Cooper Co.*, supra; 36 Cyc. 587; *Brown v. Western Maryland R. Co.*, 84 W. Va. 271, 99 S. E. 457, 4 A. L. R. 523. Assuming, for the purposes of this decision only that the rule is not one that goes to the very jurisdiction of the court, as a court of equity, but that it is a rule of decision only, based upon considerations of convenience and judicial discretion, the rule, nevertheless, is one of those fixed principles of equity that have become established for the guidance of the court, and any departure therefrom, save where the convenience of the public would have been promoted, would amount to an abuse of the court's legal discretion. *Rochester & K. F. Land Co. v. Roe*, 8 App. Div. 360, 40 N. Y. Supp. 799, 805. We think it clear that, in the exercise of a judicial discretion, a court of equity should always decline to enforce specific performance where, as here, private interests only are involved, and the task of supervision, in order to see to it that plaintiff, in good faith, exercises its best judgment and skill in marketing the eggs for the highest possible prices, would impose upon the court a duty well-nigh impossible of performance.

"It is claimed by respondent that the general rule requiring mutuality of remedy is subject to the exception that when a party has substantially performed his part of the contract he may compel specific performance by the other party. In this regard our attention is called to the fact that the lower court found that plaintiff, shortly after its organization, in reliance upon defendant's contract and similar contracts executed by the other poultrymen, rented a large warehouse for a central distributing depot; that it entered into contracts obligating it to sell and deliver eggs to third persons during the year 1917, and that it expended considerable sums of money for the purposes of standardizing the egg product to be delivered by it.

[7] "Undoubtedly a want of mutuality in the right to specific performance, existing at the inception of a contract, may be removed, and is removed when there had been a full and substantial performance of the contract. And if the renting of the warehouse, the making of contracts for the resale of eggs during the year 1917, and the expenditure of moneys to standardize the egg products, could be said to constitute a substantial performance of plaintiff's agreement to use its best efforts to resell the eggs during the years 1917, 1918, and 1919 at the best obtainable prices, then plaintiff would be entitled to specific performance. The substantial execution by plaintiff of its obligation would give present mutuality to the contract, although in its inception it lacked it. *Spires v.*

Urbahn, 124 Cal. 110, 56 Pac. 794. But nothing less than a full or substantial performance of plaintiff's obligations can create the mutuality of remedy necessary to entitle it to specific performance against defendant. The rule is stated in section 3386 of the Civil Code, as follows: 'Neither party to an obligation can be compelled specifically to perform it, unless the other party thereto has performed, or is compellable specifically to perform, everything to which the former is entitled under the same obligation, either completely or nearly so, together with full compensation for any want of entire performance.' See, also, *Pacific, etc., Ry. Co. v. Campbell-Johnston*, supra, 153 Cal. 115 et seq., 94 Pac. 623. It is quite evident that plaintiff's obligation has neither been performed nor substantially performed, and that it is not compellable to perform everything to which defendant is entitled under his contract, either completely or nearly so. It is alleged in the complaint and found by the court that plaintiff 'has entered into contracts for the sale of eggs during the present calendar year'; i. e., the year 1917. There remained, therefore, two years during which plaintiff, according to the terms of its obligation, was obligated to use 'its best efforts to resell the eggs at the best prices obtainable under market conditions.' It does not appear that it had made any contract to resell the eggs during those years. The contract that it made for the resale of the 1917 egg product was made by it with a brokerage company. By this contract plaintiff employed the brokerage firm to sell eggs upon the market, during the year 1917, for the best prices obtainable, agreeing to pay a commission for such services. This contract, while it remained executory, was not even a partial performance of plaintiff's obligation. The brokerage company merely agreed to do for plaintiff what the latter had agreed with defendant and his fellow poultry raisers to do for them. Assuming, though by no means conceding, that plaintiff thus could delegate to the brokerage company authority to perform its obligation to exercise, from time to time and as necessary, its own judgment, or that of its directors or managing officials, in an honest endeavor to use its best efforts to resell the eggs at the highest market prices, still a large and very material part of plaintiff's obligation remained unperformed and unenforceable. When the complaint was filed on December 14, 1917, there still remained two years during which plaintiff was to resell defendant's eggs, and, to that end, use its best efforts to resell at the best prices obtainable in the markets of the state. The most that can be said is that plaintiff's obligation has been performed to a large extent, but it certainly cannot be said that it has performed or is compellable specifically to perform everything to which defendant is entitled, either completely or nearly so.

[8, 9] "Finally, it is suggested that plaintiff has performed its obligation as far as it can in view of defendant's refusal to deliver to it the eggs that he contracted to sell and deliver to plaintiff for resale by the latter. But neither the refusal of defendant to permit plaintiff to resell his eggs, nor plaintiff's willingness to do so, have any bearing on the applicability of the equitable principle that where there is no mutuality of remedy there can be no decree for

specific performance. Every action for specific performance is based upon the refusal of a defendant to perform the terms of a contract which the plaintiff thinks equity should compel him to perform. So that a defendant's refusal to perform his part of the contract is of no moment so far as plaintiff's right to a decree of specific performance is concerned. *Pacific, etc., Ry. Co. v. Campbell-Johnston Co.*, supra; *Roy v. Pos*, 60 Cal. Dec. 88, 92; *Moore v. Tuohy*, 142 Cal. 342, 75 Pac. 896; *King v. Gildersleeve*, 79 Cal. 504, 21 Pac. 961. Neither does the offer or willingness of the plaintiff to do what otherwise he could not be specifically required to do confer the right to compel it from the other party. If this were true, then in the present instance plaintiff, by offering and expressing a willingness to resell eggs delivered to it by defendant, and to use its best efforts to secure the best market prices therefor, could have demanded of defendant a sale and delivery to it of all eggs produced by defendant's hens during the unexpired term of the contract, and on defendant's refusal, and without its having performed any part of its contract for such balance of the term of the contract, but simply reiterating in its complaint its willingness to do so, could have demanded specific performance of defendant. The equitable doctrine, codified in section 3386 of the Civil Code, that the plaintiff is not entitled to a decree of specific performance unless he has performed or is compellable specifically to perform all or substantially all of his obligation, is not satisfied by a mere willingness, or offer, to perform. See *Pacific, etc., Ry. Co. v. Campbell-Johnston*, supra, 153 Cal. 116, 94 Pac. 623.

"It may be possible that if, before defendant breached his agreement, plaintiff had so altered its position that to deny it specific performance now would operate as a fraud upon it, equity would regard plaintiff's past performance as a substantial performance, and indirectly decree specific performance by defendant by enjoining him from selling his eggs to any one other than defendant. But the complaint does not allege, nor does the court find, any fact from which such fraud may be inferred. It is true it is alleged in the complaint and found by the court that, relying upon the contracts made by it with the defendant and the other poultry raisers, plaintiff entered into contracts with various persons for the future conduct of its business, including a contract whereby it rented a warehouse for a central distributing depot, etc., but the nature and extent of the obligations and liabilities thus incurred by plaintiff under these contracts with third persons are not disclosed; nor do the pleadings or findings vouchsafe any information as to the period during which such contracts are or were enforceable. Non constat but that the contracts thus entered into by plaintiff with such third persons covered a period that has wholly expired before the action was commenced, or even before defendant breached its contract. There is nothing to show that the obligations incurred by plaintiff under these contracts with third persons will become more onerous if defendant should fail specifically to perform his agreement to sell and deliver to plaintiff eggs during the years 1918 and 1919.

"Our conclusion is that the contract is valid,

and that plaintiff is entitled to the damages which the trial court found were suffered by it by reason of defendant's breach, but that it is not entitled to specific performance, either directly or indirectly, by enjoining defendant from violating his agreement; and that, in so far as the judgment decrees specific performance, either directly or indirectly, it should be so modified as to omit those provisions. We also think that appellant is entitled to have the judgment thus modified, notwithstanding that the time during which he has been enjoined from selling eggs to others—the years 1918 and 1919—has expired. This is so because otherwise appellant would be deprived of his right to costs.

"The trial court found on all the issues presented by the pleadings. The rights of the respective parties are determinable from the findings, and a retrial is therefore unnecessary."

Were it not for the doctrine of mutuality of remedy as a prerequisite to the equitable relief here demanded, there would seem to be no good reason for denying respondent the more adequate relief that would be thus afforded to marketing corporations such as this, which are more or less dependent for their efficient maintenance and operation upon ability to specifically enforce the mutual obligations of their members. The individual stockholder thus contracting the delivery of his wares would seem to be adequately safeguarded by his legal remedy for damages.

But in view of the established rule requiring mutuality of relief in equity, parties situated as is the respondent here will have to safeguard themselves as best they can by resort to their legal remedy in damages.

The judgment is reversed, with directions to the trial court to enter judgment on the findings conformable with the views herein expressed.

We concur: SHAW, C. J.; WILBUR, J.; WASTE, J.; LAWLOR, J.

189 Cal. 331

Ex parte SELOWSKY. (Cr. 2482.)

(Supreme Court of California. July 21, 1922.)

1. Habeas corpus §92(3)—Scope of inquiry.

In a proceeding in habeas corpus to obtain release from custody under a judgment of contempt, the only inquiry that can be made is with reference to the jurisdiction of the court which made the judgment of which the imprisonment is a part.

2. Habeas corpus §94—Question of jurisdiction determined by record.

The question of jurisdiction must be determined by the record in the case, and, if jurisdiction is thereby shown, extrinsic evidence cannot be allowed to contradict it.

3. Contempt §54(6)—Filing of affidavit with clerk unnecessary to give court jurisdiction.

The superior court has jurisdiction to proceed in a matter of contempt committed out of

its presence, where proper affidavit has been submitted to it, though such affidavit is not then filed with the clerk of court, where prosecution is not for a criminal contempt, under Pen. Code, § 166, but a "special proceeding of a civil nature," under Code Civ. Proc. §§ 1209-1222.

4. Courts ~~30~~—Jurisdiction not affected by irregularities after its acquisition.

Irregularities in proceedings after acquisition of jurisdiction, such as failure of district attorney to present affidavit and clerk to file it in a contempt proceeding under Code Civ. Proc. §§ 1209-1222, do not affect or divest jurisdiction.

In Bank.

Application of Mary M. Selowsky for a writ of habeas corpus, directed to the sheriff of Napa County, to secure the release of petitioner from custody under a judgment of contempt. Writ denied.

See, also, 186 Pac. 608.

D. M. Duffy, of Napa, for petitioner.

Clarence N. Riggins, Dist. Atty., of Napa, for respondent.

SHAW, C. J. Application is made herein for a writ of habeas corpus, in order to release from custody Mary M. Selowsky. The ground of the petition is that the judgment of contempt upon which she is imprisoned is void.

[1, 2] In a proceeding in habeas corpus in a case of this character, the only inquiry that can be made is with reference to the jurisdiction of the court which made the judgment of which the imprisonment is a part. *Ex parte Joutsen*, 154 Cal. 544, 98 Pac. 391; 1 Bailey on Jur. § 311. The question of jurisdiction must be determined by the record in the case, and if jurisdiction is thereby shown, extrinsic evidence cannot be allowed to contradict it. 1 Bailey on Jur. § 526. The judgment in the present case was a judgment convicting Mrs. Selowsky of contempt of court for a violation of a previous judgment of the court enjoining her from maintaining a nuisance on certain premises in Napa county.

The contempt charged against Mrs. Selowsky was committed out of the presence of the court. The point of objection to the judgment of contempt arises from the contention that at the time of the proceedings leading up to that judgment no affidavit stating the facts constituting the contempt had been filed in the superior court. The facts relating to this subject are as follows: On April 17, 1922, the district attorney of Napa county presented to the superior court of that county his verified petition, supported by an affidavit, adequately stating the facts which constituted the contempt of which Mrs. Selowsky was finally adjudged guilty. Thereupon the court made an order directing her

to appear and show cause on April 24, 1922, why she should not be punished for such contempt. This order, with copies of the petition and affidavit, so presented to the court, were duly served on Mrs. Selowsky on April 17, 1922. On the 24th the parties appeared in court, and the hearing was continued to May 16, 1922, on which day, the parties all being present, the evidence was heard relating to the matter and the case was submitted to the court for decision. In the meantime it appears that the affidavit and petition in which the order to show cause was issued had not been marked "Filed" by the clerk of said court. The order to show cause, together with the copies of the affidavit and petition of the district attorney, were delivered to the sheriff on April 17, 1922, for service, and at the same time, in some manner, he obtained possession of the original affidavit and petition of the district attorney. Thereafter the originals remained in his possession until June 12, 1922. On that day the said original petition and affidavit were marked "Filed" by the clerk of the court as of that day, and at that time the court pronounced its judgment and sentence in the matter of the contempt, adjudging said Selowsky guilty and imposing a fine of \$1,000 and imprisonment of six months in the county jail.

[3] The contention of Mrs. Selowsky is that the superior court has no jurisdiction to proceed in a matter of contempt committed out of its presence unless and until an affidavit charging the contempt in question is filed with the clerk of said court.

[4] We are of the opinion that this point is not well taken. The proceeding was not a prosecution for a criminal contempt under section 166 of the Penal Code, but a "special proceeding of a civil nature," under title 5, part 3, of the Code of Civil Procedure (sections 1209-1222). While it is frequently described as quasi criminal in opinions on the subject, the procedure to be followed is that prescribed in the Code of Civil Procedure, and the mode by which the court obtains jurisdiction is that which is given in section 1211, as follows:

"When the contempt is not committed in the immediate view and presence of the court, or judge at chambers, an affidavit shall be presented to the court or judge, of the facts constituting the contempt, or a statement of the facts by the referees or arbitrators, or other judicial officer."

No other or different proceeding is necessary to set the power of the court in motion in such a case. Therefore, when the district attorney presented to the court the affidavit stating the facts constituting the contempt, the jurisdiction of the court over the subject-matter at once attached, and when the order to show cause was thereafter made and serv-

ice was made by delivering copies of the order and affidavit to the accused, the court thereby obtained jurisdiction of the person. The Code does not require that the affidavit shall be filed, or shall be so marked by the clerk, either as a condition precedent to obtaining jurisdiction, or as a condition necessary to retain it. His failure to do so, or the failure of the court or the district attorney to deliver it to him to be filed, could not divest the court of jurisdiction to proceed. These acts were purely ministerial, and ministerial misprisions after jurisdiction has been obtained are mere irregularities of procedure and are not fatal to the jurisdiction of the court or to the validity of its orders or judgments. The only part of the record to be looked to is that part which relates to the acquisition of jurisdiction. Irregularities in procedure thereafter and prior to the judgment do not affect or divest the jurisdiction after it has attached. The record on that subject in this case shows that all the steps necessary to give the court jurisdiction to pronounce the judgment were regularly taken. The judgment of contempt is therefore valid regardless of the failure to have the affidavit filed until the day on which the judgment was rendered.

The remarks in *Ex parte Williams*, 183 Cal. 11, 190 Pac. 163, were, of course, made with reference to the requirements of the Penal Code as to the procedure in the prosecution of misdemeanors in police courts. That Code at least implies that the complaint against the accused person must be filed with the court before it can proceed in such a case. The decision, of course, can have no application to a special proceeding of a civil nature under section 1211, Code of Civil Procedure. The statement in the opinion of the District Court of Appeal in *Metzler v. Superior Court*, 201 Pac. 142, to the effect that the "filing of an affidavit" in such a case is necessary to a valid judgment, was made with reference to the case there presented where no affidavit had been presented, or even made, and where the court had issued the order to show cause solely upon information obtained from the testimony of witnesses in a case pending before it. The question of the necessity for filing was not before the court. The statement means no more than that there must be an affidavit and that such order cannot be issued upon oral testimony. There are no decisions to the effect that the court cannot proceed unless the affidavit is first filed. No other objection to the validity of the judgment is worthy of mention.

The petition for a writ of habeas corpus is denied.

We concur: **LAWLOR, J.; WILBUR, J.; WASTE, J.; LENNON, J.; RICHARDS,**
Justice pro tem.

189 Cal. 215

**FIRST FEDERAL TRUST CO. v. HOWARD
INV. CO. et al. (S. F. 9506.)**

(Supreme Court of California. June 28, 1922.
Rehearing Denied July 27, 1922.)

Corporations § 155(4) — Payments made to president held salary, and not dividends, in the absence of showing of subterfuge.

Where, on death of H., who had given the stock of a corporation in trust, among other things, to pay \$250 per month to F., his son, with proviso that such payments, when received, should be a waiver of compensation for any services rendered by him to the corporation, the son was elected president, serving without compensation till the widow brought suit for half the stock as community property, whereupon the directors voted that a salary of \$250 per month be paid him, and that the trustee be notified thereof, and that any dividends due him under the trust be retained in accordance with its provision that receipt of salary should be in lieu of dividends under the trust, *held*, as against claim of the widow, after being decreed half the stock, to recover from the corporation half of the amount so paid F., on the theory that the payments were of dividends in the guise of salary, that they should be considered salary, in the absence of evidence that the salary arrangement was a subterfuge.

In Bank.

Appeal from Superior Court, City and County of San Francisco; **Thomas F. Graham, Judge.**

Action by the First Federal Trust Company, executor, against the Howard Investment Company and others. Judgment for plaintiff, and defendants appeal. Reversed.

Charles W. Slack, F. A. Denicke, and H. S. Young, all of San Francisco, for appellants.

A. E. Shaw and Cushing & Cushing, all of San Francisco, for respondent.

SLOANE, J. This action was brought to recover \$8,375, being one-half of a sum paid by the defendant Howard Investment Company to one Frederick P. Howard, ostensibly as a salary for his services as president of the corporation.

The original plaintiff was Mrs. Emma Shafter Howard, who subsequently died, and the suit was thereafter prosecuted in the name of the present plaintiff, First Federal Trust Company, her executor.

Plaintiff's cause of action rests upon the claim that the payments in question were wrongfully made by the Howard Investment Company from a fund in which the original plaintiff, Mrs. Howard, owned a half interest.

Judgment in the trial court was for plaintiff, and defendants appeal. The matter is before us upon an order for hearing after judgment of reversal in the District Court of Appeal.

The facts necessary to an understanding of the case are that Mrs. Howard was the wife of Charles Webb Howard, whom she survived. In his lifetime Charles Webb Howard organized the defendant corporation, Howard Investment Company, taking in his own name 4,995 shares of the capital stock of 5,000 shares at the par value of \$100 per share. The remaining five shares were issued for the purpose of qualifying directors of the corporation, but were indorsed over so that the entire beneficial interest in the corporation was in Charles Webb Howard. In consideration for the stock Mr. Howard conveyed to the corporation property valued at \$500,000. Subsequently Charles Webb Howard created a trust wherein he transferred the 4,995 shares of stock of the Howard Investment Company to the Central Trust Company, the predecessor of the defendant Anglo-California Trust Company, in trust for the distribution of the net dividends for purposes not here necessary to set forth, other than it was provided that, after his death, while the trust should exist, there should be paid from the balance of the dividends from said stock the sum of \$250 per month to his son, Frederick Paxson Howard, with the proviso that—

"Such payments to Frederick Paxson Howard, personally and while living, shall be and constitute, when received by him, a waiver of all compensation for any and all services which, as an officer or otherwise, he personally may, from time to time, render to said Howard Investment Company."

After the death of Charles Webb Howard on July 17, 1908, his widow Mrs. Emma Shafter Howard, was appointed administratrix of his estate, and instituted various actions affecting the status of the Howard Investment Company stock and the trust under which it was held. Particularly, as most intimately affecting the proceeding before us, Mrs. Howard in her individual right brought suit against these defendants and all others interested in the Howard Investment Company, and under the trust, to have an adjudication that all of the property conveyed to the Investment Company for its stock was community property of herself and husband, and adjudging that she was the owner of one-half thereof, and entitled to one-half of the capital stock of said corporation, and of the dividends therefrom, subsequent to her husband's death. She recovered judgment in the superior court sustaining her claim and directing a transfer to her of one-half of said 4,995 shares of stock. The defendant appealed, but pending such appeal an agreement was reached by all the parties in interest by which said judgment in Mrs. Howard's favor became final, and a settlement of all litigation was effected whereby Mrs. Howard transferred her half of the corporate stock to the trustee corporation, and received in consideration therefor a conveyance from the How-

ard Investment Company of "one-half of its property and assets of every nature, kind and description, after proper deductions made for * * * its current indebtedness and its attorneys' fees incurred to date."

It is not questioned that under this settlement it was determined that the property of Charles Webb Howard, which was invested in the Howard corporation, was community property, and that upon the death of her husband Mrs. Howard become entitled to one-half of the stock issued to her husband, and that, by virtue of the settlement subsequently made, on the surrender and transfer of this stock she became the owner of a one-half interest in all the property and assets of the corporation. Up to the date of this settlement and transfer Mrs. Howard's interest in the corporation was that of a stockholder, and subject to the necessary and proper expenditures of the corporation for its operating expenses.

On the consummation of the settlement of April 2, 1914, Mrs. Howard in acknowledgment thereof executed to the defendants a release of all claims and demands, which recites that she thereby does "remise, release, and forever discharge" the parties, including the parties to this action, and others, naming them, from "all manner of action and actions, cause and causes of actions, suits, debts, dues, sums of money, accounts, reckonings" and liabilities of every kind, which she ever had, now has, or hereafter "can, shall, or may have by virtue of any matter or thing whatsoever from the beginning of the world to the date of these presents."

It was subsequent to this settlement and release that Mrs. Howard instituted the present suit. It is predicated upon transactions growing out of the protracted litigation prior to the final settlement and release.

Upon the death of Charles Webb Howard in 1908 and the commencement of legal proceedings attacking the validity of the trust in favor of F. P. Howard and others, the distribution of dividends under the trust was discontinued. In consideration of an agreement by Mrs. Howard not to tie up the affairs of the Howard Investment Company by an application for an injunction and the appointment of a receiver, the investment company and the trustee company stipulated with Mrs. Howard, as testified by witnesses and found by the trial court, that pending the litigation none of the property would be disposed of, no dividends declared, no payments would be made to the trustee or dividends distributed until all of the litigation commenced by Mrs. Howard involving the title to said property should be settled and determined, and that, if she should be successful in the litigation, they would account to her for all the property and income, and that no payments would be authorized by the investment company except the necessary current expenses incurred in conserving the property

and incidentally to maintain the control thereof. That these expenses were intended to include legitimate salaries to officers and employees is apparent from the fact that no exception was taken to the payment of other salaries than that to F. P. Howard.

This agreement stopped all payments of dividends to Frederick P. Howard under the trust. After his father's death in July, 1908, he was elected president of the Howard Investment Company, and served without salary until October, 1908. During that month, and in consequence of the agreement to suspend distribution of the corporation's dividends under the trust, and pending the litigation, the board of directors of the Howard Investment Company adopted the following resolution:

"On motion duly made and seconded, and unanimously carried, the following preamble and resolution was adopted:

"Whereas, Mr. F. P. Howard, president of this company, has been devoting his time to the affairs of this company, and for such time and attention no compensation has been paid him:

"Now, therefore, be it resolved, that said F. P. Howard, as president of this company, be paid a salary of \$250 per month, commencing with the 1st day of October, 1908; and

"Be it further resolved, that the Central Trust Company of California be notified that the said F. P. Howard is receiving a salary of \$250 per month for services rendered to the company, and that from and after October 1, 1908, any dividends which may be due him under that certain trust agreement made and executed by the late Charles Webb Howard, be retained, in accordance with the provisions made therein, by which should said F. P. Howard receive a salary for services rendered, said salary shall be in lieu of dividends that he might receive from the Central Trust Company under the aforesaid trust agreement."

Pursuant to this resolution the investment company paid to Frederick P. Howard, who continued as its president, the sum of \$250 per month from October 1, 1908, to May 1, 1914, about the date of the final settlement of all pending controversies over the estate. The total sum thus paid to Frederick P. Howard was \$16,750, and it was for the recovery of one-half of this amount that this action was brought by Mrs. Howard.

The theory upon which the action was maintained, and judgment for plaintiff given by the trial court, was that the money was actually paid in pursuance of the trust from money one-half of which belonged to Mrs. Howard and that her half of the amount thus paid out should have been accounted for to her under the terms of the final settlement, and that she failed to demand and receive such sum because the alleged fact that it had been paid out in lieu of dividends was unknown to and had been concealed from her.

Such are the facts upon which the judgment appealed from rests.

It is contended by defendants that the undisputed facts defeat a recovery by plaintiff,

and that the facts found essential to sustain the judgment are not supported by the evidence. It is quite evident that plaintiff's cause of action depends primarily upon whether the money sought to be recovered was paid as salary or dividends. During the period in which these payments of \$250 per month were being made to F. P. Howard, Mrs. Emma Shafter Howard's relation to the property and stock of the Howard Investment Company consisted in her right, as the widow of Charles Webb Howard, to succeed to one-half interest in the 4,995 shares of the company's stock held by her husband as community property and the dividends therefrom accruing after her husband's death. If the money paid to F. P. Howard during this period was legitimately paid as a salary, it was part of the current expenses of the company, and infringed no right of Mrs. Howard. If it was paid as dividends, one-half of the amount belonged to Mrs. Howard, and she was entitled to recover it from whoever wrongfully misapplied it.

After the settlement was made, and before this suit was commenced, Mrs. Howard had reassigned her interest in the investment company's stock to the trust company, and had taken therefor an assignment of one-half of all the assets of the investment company. Her right then was to recover any property or money in the hands of either defendant which constituted assets of the investment company at the date of the transfer and settlement, waiving, for the present, any question of estoppel by reason of the instrument of full satisfaction and release executed at the time of the settlement. Whether this money paid to F. P. Howard, and which he had received to his own use, was paid from the general funds of the investment company as salary, or from money declared as dividends for the benefit of the trust, we are unable to see how it could longer be assets of the investment company. But, assuming the right of Mrs. Howard to recover such money if wrongfully paid from her share of the property, the burden is upon her to show that this money was dividends, and not salary. We do not understand that it is disputed that the Howard Investment Company had the right to pay F. P. Howard, as president of the company, a salary. If it had such right, and exercised it in good faith, the plaintiff was not injured, for the reason that during such period Mrs. Howard's rights to profits of the business were those of a stockholder, and subject to the reasonable operating expenses of the company. Indeed, there would be no doubt of estoppel, by her release, to complain of such payments, because it is conceded that Mrs. Howard and her attorneys were aware almost from the beginning that what they assumed to be a salary of \$250 per month was being paid to F. P. Howard as president of the Investment Company.

Plaintiff's right of recovery, then, rests upon the sufficiency of proof that the payments

made to F. P. Howard were dividends, and not salary, and that Mrs. Howard was deceived and misled by the conduct or declarations of the defendants in assuming that the payments were for salary. We find no evidence in the record to sustain either of these propositions. The only fact pointed out upon which the plaintiff professes to rely as proof that these payments were dividends in the disguise of salary is contained in the recital of the resolution providing for these monthly payments that "said salary shall be in lieu of dividends" under the trust. Such oral testimony as was given on the subject was precisely in line with this resolution.

Appellants attach an unwarranted significance to this recital. Used as it was in connection with the preceding provisions that "F. P. Howard, as president of this company, be paid a salary of \$250 per month," and notice to the trustee that dividends thereafter should not be paid, it can only be construed to mean that he should not also be entitled to the trust payment from the dividends, but that such salary should also satisfy the claim under the trust, or, in the words used, be "in lieu" thereof. As the declaration of trust provided that the dividend allowance when received should be in lieu of salary, so the salary resolution provided that the salary, when received, should be in lieu of dividends. Any less precaution on the part of the investment company in providing for this salary during the time when the dividend payments were discontinued would have been inexcusable. Without some such condition in the resolution F. P. Howard would have been entitled, after receiving this salary, to subsequently demand his dividends from the trust when it again commenced to function. This is what is decided, and all that is decided, in the case of *Howard v. Anglo-California Trust Co.*, 34 Cal. App. 164, 167 Pac. 177, an action in which Frederick Paxson Howard attempted to recover from the trustee of the trust here involved the amount of his dividend allowance accumulated during the period the salary was paid and the trust tied up by Mrs. Howard's litigation. It was there held that, in receiving the salary under the conditions stated in the resolution granting it, he had waived his right to trust dividends during the period of such salary; that, while, in the absence of such proviso, he would have been entitled to both salary and dividends, his acceptance of the salary under the terms specified estopped him from collecting under the trust. It will be observed that the trust proviso did not prohibit him from collecting his allowance thereunder if he received a salary, but prevented his receiving a salary while he was paid under the trust, and it was only this reservation in the salary resolution that prevented his collecting both. The expression of the Court of Appeal on this point is as follows:

"We are of the opinion that the trial court rightly resolved this question in favor of the respondents. It is true that, under the peculiar wording of the proviso in the trust instrument above set forth, the plaintiff cannot be held to have waived any right which he might otherwise have to receive compensation for his services as an officer of the Howard Investment Company until such time as he had actually received the payments coming to him as a beneficiary of said trust; and had the Howard Investment Company voted to pay and paid the plaintiff said salary during the period when he was not receiving the monthly payments due him as such beneficiary, without the limitations attending the allowance and receipt of such salary in the foregoing resolution, the plaintiff's right of recovery in this action would have been unassailable. But such was not the case; and while it is true that the original trustee and the individual respondents herein were not parties to the contract contained in the resolution providing for the payment of a salary to plaintiff as president of the Howard Investment Company, yet the interrelation of the parties was such that said resolution cannot be otherwise construed than as intended to substitute the monthly salary which the plaintiff was to receive thereunder for the monthly sum he was otherwise entitled to receive, but was not as yet receiving, from the trustee, and that when plaintiff undertook to perform the duties of president of the Howard Investment Company for the monthly salary to be allowed him under the limited terms of said resolution, he must be understood to have agreed to waive his right to receive his monthly stipend from the trustee while such salary was being paid, and, in view of the interrelation of the parties, it must also be held that this was a waiver made expressly for the direct benefit of the trustee and of the other ultimate beneficiaries of the funds and properties of the trust."

This decision does not hold that the payments made by the investment company were dividends, and not salary, but that they were salary, in place of dividends; and, if the reservation had not been made, F. P. Howard would have recovered salary plus dividends. It therefore appears that there was nothing in the relation of the defendants to the manner of payment of the \$250 per month which made the transaction different from that which the plaintiff all along supposed it to be, the payment of a salary. The fact that it also precluded any further payment of trust dividends certainly did not operate to Mrs. Howard's disadvantage.

Moreover, there is nothing to indicate that there was any misrepresentation or concealment to prevent plaintiff from ascertaining the precise state of the matter. The resolution was spread on the minutes of the corporation, the payments were carried on the corporation books as part of the expense account, and Mrs. Howard and her representatives had or could have had access to these records at any time. They knew of the salary, they knew of the conditions of the dec-

laration of trust regarding waiver of salary while payments were made under the trust, and were reasonably put upon inquiry to inform themselves as to the state of the matter, at least before entering into a general release of all claims and demands against the defendants.

That the salary agreement was entered into in good faith, and not as a subterfuge, can scarcely be questioned, as one of plaintiff's attorneys was a director of and attorney for the investment company when the salary resolution was adopted, and advised as to its legality and fairness, and there is no evidence that F. P. Howard, as president of this corporation, operating under a half million dollars capital, was not entitled to pay for his services during this long period when he was deprived of his income from the trust. The declaration of trust, it will be recalled, only made the payment of the dividend allowance a waiver of the right to a salary, when the trust fund was being received by him.

Even if it might be surmised that the position of president of this corporation was a sinecure, and carried with it no duties or responsibilities calling for remuneration, and that this salary arrangement was a pure gratuity to protect F. P. Howard from the loss of his trust income, we can indulge in no such presumption under the evidence. As already pointed out, all the evidence on this subject indicates that the services rendered were in good faith and considered by the directors of the corporation worth to the corporation the amount paid.

The stipulation between the parties to preserve the assets of the investment company in statu quo during the pendency of the litigation provided for a continuance of payments for the current operating expenses necessary for the conservation of the corporation's business and property, and that this was intended to include salaries is evidenced by the continual acquiescence of the plaintiff in the payment of this and other amounts, as salaries, with full knowledge that the payments were being made. Plaintiff's demand here is only alleged on the theory that what was thought to be a payment of salary was discovered later on to have been an advancement of dividends.

In the light of the undisputed facts, we conclude there was no foundation for the finding of the trial court that the money in question was not paid in good faith as a salary, or that it was intended as an advancement of dividends under the trust.

As already stated, and in the absence of any evidence of fraud, or mutual mistake of the parties, there is also strong reason for holding the plaintiff estopped from reviving her claims against the defendants after the complete agreement of release and satisfaction entered into on the consummation of the con-

tract of settlement, even though it had appeared that there had been a misapplication of some of the funds in which Mrs. Howard was interested. This money paid to F. P. Howard was part of the accounts of the investment company which entered into the determination of its available assets at the time of the settlement. It was taken into consideration in making the division agreed upon, and it may be inferred that the settlement would not have been reached, if, at the time, the investment company's right to have credit for this salary payment had been disputed. There is no claim for rescission here, and no offer to place the defendants in status quo, as a condition of this further demand.

There are other questions presented on this appeal, but, in view of our conclusion that the plaintiff has established no cause of action, it is unnecessary to consider them.

The judgment is reversed.

We concur: SHAW, C. J.; WILBUR, J.; LENNON, J.; LAWLOR, J.

189 Cal. 107

**FRANCES INV. CO. v. SUPERIOR COURT
IN AND FOR IMPERIAL COUNTY
et al. (L. A. 6387.)**

(Supreme Court of California. June 10, 1922.)

1. Records §9(3)—Object of Torrens system of registration is to establish reasonable record title to land.

The obvious purpose of the Torrens Land Act is to establish a merchantable record title to land in the true owner, and to enable the registration of every tract in such a way that all interests therein may be disclosed by the certificate, and wide powers are therein expressly granted to determine collateral issues as preliminary to establishing a title subject to registration.

2. Records §9(4)—Court acquires jurisdiction to adjudicate title under Torrens Act, though applicant is not owner of fee.

Though the Torrens Land Act provides that no estate less than a fee simple shall be registered unless the fee is first registered, it is not essential to give the court jurisdiction to register a title that the applicant for such registration be the owner of the fee, but it is sufficient if the facts pleaded are such that, when determined by the decree of the court, they establish title in fee in some one or other of the claimants.

3. Records §9(8)—Court can require pleadings in Torrens proceedings to cover every proper issue.

The objection to jurisdiction of the court in proceedings under the Torrens Land Act to determine the claim that a trust deed was procured by fraud, on the ground that fraud was not adequately pleaded, is not substantial, since the court, under the expressed and implied

powers given in such proceeding, has authority to require pleadings adequate to cover any issue proper to be tried.

4. Records ☞9(5)—Court has jurisdiction in Torrens proceedings to adjudicate that trust deed was procured by fraud.

In proceedings for the registration of a title under the Torrens Land Act, a court has jurisdiction to adjudicate the issue raised by the applicant for registration that a trust deed against the land was procured by fraud, since the act broadly authorizes the ascertainment of the title to the land and the issuance of a certificate to the owner thereof, and is not limited to the ascertainment of the record title.

5. Statutes ☞115(2)—Title of Torrens Land Act includes jurisdiction to adjudicate issue of fraud.

The title to the Torrens Land Act, which is "An act for the certification of land titles and the simplicity of the transfer of real estate," is sufficiently broad to include the provisions of the act authorizing the ascertainment of the true title to the land, though such provisions are construed to include authority to adjudicate a claim that a trust deed affecting the land was procured by fraud.

6. Records ☞9(5)—Principle that a court of equity will give full relief may be applied in Torrens proceedings.

Though a proceeding for registration of title under the Torrens Land Act is a special proceeding, it is a proceeding in the superior court, which is the ordinary trial tribunal, in which the pleadings and practice are similar to ordinary civil actions, and the principle that a court of equity, having acquired jurisdiction for a particular purpose, will administer full relief between the parties can be applied by the court in such proceedings.

7. Records ☞9(5)—Provision registration decree quiets title against the world requires adjudication of claims of fraud.

The provisions of the Torrens Land Act, §§ 14 and 16, stating what is to be covered by the decree ordering registration, and providing that the decree forever quiets title to the land ordered registered, and is final and conclusive as against all persons requires the court, in proceedings for the registration of such title, to adjudicate the claim by one of the parties that a trust deed upon the land was secured by fraud.

In Bank.

Application by the Frances Investment Company, a corporation, for a writ of prohibition, prayed to be directed to the Superior Court in and for Imperial County, and to Phil D. Swing, as judge thereof, to restrain respondent from proceeding in an action for registration of title. Writ denied.

Wm. Story, Jr., of Salt Lake City, Utah, and Lissner, Lewinsohn & Barnhill, of Los Angeles, for petitioner.

Joe Crail and Julius V. Patrosso, both of Los Angeles (Walter Kibbey, of El Centro, amicus curiæ), for respondents.

SLOANE, J. This matter comes to us on petition for rehearing upon an order of the District Court of Appeal, Second Appellate District, denying an original application of petitioner for a writ of prohibition to restrain the superior court of Imperial county from trying the validity of a trust deed in a Torrens land proceeding.

In the application for registration of title in the land proceeding, Walter P. Downey and Nellie E. Downey claimed title in fee to the premises, subject only to a trust deed which they had given to third parties to secure their promissory note. They are seeking in the land title proceeding to rescind and set aside this trust deed on the ground that it was procured by fraud, and to have title in fee certified in themselves, freed from this adverse evidence of title.

The sole question presented on this hearing is that of jurisdiction of the superior court under the Torrens Act (St. 1897, p. 138) to adjudicate as well as to ascertain and certify real estate titles. Petitioner concedes authority in the court under this procedure to quiet title to real estate by removing clouds therefrom and determining adverse claims, but disputes jurisdiction to establish title by judicial decree in one who has no title at the time of filing his petition for registration, but only an actionable right to such title. The opinion of the court of appeal in this case upholding such jurisdiction is without precedent in this state, and apparently goes further than the decisions in other states in construing similar statutes, but we find its argument convincing.

[1] The obvious purpose of the act is to establish a merchantable record title to land in the true owner, and to enable the registration of every tract in such a way that all interests therein may be disclosed by the certificate. The title of the act is:

"An act for the certification of land titles and the simplification of the transfer of real estate."

To attain this end in all cases it must frequently be necessary to determine adverse claims, either in such proceeding or by resorting to an independent action. Wide powers are expressly granted under the act to determine collateral issues as preliminary to establishing a title subject to registration, and it is insisted that the powers conferred are sufficiently in the nature of a proceeding in equity to empower the court entering upon the investigation to grant complete relief.

It is provided that—

"All land may be brought under the operation of this act by the owner or owners of any estate or interest therein, whether legal or equitable."

Petitioner insists that the claimants in this case had no estate whatever; that their

estate became vested in the grantee under the trust deed, and that, conceding the transfer to have been obtained by fraud, all the interest the claimants have is an equitable remedy to avoid the transfer.

Waiving the doctrine affirmed in *Warren Co. v. All Persons*, 153 Cal. 771, 96 Pac. 807, that under a trust deed the legal title to land is conveyed solely for purposes of security, and that a legal title is left in the trustor as against all persons excepting the trustees and those claiming under them, may it not be true that even the right to a decree revesting title in the trustor, or for the enforcement of any other right which would vest a legal title, may be maintained in this proceeding? Suppose, for instance, the holder of a record title obtained by fraud should be the petitioner for registration of title in his name under the Torrens Act. Surely the person entitled to the rescission of such fraudulent conveyance could come in and assert his rights and have them adjudicated in such a way as to restore his title and have it certified.

So far as jurisdiction is involved, no greater power would be invoked if the owner of the equitable right to title by rescission was the moving party in the petition for certification under the act. The act especially provides for the registration of titles by prescription. Would not the same trial of independent claims of ownership be involved where in such a proceeding the claimant by adverse possession is opposed by one holding an apparent title of record? The act provides for notice to all parties in interest, and that "all persons who claim an interest may appear and object to the granting of the application"; that "the court shall set the petition down for hearing upon notice to all persons who have appeared as is required in other civil actions and shall proceed to determine the title to all the land described in the petition and of all persons who may have an interest therein * * * and shall make, give and enter a decree confirming the title of the person found to be the owner whether he be the applicant or any other person who may * * * ask to have his title registered," and that "upon the trial of any issue of fact raised by the verified pleading of any person claiming by such pleading to have an interest in * * * the land or appurtenances, such issue shall, upon demand of any party appearing, be submitted to a jury in the same manner and to the same extent as such issue can, under general law and the Constitution of the state, be submitted to a jury trial, * * * and * * * the verdict * * * shall have the same force and effect as is provided by general law upon the submission of like issues to a jury." Stats. 1915, p. 1932.

The act contains many other provisions for determining and certifying various estates, liens, and incumbrances incident to

land titles "in such a manner as to show their relative priority, all particular estates, mortgages, easements, liens, attachments and other incumbrances," and that "a decree of the court ordering registration shall be in the nature of a decree in rem, shall forever quiet the title to the land therein ordered registered and shall be final and conclusive as against the rights of all persons, known and unknown, to assert any estate, interest, claim, lien or demand of any kind or nature whatsoever, against the land so ordered registered." It is also declared that "this act shall be construed liberally so far as may be necessary for the purpose of effecting its general intent."

[2] Petitioner calls attention to the requirements that "no mortgage, lien, charge or lesser estate than a fee simple shall be registered unless the fee simple to the same land is first registered." It is true that a fee simple title must be established before a certificate of registration may be decreed, but it will be remembered that the existence of a fee-simple title is not required in the applicant at the time of filing his petition, but that the owners of any estate or interest, whether legal or equitable, may petition, and that it is sufficient to institute proceedings "if it appears to the court from its examination of an abstract or from the report of the examiner, or from the petition, where no abstract is required, that the title to the land described in the application appears to be substantially as alleged." In other words, it is sufficient to give the court jurisdiction if the facts pleaded are such that when determined by the decree of the court they establish title in fee in some one or another of the claimants.

Petitioner in its final reply brief cites *Matter of Application of Wasson* (Cal. App.) 201 Pac. 793, as the latest pronouncement of the courts of California construing this law. The question presented here was not involved in that case, and it contains nothing repugnant to the jurisdiction here invoked. The opinion holds that—

"The applicant for initial registration of title, as a title in fee, must produce proof that he is possessed of such title, either by the production of a regular chain of conveyance from the general government, or by proof of the creation of a title by adverse possession, and evidence establishing title good as against the world is essential to warrant a decree awarding such registration."

This does not negative the proposition that the decree in the Torrens proceeding itself may determine such title under an inchoate right thereto as preliminary to granting registration.

[3] We are not seriously impressed with petitioner's objection that fraud is not adequately pleaded. We have no doubt that under the expressed and implied powers of

the court in such proceeding there is authority for requiring pleadings adequate to cover any issue properly to be tried.

[4, 5] We agree with the District Court of Appeal that the superior court of Imperial county is not without jurisdiction to try the issue presented under the Torrens Land Act, and adopt and quote from the opinion of Mr. Justice Works of that court to supplement the views already herein stated, as follows:

"It is pointed out to us that the title of the law, contemplating, as it does, a 'certification of land titles,' is not broad enough to allow an inclusion in the measure of a grant of such jurisdiction as the respondents seek to exercise, but the suggestion does not impress us as being of great weight. The purpose of the act is to provide a machinery through which *some* title may be certified, and a part of that machinery consists in the determination by a court *what* title is to be certified. Said Mr. Justice Shaw in *Robinson v. Kerrigan*, 151 Cal. 40, in which case the constitutionality of the original Torrens law was settled: 'The object of the act is well stated in the title. It purports to establish a system for the registration of title to land, whereby the official certificate will always show the state of the title and the person in whom it is vested, and to provide that, after the original registration, transfers of the land may be made in the manner prescribed in detail in the act. As a foundation for the system, it is necessary to have the title established. To that end a proceeding is authorized whereby such title may be settled and declared by a decree of the superior court.' It appears, then, that in passing upon the question of jurisdiction presented by the controversy before us emphasis is not to be placed upon the word *certification* in the title of the law. The ascertainment of title, in a given proceeding, is a preliminary step to certification, and the question now is: What kind or nature of *land titles* had the people in mind in framing the title to the law they adopted? Had they in contemplation merely the record title or did they intend the actual right, to be determined from a consideration of all existing evidence on the subject and from which consideration there might spring a decree establishing actual title, or ownership? These questions are to be answered upon a construction of the body of the law. We are convinced that the title of the act is comprehensive enough to allow the *certification* of whatever kind or nature of *land title* the text of the act gives jurisdiction to ascertain and establish.

"The nature and extent of the jurisdiction conferred by Torrens Law, with especial reference to the question whether the exercise of that jurisdiction permits an inquiry into such matters as the respondents threaten to take cognizance of, must be ascertained by viewing from several standpoints the parts of the law which we have above marshaled. Let us first point out the various issues and controversies which may be presented for settlement in a Torrens proceeding under express provision of the law, for, if they may cover a wide range and lead to the consideration of questions of a varied and complex character, that fact will be in some degree persuasive of the construction

in favor of respondents of the general language of the law under which the right to exercise the questioned jurisdiction is insisted upon. The act unquestionably confers the power to determine whether land sought to be brought under its operation is community property; to settle boundaries the location of which is disputed between the applicant and adjoining proprietors; to locate the lines of private ways, as well as those of streets and public ways generally; to ascertain, between the applicant and the state the lines of boundaries where their location is affected by the presence of navigable streams or by the flow of the tides in arms of the sea; and to determine whether a title has arisen by adverse possession. It is not necessary to draw particular attention to the range which litigation may take upon these matters. Suffice it to say that the questions of fact and law presented by some of them often lead to the consideration of as complex and different problems and as to as lengthy trials as are known to the administration of justice.

"In addition to these matters, pointed to directly by the provisions of the law, its text is burdened with words, phrases, and clauses showing an intent to confer jurisdiction of the most exhaustive and extensive character. The owner of any estate or interest in land, whether legal or *equitable*, may avail himself of the provisions of the act. The petition must show what interest in the land the applicant has or *claims*, what interest each occupant and any other person has or *claims* in law or *equity*, in possession, remainder, reversion or expectancy, and it must show all liens and incumbrances, whether recorded or not. An examiner of titles may be appointed by the court, but he is evidently intended to serve as a general referee if occasion demands, for he must be an attorney who has been under admission for five years and he is to examine into the title as well as to investigate all facts pertaining to the title which shall be brought to his notice. He is to file a written report together with his opinion as to the title. The court is not to be bound by the report but may require other or further proof. The 'notice' provided for is similar to a summons, the method of service, whether personal or by publication, is much the same as in the case of a summons and the time for appearance after service is the same. Verified pleadings are required from all parties. The notice must state that the applicant has filed a petition praying for a decree that he is the *owner* in fee of the land. All persons who *claim* an interest may appear and object to the application, or may assent in writing to registration. A Torrens proceeding is undoubtedly a special proceeding under the technical distinction provided by our law (*County of Yuba v. North American C. G. M. Co.*, 12 Cal. App. 223, *In re Scott*, 182 Cal. 83, 187 Pac. 9); but it is worthy of note, especially as the law was framed and adopted under the initiative, where correct technical distinctions may not always be in mind, that the court must give notice of hearing as is required in *other* civil actions. Any issue of fact raised by any person *claiming* to have an interest in the land is, upon demand, to be tried by a jury. The decree shall state whether the *owner* of the land directed to be registered is married or unmarried, whether the *owner* is under disability, shall set forth the estate of the *owner* in the land and shall show the liens and

charges against the land or the owner's estate therein. The registrar is to issue a certificate of title to each person declared by the decree to be the owner of any parcel of land in severalty, and the certificate must show that he is the owner of an estate in the land. In this recitation of significant terms used in the law, so striking as to require no comment further than that made at the head of this paragraph, we have omitted all reference to certain portions of section 14 and all of section 16 of this act, as they will receive attention below.

[6] "In some of the other states land courts, as they are termed, are created for the purpose of exercising the jurisdiction incident to the operation of the Torrens system. Under the California act, however, the jurisdiction is conferred upon the superior court, our ordinary trial tribunal. We have already pointed out that the course outlined for a Torrens proceeding is strikingly similar to that provided by general law for the ordinary civil action, from the filing of complaint to the rendition of judgment. Finding present the usual machinery for the conduct of a civil action, modified only in so far as the peculiar nature of a Torrens proceeding appears to require, noting that jurisdiction under the act is to be exercised by the superior court, it would not be unnatural to discover that the people intended that a Torrens decree should cut deep and should cover a wide field. It might reasonably be expected that such a law would provide for the settlement of all matters affecting land ownership instead of limiting jurisdiction to the ascertainment and certification only of record title. It may or may not be proper to consider jurisdiction under a Torrens law as jurisdiction in equity, but there is certainly great reason for the application under such law of the principle through which courts of equity, once obtaining jurisdiction of a given subject-matter, will administer complete relief in the premises. That principle has been held to apply to a Torrens proceeding (Lewis v. Chamberlain, 69 Or. 476, 139 Pac. 571), and there is internal evidence in our law that the people had the same idea in mind in adopting it. We refer to the provisions of section 17, under which a registration may occur in actions to quiet title or for partition and in probate proceedings. Having in specific terms provided that a Torrens proceeding may be merged into or engrafted upon an action to quiet title, are we not free to conclude that by general language, if general language of sufficient breadth may be found in the act, the people intended that all questions affecting actual title or ownership, should be merged into a Torrens proceeding? An act framed pursuant to such a purpose would lead to the issuance of a certificate of title worth having, one which would vouch to the world that the holder was the owner of the land described in it, that a merchantable title was vested in him. A statute framed without such an end in view would be of but scant value. It is to be remembered that the law, according to its title, is not purposed merely for the certification of land titles. It is also designed to provide for the simplification of the transfer of real estate, and no considerable simplification results in such transfers if after obtaining a decree of the superior court that he has title to property and obtaining a certificate to that effect, one who has resorted to the procedure sanctioned by the law is compelled afterward to contend for additional de-

crees to secure to him a title which a buyer would accept on the market.

[7] "We proceed now to a consideration of other features of the law. Under its terms the holder of a mortgage procured by fraud could without doubt, in a proceeding instituted by some other person to secure a registration of the fee-simple title, petition that his title under the mortgage be registered. It is equally free from doubt that one who has obtained the delivery of a deed through fraudulent practices may petition for a registration of the fee in him under it. It is clear that interested persons could present the issue of fraud against the mortgage in the one instance and against the deed in the other, as a bar to registration. In fact, they would be bound to present it or be forever precluded from litigating the question, for, under the provisions of section 16, a decree ordering registration forever quiets title and is final and conclusive against the world. These reflections demonstrate that jurisdiction is conferred by the law to rescind, or, at least, to deprive of legal effect, instruments procured by fraud. If that jurisdiction may be exercised in such instances as the two mentioned, why not in this instance?

"Although the foregoing arguments are most persuasive to our minds, so much so that we might safely base upon them a construction of the law favorable to the contentions of respondents, we have yet to notice certain provisions of section 14, stating what is to be covered by the decree ordering registration, and the provisions of section 16, announcing the force and effect to be ascribed to the decree. Under the first-named section the court is not only to determine the title to the land, but the title of all persons who may have any interest in it. It is also to determine whether the property is the separate or community property of the party found to be the owner, and it is to enter a decree confirming the title of the person found to be the owner, whether he be the applicant or any other person. After all that has been said, it seems a work of supererogation to more than state the language which we have so liberally italicized. Its broad and all-inclusive character is at once apparent. We may, however, call attention to the fact that the use of the word 'title' is always without qualification or limitation, a circumstance which is characteristic of the act generally. References to record title are not to be found in it. The significance of the continual use of the word 'owner' in section 14 is also evident, and that word is used as well throughout the act when reference is made to the person in whose favor the decree ordering registration is rendered. All of the foregoing considerations are brought to a climax in section 16. By its terms the decree is to forever quiet title to the land ordered registered and it is to be final and conclusive as against all persons, known and unknown. The Downeys are plainly entitled to litigate the matters presented in their application for registration and the respondents have jurisdiction over these matters."

The application for a peremptory writ of prohibition is denied.

We concur: SHAW, C. J.; LENNON, J.; SHURTLEFF, J.; WILBUR, J.; LAWLOR, J.; WASTE, J.

189 Cal. 319

HIND et al. v. OVERSEAS AGENCIES, Limited. (S. F. 9607.)

(Supreme Court of California. July 13, 1922.)

1. Sales ⇨415—In action for breach of contract to deliver in bond at dock, plaintiff must prove tariff duty and dock charges as part of difference between contract price and market value of replacement goods purchased.

In an action for breach of a contract to deliver rice at \$6.95 per 100 pounds gross "ex dock San Francisco in bond," where plaintiffs purchased a like quantity and quality in the open market f. o. b. San Francisco at \$10.25 and \$11 per 100 pounds gross, the burden was on them, in order to recover more than nominal damages, to affirmatively establish, as part of the difference between the cost price under the contract and the market value of the substituted rice, if it was not purchased ex dock and in bond, the amount of the tariff duty and dock charges, which were included in the contract price, and these were not expenses to be pleaded and proved by defendant in mitigation of damages.

2. Appeal and error ⇨835(2)—Sufficiency of evidence to sustain finding considered, though raised only in supplemental brief on rehearing.

In an action for breach of a contract to deliver rice "ex dock" and "in bond," sufficiency of the evidence to sustain a finding that substituted rice purchased by plaintiffs f. o. b. was likewise purchased in bond will be considered, though such claim was made only in plaintiffs closing supplemental brief on rehearing, and there was no evidence from which the court could determine the application of the term "f. o. b." to payment of duty and dock charges.

3. Sales ⇨417—Contract to resell in bond held insufficient to justify inference that rice purchased f. o. b. to replace undelivered rice contracted for in bond was sold in bond subject to duty.

That rice purchased f. o. b. in place of undelivered rice contracted for "ex dock" and "in bond" was bought to fill the buyer's contract to resell in bond was insufficient to justify an inference that the substituted rice was purchased in bond subject to duty, even aside from the buyer's admissions that no rice in bond was available at such time, where the resale was made before the seller's breach; it being competent for the buyer to arrange after the breach for a delivery of the rice to his customer free of duty.

4. Appeal and error ⇨714(4)—Evidence ⇨16—Sales ⇨415—That charges covered by vendor under contract for delivery "f. o. b." include tariff duties must be proved by party alleging it.

While the court must take judicial cognizance that the letters "f. o. b." call for delivery to the purchaser free of charges for transportation, loading, etc., the burden is on the buyers, in an action for breach of a contract to deliver rice "ex dock" and "in bond," to show that a

purchase of rice "f. o. b." to replace that undelivered was likewise subject to tariff duties, and the Supreme Court cannot take representations made on the final argument in proof.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, F. O. B.]

5. Evidence ⇨129(6)—Contract relating to another transaction between parties to action for breach of contract to deliver properly excluded.

In an action for breach of a contract to deliver rice, the trial court properly excluded a contract relating to another and distinct transaction between the parties.

In Bank.

Appeal from Superior Court, City and County of San Francisco; Bernard J. Flood, Judge.

Action by George U. Hind and another, co-partners, doing business as Hind, Rolph & Co., against Overseas Agencies, Limited. Judgment for plaintiffs, and defendant appeals. Reversed and remanded.

I. F. Chapman, D. D. Hawkins, and Frank B. Austin, all of San Francisco, for appellant.

Ira S. Lillick and Norman A. Eisner, both of San Francisco, for respondents.

SLOANE, J. By a contract in writing, of date May 20, 1919, the defendant agreed to sell, and plaintiffs agreed to buy, certain rice, described as "2,000 small bags No. 1 Siam Usual Rice, type S3 at \$6.95 per hundred pounds gross, ex dock San Francisco, in bond."

The defendant breached the contract June 25th by refusing to deliver the rice, and thereafter, within what the jury determined was a reasonable time, the plaintiffs proceeded to purchase a like quantity and quality of rice in the open market to take the place of the rice contracted for with defendant, and gave notice to defendant that they were about to make such purchase, and would hold the defendant responsible for any loss sustained in the transaction.

This substituted rice was purchased, 50 tons, or 1,000 bags of 100 pounds each, on the 27th of June, 1919, at \$11 per 100 pounds gross, and 50 tons, or 1,000 bags, on the 7th of July, 1919, at \$10.25 per 100 pounds gross.

Plaintiffs seek to recover in this action the sum of \$7,350, the alleged excess which they were compelled to pay for the substituted rice. It is a conceded fact in the case that the terms "ex dock" and "in bond," used in the original contract, meant that the stipulated price of \$6.95 per hundred was for rice on the dock and subject to wharfage charges, and subject to tariff duty. The cash payments to become due under this contract amounted to \$13,900. What the amount of dockage and duty on the rice would be was

not alleged in the complaint nor shown in evidence. The \$7,350 sued for, therefore, represents the difference between the cash items of \$21,250 for the substituted rice, and \$13,900, the original contract purchase price, without taking into account the liability to be assumed by plaintiffs for dock charges and duty. The evidence, we think, is undisputed that the substituted purchase was made for rice f. o. b. San Francisco, which means free on board in San Francisco, and is claimed by defendant to be free from dock charges and duty. Assuming, for the time, that such is the proper interpretation of the evidence, the real issue presented is whether it was necessary for plaintiffs, as a condition of ascertaining their damages resulting from this breach of contract, to allege and prove the amount they would have had to pay on the original contract for duty and dock charges in addition to the stipulated cash payment. Judgment was for plaintiff in the trial court for the full demand of \$7,350, and defendant appeals.

[1] There is no dispute between the parties as to the law of damages applicable to such a case. Respondents say in their opening brief:

"We agree with appellant's counsel that the damages in this case should be measured according to the principles laid down in sections 3308 and 3354, Civil Code, that is, the difference between the contract price, and the market value of rice of like grade and quality as the rice called for by the contract, in San Francisco, within a reasonable time after June 25, 1919."

Where the parties differ on this branch of the case is as to whether the charges to accrue as duty and dockage were a part of the contract price to be pleaded and proved by plaintiff, or were expenses which they were relieved from, through the failure of the contract, to be pleaded and proved by defendant, in mitigation of damages. Defendant did not itself plead these matters as an affirmative defense, but relies upon the failure of the plaintiffs to either plead or prove the necessary facts to show what the difference was between the contract price of the original purchase and the market value of the substituted rice.

It appears as conceded, that there was no rice of the quality involved to be purchased at or about the time of the breach of this contract "ex dock San Francisco, in bond," and therefore the plaintiffs were entitled to go into the market and substitute as nearly as they could the value of their original contract, but all they were entitled to recover in damages was enough to equalize the cost so that they would not be out of pocket by reason of having to buy elsewhere and under different conditions. They were not entitled to gain an advantage by reason of getting the

substituted rice freed from liability for duty and dock charges.

For all that appears the difference in the price of this quality of rice "ex dock San Francisco, in bond," and as it was substituted, f. o. b. San Francisco, may have been largely accounted for by the saving made to plaintiffs in the substituted purchase by reason of buying free from duty and dock charges. The duty, at least, was a fixed charge which plaintiffs assumed and undertook to pay as part of the cost price under the contract.

As illustrated by appellant, if this contract had called for a stipulated cash price of \$13,900, subject to lien of a chattel mortgage, and the substituted rice had been bought for \$21,250, free of any lien, a measure of damage could not have been established until there had been pleaded and proved the amount of the lien, and it had been deducted from the \$21,250 to establish the difference between the contract price and the subsequent purchase.

What the plaintiffs were entitled to under their contract was rice in bond at the dock. The equivalent thing which they were entitled to substitute was rice in bond at the dock at its then market value. It is an obvious proposition that the market value of rice subject to duty and that on which the duty has been paid will not be the same.

The burden is clearly upon plaintiffs to affirmatively establish the difference between the cost price of the rice under the contract, and the market value of the rice purchased as its equivalent, and the tariff duty and dock charges are a necessary element in that difference if the substituted rice was not purchased "ex dock" and "in bond."

The case of *J. J. Moore & Co. v. J. S. Guerin & Co.*, 165 Cal. 534, 132 Pac. 1038, cited by respondents, is not in conflict with this conclusion. In that case the contract was to deliver coal at the ship's side at \$8 a ton. On the breach of the contract by seller the buyer bought in the open market from local dealers at \$12 a ton, which was the market price at that time. There was no coal to be had at the ship's side, though the evidence was that when coal was so obtained it was usually sold at about 75 cents less per ton than at the yards. There was no evidence, however, that the coal was of any more value to the buyer from being purchased at the yards. If it could have been shown that by getting coal from the yards, rather than from the ship's side, the buyer made a saving in transportation, for instance, the case would be in point, but so far as appears, delivery from the yards was no less expensive than from the ship.

Quite, a different situation, too, is presented in *Rosenberger v. Pacific Coast Ry. Co.*, 111 Cal. 313, 43 Pac. 963. There the plaintiff sued for damages for wrongful dis-

charge from an employment for a stated term. The measure of his damages under the recognized rule of law was his salary for the unexpired term. The burden was on the defendant to show, in mitigation of damages, that plaintiff might have obtained other employment.

In *Humphrey v. Milling Co.* (Cal. App.) 190 Pac. 489, the sale of the goods was f. o. b. Stockton, California. The court properly took evidence of the market value at Stockton in determining damages for failure of delivery. If the ultimate destination of the goods was Evansville, Ind., that was aside from the contract of purchase and sale, and we see no reason why the defendant could demand that the market price at Evansville should be the measure of his liability. If there were such reasons it would clearly be incumbent upon the defendant to set them up. The plaintiff's prima facie rights grew out of the contract of delivery f. o. b. at Stockton.

An examination of all of respondents' citations fails to disclose any authority relieving them from affirmatively showing all the elements going to measure the cost they were to incur in purchasing the rice under the contract as a necessary element in fixing their damages.

The evidence was sufficient to support the finding of the jury that there had been an unjustifiable breach of the contract by defendant, and plaintiffs were entitled to nominal damages in any event, but if the substituted rice was purchased free of duty and charges, the jury was not in a position to return the verdict it did, without knowing the amount of the duty and charges for which plaintiffs became liable under the contract.

[2] Some discussion is had as to whether it does not appear that the substituted purchase of rice was made "ex dock" and "in bond." This claim on the part of plaintiffs is only made in their closing supplemental brief on rehearing. The undisputed evidence was that this purchase was made f. o. b. San Francisco. As a matter of law this term carries the implication that the goods are sold free on board, but there is nothing in the record to enable the court to determine the application of the term to payment of duty and dock charges. 26 R. C. L., p. 745, and citations; *Whitaker v. Dunlap-Morgan Co.*, (Cal. App.) 186 Pac. 181; *Chandler Lumber Co. v. Radke*, 136 Wis. 495, 118 N. W. 185, 22 L. R. A. (N. S.) 713. Moreover, in all the preceding arguments of counsel for appellant, it has been virtually conceded that the subsequent purchase was made without liability for tariff and wharfage charges. It is repeatedly stated in plaintiffs' briefs that there was no rice in bond procurable when the second purchase was made.

Only in respondents' supplemental brief on the hearing in this court is it suggested that the record shows that the rice, admittedly

purchased f. o. b. San Francisco, was actually purchased in bond. Notwithstanding the inconsistency of this position with the theory on which the case was presented in the Court of Appeal and in this court on the argument, if the record discloses evidence sufficient to sustain a finding that the substituted rice like that contracted for was purchased "in bond," we see no reason why such belated discovery should not be given due consideration.

[3] Counsel for respondents apparently rely for support of this contention upon an inference which they seek to draw from the evidence showing that the rice which they contracted to buy "ex dock" and "in bond" on May 20th they contracted to sell to National Rice Mills "ex dock" and "in bond" on May 23d, and that the substituted rice was bought by them "to fill their contract" with National Rice Mills. To quote their argument they say:

"Notwithstanding the contentions of appellant the record plainly gives support to the verdict below. The contract between appellant and respondents under which the latter originally purchased the rice, provided for a sale in bond. The contract between respondents and the National Rice Mills, under which this rice was resold is also a sale 'in bond.'"

Obviously, the contract last referred to was intended to transfer to the National Rice Company the rice contracted for by plaintiffs, under precisely the conditions under which they bought it. But the resale was made before the breach of contract by defendant, at a time when they expected to be able to turn over the original purchase to their customers. Even without the admissions made in respondents' briefs that there was no rice in bond to be had at the time of the substituted purchase, there is nothing to justify an inference that because they originally contracted for rice ex dock and in bond, and contracted to sell on the same conditions, the rice, obtained over a month later f. o. b. San Francisco, was in bond, subject to duty, even though it was bought to fill such contract. We have no means of knowing what adjustment may have been made by plaintiffs with their customer regarding this sale and it was perfectly competent for them to have arranged for a delivery of the rice required, free of duty.

[4] While we must take judicial cognizance that the letters f. o. b. San Francisco call for a delivery to the purchaser free of charges for transportation, loading, etc., we are not advised by anything in the record as to the facts, or any citation as to the law whether such charges to be covered by the vendor include tariff duties. It is possible that evidence as to commercial custom in such matters might disclose that such a sale f. o. b. would still be subject to duty; but the burden is upon the plaintiffs to show it,

and we cannot take representations made on the final argument in proof.

[5] As already indicated the record supports the right of plaintiffs to recover for a breach of contract. The trial court did not err in excluding contract No. 5191, relating to another and distinct transaction between the parties. The conditions arising out of that transaction could have no legitimate bearing upon the conduct of the defendant in repudiating the contract involved in this action. We find no error in the record other than as herein pointed out in relation to the measure of damages.

The judgment is reversed, and the cause remanded for a new trial to determine the question of fact as to whether the purchase of the rice to replace the original purchase was made ex dock and in bond, and if the purchase was so made, to give judgment for the plaintiffs as heretofore found by the verdict of the jury, and if made free of duty or dock charges, to ascertain the amount thereof and to reduce the amount of former judgment by the amount of such duty and dock charges.

We concur: SHAW, C. J.; WILBUR, J.; LENNON, J.; LAWLOR, J.

(189 Cal. 296)

POPP v. EXCHANGE BANK. (S. F. 9597.)

(Supreme Court of California. July 11, 1922.)

1. Appeal and error §1011(1)—Findings on conflicting evidence not disturbed.

Where there is a conflict in the evidence, the Supreme Court will not disturb the finding of fact touching which the conflict exists.

2. Corporations §474—Evidence held to sustain finding wife as well as husband to secure note delivered corporate bonds belonging to children to bank with representation that they belonged to her.

In an action by a guardian against a bank to recover possession of corporate bonds, the property of minor children of a husband and wife whose note was secured by pledge of the bonds, evidence held to sustain a finding that the wife, as well as the husband, signed the note and participated in the delivery of the bonds to the bank, with the representation they belonged to the wife.

3. Banks and banking §150—Overdraft of joint account is binding debt regardless of who drew the checks.

Where a bank account stood in the joint names of the husband and the wife, an overdraft was the joint debt of both husband and wife, even though all of the checks except one or two had been drawn by the husband.

4. Bills and notes §94(1)—Antecedent debt is good consideration.

An existing debt is sufficient consideration for a note or other commercial instrument,

whether the debt is an open account or one resting on an implied contract, or whether it is evidenced by an instrument of indebtedness which is surrendered for the new instrument.

5. Evidence §597—Testimony to best of witness' recollection supports finding.

Testimony by an officer of the bank to the best of his recollection supports a finding in accordance with the testimony, notwithstanding positive testimony to the contrary.

6. Corporations §474—Pledges of corporate bonds held bona fide holder for value.

Where corporate bonds were pledged by a husband to secure a note executed by himself and his wife to cover an overdraft of their joint account, the bank could rely on the husband's statement that the bonds were the property of his wife which she had received from an aunt back East, and became a bona fide holder of the bonds upon their pledge without the necessity of making any further investigation as to the ownership.

7. Corporations §474 — Names of minors written on margin of pledged bonds held not constructive notice of ownership.

Where corporate bonds payable to bearer were pledged to a bank to secure a note executed by a husband and wife, the fact that the names of the minor children of the parties were written on the margins of the bonds, even if it came to the attention of the officers of the bank, did not establish lack of good faith on the part of the bank from taking the bonds on the strength of the absolute representation by the husband that they belonged to his wife.

8. Bills and notes §337—Knowledge of facts putting on inquiry does not defeat good faith.

Mere knowledge of facts sufficient to put a prudent man on inquiry, without actual knowledge, or mere suspicion of an infirmity or defect of title, does not prevent the transferee from being a holder in good faith unless the circumstances indicate that the failure to make inquiry arise from a suspicion that it would disclose a vice or defect in the instrument.

9. Corporations §472 — Bonds showing on face they are secured by mortgage are not negotiable.

Bonds issued by a corporation payable to bearer, but showing on their face that they are secured by a mortgage on real estate, were not negotiable under the law as it existed prior to 1915.

10. Corporations §473—Purchaser of non-negotiable bonds acquires only title of his seller.

Where the bonds of a corporation were nonnegotiable, a purchaser of them, even though he acted in good faith and paid value, acquired only the title of his seller.

11. Constitutional law §190—Statute cannot make previously issued instruments negotiable.

The act of August 8, 1915,¹ which was enacted after the issuance of corporate bonds which at the time of issuance were not negotiable, but before the transfer of the bonds in controversy, could not make the bonds negotiable.

¹For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

ble, which would be in effect the making of a contract for the parties by the Legislature, though, if the bonds were negotiable when issued, their negotiation would depend upon the law in force at the time of indorsement.

12. Evidence **80(1)—Law of foreign state is presumed to be the same as domestic state.**

In the absence of proof as to the law of a foreign state, it must be presumed to be the same as that of the state of the suit.

In Bank.

Appeal from Superior Court, Sonoma County; Emmett Seawell, Judge.

Action by Lenora S. Popp, as guardian of the persons and estates of Alida Newell Popp and another, against the Exchange Bank to recover possession of personal property. Judgment for defendant, and plaintiff appeals. Reversed.

Edward A. O'Brien and W. W. Bedford, both of San Francisco, for appellant.

Wallace L. Ware and R. L. Thompson, both of Santa Rosa, for respondent.

SHURTLEFF, J. The plaintiff and appellant, as guardian of the persons and estates of Alida Newell Popp and Mary Elizabeth Popp, her minor children, brought this action against the defendant bank for the possession of three bonds of the Adirondack Electric Power Corporation, alleged to be the property of said minors, and wrongfully in the possession of defendant.

The defendant in its answer admitted that the bonds were in its possession, but denied they were owned by said minors or that such possession was wrongful, alleging upon information and belief that they were the property of the said Lenora S. Popp and J. Popp, her husband, who is not a party to the action, and were delivered to defendant by said Lenora S. Popp and J. Popp as collateral security for the payment of their joint and several note to the defendant for the sum of \$2,400, dated July 13, 1916. Upon these issues the case was tried without a jury, and the court found that said note was on July 13, 1916, for a valuable consideration, executed and delivered by the said Lenora S. Popp and J. Popp to defendant, and that no part of the principal sum of said note had been paid; that upon said July 13, 1916, the said Lenora S. Popp and J. Popp, as a part of the same transaction, including the execution and delivery of said promissory note and agreement which accompanied the same and embodied the terms upon which said bonds were deposited with defendant as collateral, delivered to defendant at its banking house in the city of Santa Rosa, Cal., said three bonds, to be held by defendant "according to the terms and conditions of said collateral agreement," to wit, to secure the payment of said promissory note, "then and there rep-

resenting to the officers and agents of said defendant, Exchange Bank, and inducing them to believe that said bonds belonged to and were the property of the said plaintiff, Lenora S. Popp, and her husband; that defendant accepted said bonds in good faith as security for the payment of said promissory note, * * * in the belief that said representation was true and without knowledge of or reason to suspect that it was not true." The court further found that said bonds had come into the hands of said Lenora S. Popp as a gift to said minors from an aunt, and were by said Lenora S. Popp placed in the custody of her husband and the father of said minors, and were not and never have been the property of said Lenora S. Popp or J. Popp; that said Alida Newell Popp was and is the owner of two of said bonds, and said Mary Elizabeth Popp was and is the owner of one of said bonds; "that defendant had no knowledge of the true ownership of said bonds or either of them, and had no reason to believe that said Lenora S. Popp and J. Popp were not the owners thereof and were without authority to pledge or sell the same; the defendant bank is the lawful holder of each of said bonds as security and as a pledge for the payment of said promissory note, together with interest thereon; that said bonds and each of them were negotiable instruments, payable to bearer in money only, and without any condition not certain of fulfillment for value, and were pledged as security * * * to defendant before maturity, in due course, and without fraud on the part of defendant." The conclusions of law were in accordance with the findings, and, among other things, ordered that plaintiff, as such guardian, had the right to redeem the bonds upon payment to defendant of the amount remaining due on said promissory note. Plaintiff in due time moved for a new trial, which motion was denied. Judgment was entered accordingly in favor of defendant, from which judgment plaintiff prosecutes this appeal.

[1] The first point which plaintiff makes for reversal is that the evidence is insufficient to sustain the findings, the specific attack being that there is no evidence in support of the finding "that Lenora S. Popp, for valuable consideration, executed the note and collateral agreement, that she executed it at the banking house of respondent bank, or that she made any representations to any of the officials of said bank." We have carefully reviewed the record and find ample evidence to support the finding. To be sure, there is present a conflict in the evidence, but where that is so this court will not disturb the finding of fact touching which the conflict exists.

[2] An extended and detailed recital of the evidence sustaining the findings specifically

assailed would be of little profit. Suffice it to say that during the period commencing in December, 1915, and extending to the date of the execution by the plaintiff and her husband of the note involved here, the account of the plaintiff and J. Popp with the defendant bank was in a continuous state of overdraft, and on the 13th day of July, 1916, the date of said note, this overdraft amounted to \$2,400, and it was to cover said amount that the note was executed and collateral deposited. The bank officials were pressing Mr. Popp to take care of this obligation, and notified him, so he testifies, that it would not cash any more of his checks. The cashier of the defendant testifies that he told Mr. Popp that "something had to be done; we [defendant] couldn't let this thing run any longer." It was this attitude of the bank that brought about the execution of the note and the delivery as collateral of the bonds, and at which time plaintiff had not been appointed guardian of the persons or estates of her minor children, she having been appointed in the month of April, 1919.

[3] The account was in the names of the plaintiff, Lenora S. Popp, and J. Popp, and was opened with money belonging to plaintiff, by the deposit of checks payable to her. She thinks she never drew any checks against the account, and, in any event, not more than one or two; nevertheless the overdraft was in law as much her indebtedness as that of her husband, and it is the law of this state that a pre-existing debt is a valuable consideration. *Schluter v. Harvey*, 65 Cal. 158, 3 Pac. 659; *Frey v. Clifford*, 44 Cal. 335; *Stroud v. Thomas*, 139 Cal. 274, 72 Pac. 1008, 96 Am. St. Rep. 111.

[4] In *Tiedeman on Commercial Paper*, § 164, it is said:

"It has been generally held that an existing debt is a sufficient consideration for a note or other commercial instrument. This is true whether the existing debt is an open account or one resting on an implied contract, or whether it is evidenced by an instrument of indebtedness, which is surrendered, for the new instrument."

Plaintiff admits that she knew that her husband, J. Popp, was indebted to the defendant, but did not know to what extent. When J. Popp delivered the bonds to the defendant, he stated to the officer who received them that they were bonds "my wife * * * got back from the East," and that they "belonged to his wife." The note and collateral agreement were signed by plaintiff and her husband, J. Popp, but both testify positively that they were signed at the Popp residence, and not at the place of business of the defendant.

[5] The officer of the bank who had charge of the transaction testifies that to the best of his recollection they were signed by both Popp and his wife at the defendant's bank-

ing house. The court found in accordance with the latter testimony, which appellant contends does not sustain such finding. With this we cannot agree, but in any event the decisive question was: Were the instruments actually signed by Popp and his wife? If they were, the place of signing was immaterial, except, perhaps as a matter of testing the accuracy of the memory of the witnesses. While plaintiff admits the verity of her signature to the note and collateral agreement she asserts, and in that she is corroborated by her husband, that she signed both writings without reading either of them, and so signed upon the representation made to her by her husband that they were "merely copies of statements." Be that as it may, she intrusted the note, collateral agreement, and bonds to her husband J. Popp, who delivered them to the defendant, which received them in good faith, in due course, and with an entire want of knowledge, constructive or otherwise, of any fact which would impeach either writing or any element of the transaction. The defendant insisted that Lenora S. Popp should sign the note and accompanying agreement that was part of the consideration upon which it extended the credit and accepted the bonds as collateral. Mr. Popp describes the delivery as follows:

"I handed him [cashier] the bonds. He says, 'What is that?' I said, 'Three bonds; I thought maybe you hold for security for the present so I can continue in business.'"

What precedes and there is other evidence to the same effect, supports the findings of the court that Lenora S. Popp executed said note and collateral agreement for a valuable consideration.

[6] The appellant's next contention is that the defendant bank is not a bona fide holder in good faith or for value of the pledged bonds. Much of what precedes is applicable to this phase of the case. The claim is made that the desperate financial condition of Popp, which had existed for months prior to the date of the note, the repeated unsuccessful attempts of the defendant to adjust the account, and the sudden appearance of the bonds tendered and accepted as collateral, coupled with Mr. Popp's declaration that they belonged to his wife, and the additional circumstance that on the margin on the outside of two of said bonds is written in ink "Alida Newell Popp," and on the margin on the outside of one of said bonds is written in ink "Mary Elizabeth Popp," should have prompted the defendant, indeed cast upon it the duty, to make "some investigation as to the true condition of the ownership of the bonds." The record discloses that the defendant did make "some" investigation, but, aside from that, we find no reason for holding that, under the conditions and facts as they then existed, the defendant or its officers were obligated to canvass the title to

these bonds with greater detail than they did. They had no reason whatever to distrust Popp or to disbelieve or doubt his statements. Further questioning of him would have elicited nothing in contradiction of his declaration that his wife owned them and that she got them back East from an aunt. This was a reasonable explanation of the ownership and their possession by him. It might also be regarded as a satisfactory apology for his failing to earlier offer them as security. The fact that the bonds were in Popp's possession, and were received by the bank from him, when taken with the recital in the collateral agreement, signed by Mrs. Popp, that they were deposited with defendant "as collateral security" for the payment of said note, justified the bank in believing, as the record discloses it did, that the bonds were so deposited with the knowledge and consent of Mrs. Popp. Not a word was said by Popp in reference to his minor children owning the bonds, and naught was said or done indicating that Popp was wrongfully hypothecating them. None of the officials of defendant knew or had reason to suspect that Popp had fraudulently removed them from the safe deposit box where the Popp's claimed they were kept, and which was unknown to defendant. Moreover, Mr. Le Baron, an official of defendant, testified, which was manifestly accepted as true by the trial court, that Mrs. and Mr. Popp "came in with the bonds and executed this note for the purpose of taking up that overdraft which we were trying to wipe out." He was asked:

"Did they hand you the bonds—these three \$1,000 Adirondack bonds? A. Surely. Q. At that time and place did John Popp and Lenora S. Popp execute that note and collateral agreement? A. They did."

So far as notice, actual or constructive, "arising from the relationship of the parties or circumstances attending the transaction," is concerned, the facts are decidedly with the bank. As has been said, the makers and pledgers were husband and wife; the account was in their joint names, and the indebtedness that of both of them; the initial deposit consisted of money belonging to the wife, against which she permitted her husband to check ad libitum, without, so far as appears, at any time requiring him to account, or ever inquiring of the bank the status of such account. Under these circumstances, it cannot be said the officials of defendant were not justified in accepting as true, and relying upon, the representations of J. Popp.

[7] It remains to inquire if the names of the minor children, written on the margin of the bonds, constituted notice, actual or constructive, to the bank that the children owned them, or notice sufficient to cast upon it the duty of making further investigation touching such ownership. The attention of no one connected with the bank was called

to said names thereon at the time the bonds were pledged, and the representative of defendant, who received them, testified that he had no recollection of having seen the names at the time the bonds were deposited, although he could not "swear" they were not there. But, even though the officials of the bank had seen these names on the bonds, in view of the fact, as we shall presently point out, that they passed by delivery without indorsement, and of Mr. Popp's unequivocal statement that his wife owned them, upon which they were justified in relying, we hold that failure to make further inquiry touching their ownership would not have established a lack of good faith, or prevented defendant from being a holder for value in due course.

[8] "The well-settled rule at present, except as already noted (not necessary to repeat here), is that mere knowledge of facts sufficient to put a prudent man on inquiry, without actual knowledge, or mere suspicion of an infirmity or defect of title, does not preclude the transferee from occupying the position of a holder in due course, unless the circumstances or suspicions are so cogent and obvious that to remain passive would amount to bad faith." 8 Corpus Juris, p. 501. But plaintiff states, referring to the same volume of Corpus Juris, p. 711, that this rule is subject to the qualification that, "where the circumstances are such as to justify the conclusion that the failure to make inquiry arose from a suspicion that inquiry would disclose a vice or defect in the instrument or transaction, such indorsee is charged with knowledge." The answer to this is that there is no finding in the present case bringing it within this exception, and, if there was such a finding, it would be pure conjecture, for we discover nothing in the evidence indicating that the bank officials were intentionally omitting to pursue information through fear they might unearth something touching the ownership of the bonds in question which would compel them to reject them as security, or, if accepted, would, in the event of its being disclosed, defeat the pledge.

[9] The next contention of the plaintiff is that the bonds in question are not negotiable. We think this proposition must be sustained. The bonds were issued apparently in the state of New York on January 1, 1912. They are payable to the bearer, or to the registered holder in case the bonds be registered, and on their face they show that they are secured by a mortgage or trust deed upon real property, and they become due on January 1, 1962. The record does not show that they were ever registered. They are precisely similar in all respects to the bonds under consideration in *Kohn v. Sacramento, etc., Co.*, 168 Cal. 1, 141 Pac. 626, and *Crocker National Bank v. Byrne*, 178 Cal. 329, 173 Pac. 752. In each of those cases bonds of that description were held to be nonnegotiable un-

der the law of California in force in 1912, and the proposition must be considered as settled.

[10] The result is that the defendant cannot protect itself upon the rule, applying to negotiable instruments only, that where the holder thereof has by delivering the instrument to a third person clothed him with an apparent title thereto, and such third person disposes of it to an innocent purchaser, such purchaser obtains title as against the true owner, although the person to whom it was delivered had no authority to make a sale thereof. *Chase v. Whitmore*, 68 Cal. 547, 9 Pac. 942. It may be possible that, as the owners of these bonds were minors, it could not be said that they had clothed their parents with apparent authority to dispose of the bonds, even if they were negotiable. But that question we need not determine, for, as the bonds were not negotiable, the rule cannot apply in any event to this case. The rule applicable here is that the seller of property can transfer to the buyer no better title than he has himself, and, if at the time of the transfer he had no title, the purchaser, although buying in good faith and for full value, obtains no title. *Crocker Nat. Bank v. Byrne*, supra, 178 Cal. 332, 173 Pac. 752.

[11] The respondent concedes that the bonds were not negotiable, under the aforesaid decisions, at the time they were issued, and he relies on the fact that the Legislature by an act which took effect August 8, 1915, amended our Code in relation to negotiable instruments so as to make bonds such as these negotiable. If that act could have had the effect to change the character of the bonds in that particular, undoubtedly the point would be well taken and the bonds would have been clothed, at the time they were transferred to the defendant, in 1916, with all the characteristics of negotiable instruments. But it is well established that the Legislature cannot by an act subsequent to the execution of a contract change its legal effect in any material particular. In section 871, vol. 1, of *Daniel on Negotiable Instruments*, that author says:

"The law in force at the time the contract is made must apply to it with respect to its interpretation and effect; *otherwise the Legislature would itself make a contract for the parties.*" (Italics ours.)

This proposition is established by the decisions in *Cook v. Mutual Insurance Co.*, 53 Ala. 37; *Bloodgood v. Cammack*, 5 Stew. & P. (Ala.) 276; and *Bowlby v. Kline*, 28 Ind. App. 662, 63 N. E. 723. The statements in 8 *Corpus Juris*, at sections 173 and 184, of the article on Bills and Notes, to the effect that the contract made by an indorsement or transfer of an instrument is governed by the law in force at the time such indorsement is made, refers wholly to indorsements or transfers of instruments which are in fact nego-

tiabile. The entire text of the sections refers to instruments which are negotiable. The cases cited in support of these sections show that the subject treated was the effect of the contract of indorsement, and not the character or effect of the instrument transferred or indorsed.

[12] The bonds were apparently executed in the state of New York. There was no proof or finding with respect to the law of New York on the subject of negotiable instruments of this character. Consequently, under the well-settled rule, we must assume that the law of that state on the subject is the same as the law of California. It seems to be settled that the law of the place of the execution of the contract determines its character and effect. But, as the question is not before us, we need not express any opinion on the subject. That question will have to remain open for future determination in case upon a new trial the evidence may show a different law in New York from that which prevails here. For these reasons we are of the opinion that the defendant, under the facts found, had no title to the bonds in controversy, and that the plaintiff should have had judgment.

The judgment is reversed.

We concur: SHAW, C. J.; WILBUR, J.; SLOANE, J.; LAWLOR, J.

(189 Cal. 343)

O'FARRELL v. SONOMA COUNTY et al.
(S. F. 9968.)

(Supreme Court of California. July 28, 1922.
Rehearing Denied Aug. 24, 1922.)

1. Counties $\S$ 178—County board must spend bond money in accordance with order calling bond election.

Where the order of the county board of supervisors calling an election for the purpose of voting bonds for the construction of roads specified the road to be constructed, the length thereof, and the amount to be expended, the board had no authority to construct the road in portions or to expend the money only on a portion of the road, in view of Pol. Code, $\S\S$ 2643, 4088, authorizing the issuance of county bonds for roads pursuant to an order of the supervisors ratified at a subsequent election, and providing that the revenue derived shall be applied only for the purpose specified in the order.

2. Counties $\S$ 178—Order calling election to vote bonds and ratification by electors held to constitute a contract.

An order of the county board of supervisors calling an election to vote bonds to build roads, and the ratification of the order by the electors, constituted a contract between the state and the individuals whose property was

affected which could not be altered by one of the parties alone.

Lawlor and Sloane, JJ., dissenting.

In Bank.

Appeal from Superior Court, Sonoma County; Emmet Seawell, Judge.

Action by Cathal O'Farrell against the County of Sonoma and H. F. Doss and others, constituting the Supervisors of the county. Judgment for defendants, and plaintiff appeals. Reversed.

J. W. McCaughey and Vincent Surr, both of San Francisco, and J. A. Barham, of Santa Rosa, for appellants.

Geo. W. Hoyle, Dist. Atty., of Santa Rosa, for respondents.

PER CURIAM. The plaintiff commenced an action against the defendants to obtain an injunction regarding the making of unlawful contracts and the unlawful expenditure of the proceeds of certain county bonds. The defendants appeared and filed a general demurrer. The demurrer was sustained. The plaintiff declined to amend, and judgment was entered in favor of the defendants for their costs. The plaintiff has appealed from the judgment.

In his verified complaint the plaintiff incorporates copies of certain records, and in the interest of simplicity, in stating the substance of the allegations we will make no distinction as to the plaintiff's allegations and the facts contained in the exhibits. In this manner we may state that the plaintiff alleges that he is the owner of property taxed and subject to be taxed to pay the bonds hereinafter referred to; that the individuals named as defendants are the supervisors of Sonoma county; that on the 16th day of April, 1919, the board of supervisors of Sonoma county adopted a resolution and order:

"Whereas, public necessity and convenience demand the building and construction of certain highways in Sonoma county; and

"Whereas, there are no funds of the county of Sonoma available for said purpose; and

"Whereas, it is necessary that a bonded indebtedness for the said purpose be incurred and created by the said county of Sonoma"

"Now, therefore, be it resolved and ordered by the board of supervisors of the county of Sonoma, at a regular meeting of the said board of supervisors held in the county of Sonoma, on the 16th day of April, 1919, all of the members of said board being present at such meeting and voting thereat in favor of this order, that the question of the issuance of bonds for the incurring of an indebtedness of one million six hundred and forty thousand dollars for the purpose of building and constructing highways in said Sonoma county, be submitted to the qualified electors of the county of Sonoma, state of California, at a special election to be held throughout Sonoma county on the 24th day of May, 1919; the said bonded indebtedness to be incurred for the purpose of building

and constructing the highways described as follows:

"Sebastopol to Freestone.

"Beginning at a point in the present Sebastopol-Freestone Road, 1.1 mile westerly from the limits of the town of Sebastopol; said point at the end of the present oil road; thence along the present road to its intersection with the present Freestone-Valley Ford Road.

"Distance 4.0 miles, \$85,000.00."

Then follow certain other formal matters concerning the election, and the resolution contains:

"Notice of County Bond Election. Notice is hereby given, etc. * * * The said bonded indebtedness is to be incurred for the purpose of building and constructing the following described highways in Sonoma county, to wit: Sebastopol to Freestone."

Then follow the description, the distance, and the pro rata amount for the above road and the similar data regarding other roads; that the election was duly held on the 24th day of May, 1919; that on May 28, 1919, the returns all being in and the same being canvassed, the defendant board declared the proposition carried, and ordered the issuance of said bonds; that on the 11th day of June, 1919, the defendant board ordered the publication of notice of sale of said bonds; that thereafter said bonds were sold for the amount of principal and accrued interest, and a premium of \$39,500; that on the 6th day of August, 1919, the county engineer and surveyor was directed to make plans and specifications for the said road from Sebastopol to Freestone; "that thereafter said county surveyor prepared, and on March 23, 1921, filed with said county clerk plans, specifications and estimates of a portion only of said Sebastopol-Freestone four-mile road showing said portion as section A, being of the length of 10,208 feet, to wit, 1.93 miles, and calling for an estimated expenditure thereon of \$81,500, but did not and has not filed any plans, specifications, or estimates whatever of, or for, the remaining 2.07 miles of said Sebastopol-Freestone four-mile road. * * *

That the fact is that in said road from Sebastopol to Freestone there are four hills requiring grading and drainage, and three of said hills are in section A, and the O'Farrell hill, the largest by far of said hills, is not in said section A, cannot possibly be graded and drained with the small amount of money, if any, that will remain applicable thereto after the building and construction of said section A, if done according to the plans and specifications filed as aforesaid. That on the 23d day of March, 1921, the defendant board adopted the above-mentioned plans and specifications and directed the clerk to advertise for bids. That on the 25th day of March, 1921, the clerk did so advertise for bids; that said bids have been received; that the board threatens to and will, unless

restrained, open the bids so invited, accept the lowest bid and will enter into a contract with the lowest bidder. That the plaintiff and many others will be irreparably damaged, etc., wherefore plaintiff prays judgment."

The complaint was filed April 11, 1921. Thereafter the plaintiff filed a supplemental complaint in which it is alleged that on the 12th day of April, 1921, the defendant board opened the bids, and that the lowest responsible bid for the construction of section A, 1.93 miles, was \$72,840.60; that the cost of constructing the rest of the road, 2.07 miles, will exceed the cost of constructing section A.

The statute (Pol. Code, § 4088) under which the bonds were issued, among other things, provides:

"Any county * * * may incur * * * a bonded indebtedness for * * * the purpose of * * * constructing roads. * * * Such indebtedness shall be * * * incurred in the following manner, to wit: The board of supervisors thereof shall by order specify the purpose for which the indebtedness is to be incurred. * * * [Then follows itemized procedure regarding issuance of bonds and the levy of a tax.] Such tax, when collected, shall be paid into the treasury of the county, and used solely to pay the interest and principal of said bonds as they respectively become due. The revenue derived from the sale of said bonds shall be applied to the purpose specified in the order of the board, and no other. Should there be any surplus, it shall be applied towards the payment of said bonds. The board of supervisors of any county can contract a bonded indebtedness for county purposes only as in this title provided. * * *"

The plaintiff contends that under the foregoing facts the board of supervisors had the jurisdiction to ask for bids for the construction of the road, Sebastopol to Freestone, as an entity, and if the bids were too high that the board was not entitled to proceed without further authority from the electors. The defendants contend that a board of supervisors has discretionary power to spend the entire \$85,000 on any part or portion of said road as to the board seems meet and proper.

[1, 2] We think that "discretionary powers" are a false issue in this case. When the defendant board was contemplating a bond issue on the 16th day of April, 1919, it had the statutory right to make its order just as broad, and just as narrow, and just as specific as it was willing to be bound by, so long as the provisions of the statute were complied with. At that time it could have asked generally for the consent of the electors to issue bonds in the sum of \$1,640,000, for constructing roads in Sonoma county, but it did not do so; on the contrary, it specified road by road, name by name, and length by length, of each piece of road that was to be constructed. When, in the order, it specified Sebastopol to Freestone, four miles, designating the point of beginning and the point of the end-

ing, any question of discretion as to division or subdivision into sections was, as to these elements, exercised once and for all and as a finality. When thereafter, pursuant to that order, the defendant board published a notice to the electors in exact accord with its order, every elector had the right to assume that the statement contained in the order to the effect that a road would be constructed from Sebastopol to Freestone meant the entire distance between those two points—not one end, or the other end, or any part or portion, but the whole. The electors are presumed to have known the law and to have known that by the provisions of subdivision 11 of section 2643 of the Political Code, road work, costing more than \$1,000, may be done and performed only after notice duly given calling for bids. The electors must have also known that ordinarily a board of supervisors has many discretionary powers; but, nothing to the contrary appearing the electors had the right to assume that after the election the board of supervisors would call for bids for the construction of a road four miles in length between Sebastopol and Freestone as described in its order and costing not to exceed \$85,000. The order calling the election and the ratification of that order by the electors constituted a contract between the state and the individuals whose property was thereby affected. *Peery v. City of Los Angeles* (Cal.) 203 Pac. 992. After the contract had been made, it could not be altered by one of the parties, only, but by all of the parties thereto. When by its order, duly accepted by the vote of the electors, the length of the road had been specifically defined, its terminals specifically located, and the cost of the whole established, these elements became a part of the contract. As to them the board, acting alone, could not redivide the contract. Neither could it directly expend the moneys on only a portion of the road. What it could not do directly it could not do indirectly. Such fact is of the utmost importance to the interested parties. It is the only hold the taxpayers have for specifically enforcing the contract as made by them. The very gist of the plaintiff's complaint is that the defendant board has not asked for, and has not obtained, a bid for constructing the whole road. For this reason the plaintiff may complain. If the defendant board has the statutory right to let contracts to build said road in sections, then, as the defendant argues, all of the funds may be spent on one mile in the discretion of the board. But the board may not let the contracts piecemeal. It has waived its right to do so. The foregoing views are fully sustained by the principles announced in *Jenkins v. Williams*, 14 Cal. App. 89, 111 Pac. 116. The only difference between the instant case and that case is that the instant case involves roads, whereas the *Jenkins* Case involved bridges. Both cases

rest on the same section of the same statute. No one can read that decision without being impressed that the board of supervisors of Sacramento county could not have used the moneys voted for a "new steel bridge over Cosumnes river at Bridgehouse, Sacramento county" for the purpose of building one-half of a bridge, or one pier for a proposed bridge, or anything else or otherwise, except an entity—a bridge, whether large, small or otherwise. Cases quite closely in point, in other jurisdictions, are in accord with the case last cited. *Marteeney v. Louth*, 197 Ill. App. 106, 115-116; *Haws v. County Court*, 86 W. Va. 650, 104 S. E. 119, 121; *Whitner v. Woodruff*, 68 Fla. 465, 67 South. 110, 111; *Pine v. Baker*, 76 Okl. 62, 184 Pac. 445, 451; *Thompson v. Pierce County*, 113 Wash. 237, 193 Pac. 706, 707; *Carson v. Road Improvement Dist. No. 2*, 150 Ark. 379, 234 S. W. 257.

We think that the demurrer should have been overruled and that the defendants should have been required to answer, and that the case should have been heard on its merits.

The judgment is reversed.

The foregoing opinion heretofore rendered herein by the District Court of Appeal of the First Appellate District, Division 2, is hereby adopted as the opinion of this court.

SHAW, C. J., LENNON, J., WASTE, J., RICHARDS, Justice pro tem., and MYERS, Justice pro tem., concur.

LAWLOR, J., and SLOANE, J., dissent from decision of case without further consideration.

189 Cal. 306

GERVASONI et al. v. CITY OF PETALUMA et al. (S. F. 9867.)

(Supreme Court of California. July 11, 1922.)

1. Public lands ☞132—Evidence held to establish bona fide occupancy by grantee of town-site lands.

Upon the issue of whether a grantee was an undisputed occupant of land in the city of Petaluma acquired by deed in 1868 from the town trustees under authority in St. 1867-68, p. 298, enacted to carry out an act of Congress approved March 1, 1867, granting to municipal authorities a trust to convey land "in the bona fide occupancy of parties," and where the city now claims an easement for a street across grantee's lot, but the deed contained a recital that the grantee was a bona fide occupant, evidence considered, and *held* sufficient to support a finding for grantee.

2. Estoppel ☞62(4)—Assessment of property not estoppel to claim land a street.

Proceeding for improvements and assessment and collection of assessments upon certain lands does not estop a city from claiming such assessed land to be a street.

3. Public lands ☞132—Actual occupancy by town-site grantee not disproved by official map showing street across grantee's property.

Grantee acquired land in Petaluma by deed in 1868 from the town trustees acting under authority of St. 1867-68, p. 298, enacted to carry out an act of Congress approved March 1, 1867, granting a trust to municipal authorities to convey United States lands where "in the bona fide occupancy of parties." Congressional act approved in 1864 provided for survey and platting of Petaluma, pursuant to which the trustees approved and recorded the "Stratton" map, which delineated a street as traversing grantee's land. In contesting grantee's occupancy at time deed was given the city asserted the existence of this street. *Held* that, although the land description was by reference to lot numbers upon this map, the rights of the occupants with reference to a street platted, but not otherwise shown to exist, were not affected by the acts providing for the map, since there was authority to represent only those streets actually existing, and a new layout was not permissible without consent of the occupants.

4. Public lands ☞132—Grantee of town-site lands held not to admit correct delineation of streets upon map showing lot numbers by which his property was conveyed.

Grantee acquired land in the city of Petaluma by deed in 1868 from the town trustees acting under authority of St. 1867-68, p. 298, enacted to carry out act of Congress approved March 1, 1867, granting a trust to municipal authorities to convey lands where "in the bona fide occupancy of parties." Congressional act approved in 1864 provided for survey and platting of Petaluma, pursuant to which the trustees approved and recorded the "Stratton" map, which delineated a street as traversing grantee's land. *Held*, that the city, in contesting grantee's occupancy at time deed was given, could not prevail in asserting that acceptance of deed referring to courses and lot numbers shown on the Stratton map bound grantee as an admission of the correct delineation of the street, especially where the deed expressly recited that grantee was in exclusive occupancy, as this recital raised an inference that the entire lot was conveyed.

5. Trial ☞412—Objection to admission of deeds waived where objecting counsel stated chain of title did not require investigation.

Objection to admission of deeds showing chain of title in an action to quiet title was waived where objecting counsel, answering a question of the court whether there was anything that would require investigation of the deeds, stated, "I think there is a complete chain of title."

In Bank.

Appeal from Superior Court, Sonoma County; Emmett Seawell, Judge.

Action to quiet title by Charles Gervasoni and others against the City of Petaluma and

others. Judgment rendered, from which defendants appeal. Affirmed.

E. J. Dole, of Petaluma, for appellants.

F. A. Meyer, of Petaluma, and T. J. Geary, of Santa Rosa, for respondents.

RICHARDS, Justice pro tem. This action is one to quiet title to certain property in the city of Petaluma, to which the plaintiffs claim ownership in fee simple, but which title the defendant city of Petaluma denies, and further sets up an easement and right of way for passage through, over, and across the said property as a public street. The trial court found in the main in the plaintiffs' favor, adjudging them to be the owners of the frontage claimed by them upon Main street in said city, but reserving to the city certain easements in the rear portion of the property covering what is known as "Water street." The defendants have appealed from the judgment.

As to the main facts in the case there is no material dispute. The city of Petaluma had its beginning during or possibly prior to the year 1850, when a number of settlers collected on the westerly side of Petaluma creek, or river, at a point at or near the head of navigation of the said stream. The land at that point was unsurveyed, and therefore unoccupied, government land, the title to which was vested in the United States. A town grew up at this point, roadways and streets were located according to convenience and by user, and property occupied by the settlers became of more or less value, and not a few transfers were made. For more than a decade there was no other title in the occupants of the property thus acquired and transferred than the possessory title of those who had settled thereon or their successors. Prior to 1860 there appears to have been a map of the town known as the "Brewster map," but it does not appear to have been found or offered in evidence in this case. In the year 1858 the town of Petaluma was incorporated by a special act of the Legislature, which defined the exterior limits of said town, but which did not embrace any details as to its interior lots, blocks, or streets. Stats. 1858, p. 140. In the year 1860 a survey and map known as the "Eliason map" was made by order of the board of trustees of the town, which purported to show its lots and streets as they then existed on the ground, and which survey and map, after some minor changes had been made by order of that official body, was accepted and filed as an official map of said town. In 1864 (13 Stat. 343) an act of Congress was adopted providing for a survey of the town of Petaluma, which act embodied a method for acquiring title to the lands held by bona fide occupants at the time of the adoption of said act. This act was amended in certain particulars a year later. (13 Stat. 529). The survey provided for in said act was made

and a map drafted and adopted and known as the "Stratton map." This map was much more detailed as to the size and description of the lots and width and location of the streets delineated thereon than was the Eliason map, from which it also differed in certain other particulars to be hereafter noted. The Stratton map was approved and certified by the trustees of the said town and was filed for record in the recorder's office of the county of Sonoma as and for an official map of Petaluma, December 30, 1865. On March 1, 1867, an act of Congress was approved providing:

"That all the right and title to the land situated within the corporate limits of the towns of * * * Petaluma, in the state of California, as defined in the acts of the Legislature of that state incorporating said towns, be, and the same [is] hereby relinquished and granted to the corporate authorities of said towns and their successors, in trust, for and with authority to convey so much of said land as is in the bona fide occupancy of parties, upon the passage of this act, by themselves or tenants, to such parties: Provided, that this grant shall not extend to any reservation of the United States nor prejudice any adverse right or claim, if such exist, to said land or any part thereof, nor preclude a judicial examination and adjustment thereof." (14 Stat. 418).

In the following year the state Legislature adopted an act authorizing the trustees of the town or city of Petaluma to execute the trust provided for in the foregoing act of Congress by the execution and delivery of deeds to the persons entitled thereto under said congressional act. This act contained a proviso:

"That in all cases of dispute or contest the parties or persons disputing or contesting shall settle and determine their respective rights in the courts of this state; and the said trustees shall, in no case of dispute or contest, make, execute or deliver a deed to either disputant or contestant until a final determination of the rights of the parties in the courts as herein provided." Stats. 1867-68, p. 298.

In the meantime, and commencing, as we have seen, early in 1850, the influx of settlers upon the town site of Petaluma had been going on. Among these early settlers coming in about the year 1850 were Capt. Tom Baylis and David Flogdell and his wife, Honora. The two men were intimate friends and probably partners. They built and for a time conducted together upon a portion of the property they had settled upon the Pioneer Hotel, which, according to tradition, bore the more intimate appellation of "Tom and Dave's." At the early date of their arrival and appropriation of the properties they occupied there were no streets, but the Pioneer Hotel, according to the quite exact identification of several early settlers, stood upon or near the corner of an indefinitely

outlined passageway leading down to tide-water, where boats were accustomed to land. That this passageway had not, as late as 1860, acquired the definiteness or character of a public street would seem to be fairly inferable from the fact that it is not laid out or delineated as such upon the Eliason map as accepted and approved by the trustees of the town in that year, and from which it appears that English street, of which it would otherwise have been the elongation, terminated at the west line of Main street, and that the property across which said passageway ran appears thereon as lots 8 and 9 of block B, and is not shown to be traversed by any road, passageway or street. After a time the firm of Baylis & Flogdell was dissolved, and they divided up their properties, Baylis taking the lower or southerly lot, while the lot upon which the Pioneer Hotel stood was retained by Flogdell, who continued to conduct the hotel, while Capt. Baylis retained the shipping business which had grown up at the landing place below. Flogdell died in the early '60's, and his widow, Honora, succeeded to the hotel property. Some controversies, more or less traditional, seem to have arisen between Capt. Baylis and the widow of his former associate over the passageway which ran across their properties down to the landing place, but these disputes were finally settled by the marriage of Capt. Baylis and the widow, Honora, at a date in the middle '60's not precisely fixed. Capt. Baylis seems also to have departed this life upon some date prior to 1868, since it appears that Honora Baylis was his widow at an early date in the latter year. On April 14, 1868, the board of trustees of the town or city of Petaluma, acting under the authority of the act of Congress of 1867 above referred to, and also and by authority of the act of the Legislature of 1868 empowering them to execute the trust with which they had been invested by the congressional act of the previous year, executed a deed to Honora Baylis, purporting to grant to her a lot "commencing on the east line of Main street at the southeast corner of lot 353; thence southerly along the easterly side of Main street 80 feet; thence at right angles to Petaluma creek; thence northerly up said creek to a point at the continuation of the southerly line of said lot 353; thence following the southerly line of lot 353 westerly to Main street and the place of beginning." The number of the lot given as lot 353 in the foregoing description refers apparently to the lot designated by that number upon the Stratton map, and the tract of land covered by the foregoing description would, as to a portion thereof, include the 50-foot frontage of lot 352½ as shown upon said map, and would also, and in addition thereto, embrace about 30 feet of the land which was designated on said map as a continuation of English street down to Petaluma creek.

This deed contains the following significant recital:

"Said party of the second part having fully complied with all of the provisions of said ordinances of said board of trustees, and her claim to said premises having been fully approved by them, the said Honora Baylis having been a bona fide occupant of said premises on the 1st day of March, A. D. 1867, by herself and tenants and agents, as will appear by the proofs on file with said trustees."

Shortly after this deed had been executed and delivered to her, Honora Baylis entered into a transaction between herself and the administrator of her deceased husband, Capt. Thomas F. Baylis, wherein the parties thereto undertook to deal with the passageway across their respective properties. Honora Baylis conveyed to said administrator an easement over a strip of 11 feet along the southerly line of her tract of land as described in her deed just received from the trustees of said town or city, extending from Main street to Petaluma creek, which strip of land was to be held by the grantee and his successors "as a perpetual easement for a passageway." Of even date with said deed the administrator conveyed to Honora Baylis an easement on a strip of 11 feet in width along the northerly line of the lands of the estate of Baylis adjacent to the strip conveyed by Honora Baylis to him, and which was also to serve "as a perpetual easement for a passageway." By these two transfers a right of way for an alleyway 22 feet wide was evidently created for the benefit, at least, of the occupants of these adjoining properties. The Pioneer Hotel building, together with a number of other structures in its vicinity, was destroyed by fire some time in the late '60's, and the property remained, except as to some small shacks which appear to have been placed upon portions of it, for several years untenanted. In the year 1871 Honora Baylis subdivided her said property into three lots, which she sold to different parties, who went into possession of their respective portions, erecting buildings and engaging in business thereon. The person who thus purchased the most southerly of these lots from Honora Baylis transferred the same by mesne conveyances to William Sexton, who became the owner thereof in about 1875 and erected a building thereon. This building, however, instead of being confined to the limits of the lot, as described in his deed, was so erected as to cover the northerly portion of the 11-foot strip which Honora Baylis had theretofore conveyed to the estate of her deceased husband, Capt. Thomas F. Baylis as her portion of the adjacent passageway, thus leaving the said passageway or alley but 11 feet wide, and said structure has ever since stood upon that spot and ever since been occupied under a claim of exclusive right by the successors in interest of said Sexton, who are the plaintiffs

herein During all of these years the evidence shows that the passageway from Main street down to the landing of Petaluma creek was used by various persons for the purpose of gaining access to said landing with their teams and produce. As to many of these they were persons bringing their produce to the landing where Capt. Baylis and his associate, Flogdell, carried on their shipping business prior to the division of their interests in about 1864. Such user at first straggled over an indefinite extent across the properties of Baylis and Flogdell, and later was confined to the 22-foot strip defined by the deeds passing between Honora Baylis and the administrator of Capt. Baylis' estate, and later still further confined to the southerly 11 feet of said strip by the fact of the erection of the structure last referred to upon the northerly 11 feet thereof. As to the public user or the right to use the 11-foot alleyway, to which width it has been thus limited since about the year 1875, no question arises in this case; the issues herein being confined to the portion of the lot the title to which was claimed by the plaintiffs' predecessors to have been acquired by Honora Baylis by virtue of the deed of the same to her by the trustees of the town of Petaluma in about 1868.

The defendants upon this appeal make the following contentions: (1) That the deed of the trustees of the town of Petaluma to Honora Baylis, which forms the foundation of the respondents' title to the premises in dispute, was and is void; (2) that the defendants' motion for nonsuit should have been granted; (3) that the defendants' demurrer to the plaintiffs' complaint should have been sustained; (4) that the court committed certain errors in law during the trial, to be hereafter noted; (5) that the findings do not support the judgment; (6) that the decision is against law.

[1, 2] As to the appellants' contention that the deed to Honora Baylis was and is void, this rests chiefly for its support upon the claim that Honora Baylis was not a bona fide and undisputed occupant of said premises at the time of the execution of said deed so as to be entitled thereto under the terms of the act of Congress granting the town site of the town of Petaluma and of the act of the Legislature authorizing the trustees of said town to make grants of lots therein to the persons entitled thereto under said congressional act. The question as to whether Honora Baylis was such an occupant of the premises in question as to be entitled to such deed is a question of fact to be determined by the trial court, and the trial court determined it adversely to the appellants' contention by its general finding that the plaintiffs, as the successors in interest and title of Honora Baylis, were the owners of the property. There is ample evidence to justify this finding; and, while there is some evidence

of travel over and across this piece of land by persons going down to the landing with their produce in the earlier days of the town's history, there was no evidence that such travel and use of the rather ill-defined passageway over this property at that time was carried on by the public under any claim of right or under circumstances showing a dedication of the property to the uses of a public street. On the contrary, there is some very direct evidence showing that such was not the case, as, for example, the Eliason map made by order of the town trustees in 1860 and adopted after some changes as the official map of the town, which map shows English street as terminating at the west line of Main street, which delineates the property in question as being lots 8 and 9 in block B of said map, with no street or alley or passageway indicated as intersecting the same. Again, the trustees of said town were authorized by the act of Congress and the state Legislature to execute conveyances only to those who were in the bona fide and undisturbed possession of the property for which deeds were applied. The deed to Honora Baylis by said trustees contained the recital above quoted and from which it would appear that the said trustees, before making said deed, investigated the question of the right of Honora Baylis thereto and of the fact that she was the undisputed occupant of the premises to which she sought a deed and that proofs of her right thereto as such occupant were on file. It is not necessary to go so far as to hold that the town of Petaluma was bound by this recital; it is enough to say that it furnishes very cogent evidence as to the truth of the facts recited. There is also some evidence showing that the municipality recognized the title of the successors of Honora Baylis to the property it had conveyed to her by the institution of proceedings for making street improvements along Main street and by the collection of assessments levied against the property now claimed to be a public street for the purpose of making said street improvements. These matters also, while not binding as in the nature of an estoppel, furnish some evidence of acquiescence on the part of the city in the claim of ownership of the premises asserted by the successors of Honora Baylis holding under the aforesaid conveyance of the premises from the trustees of the municipality to her.

[3, 4] The appellant further urges in support of his contention that the deed to Honora Baylis was invalid in so far as it purported to convey the premises now claimed to be a public street, for the reason that said deed to her was made after the resurvey of the lands of the town under the act of Congress of 1864 and the making and adoption of the Stratton map, upon which map said lands were plotted as an extension of English street to tidewater. The appellant fur-

ther urges that the fact that the description of the property conveyed in the Baylis deed refers by number to one of the lots delineated on the Stratton map binds the party taking said deed to a recognition of the correctness of the Stratton map in so far as it purports to delineate a street as traversing said property. Neither of these contentions is sound. This court had occasion in the early case of *Jones v. City of Petaluma*, 36 Cal. 230, to pass upon the effect of the acts of Congress of 1864 and 1867 in relation to the lands of the town or city of Petaluma in the actual occupancy of bona fide settlers thereon, and upon the effect of the making of this very survey and map under said acts. A public square had been delineated upon said map, and it was the claim of certain of the parties to the above case that at the time of the passage of said acts and the making of said map they were in the bona fide occupancy of lands forming a portion of said public square as the same appears upon said map. In disposing of this claim this court held that the rights of such occupants could not be affected by the terms of said acts having reference to the making of a survey or map of the town. In the case of *Aleman v. City of Petaluma*, 38 Cal. 553, the same subject was presented with particular reference to the delineation upon said map of a certain street claimed to have been at the time in the bona fide occupancy of private persons, and this court said with respect to such claim:

"The map which they were authorized to make was a map representing the existing streets, alleys, and squares, and such others as the occupants of the property might consent to. But it was not within the contemplation of the act that the persons getting up a map of an existing town might wholly disregard the former plan, lay out new streets, alleys, and squares, upon property before then devoted to private use, without the consent of the occupants. Such a power, in the hands of a few persons proceeding to secure the benefits of the act of July 1, 1864, to an already existing town, would have been liable to the grossest abuses, and destructive of the private rights which the act was mainly designed to foster."

A like rule has quite generally been adhered to in other jurisdictions in cases where similar conditions were presented. *Scully v. Squier*, 13 Idaho, 417, 90 Pac. 573, 30 L. R. A. (N. S.) 183; *Parchen v. Ashby*, 5 Mont. 68, 1 Pac. 204; *Ashby v. Hall*, 119 U. S. 526, 7 Sup. Ct. 308, 30 L. Ed. 469. Nor is the fact that the grantee in the Baylis deed took said conveyance with a description, which in certain of its courses referred to a lot by its number as shown upon the Stratton map, to

be held as binding said grantee to an admission of the correctness of said map otherwise than as to the location of said lot. The inference arising on the face of said description would rather be otherwise, since the officials of said town, with said map before them showing the apparent existence of a street across a portion of the property they were purporting to convey to the grantee, nevertheless conveyed the same, and in their said conveyance expressly recited that the said grantee was in the exclusive and bona fide occupancy of the premises covered by said description and was entitled to a deed thereto notwithstanding the delineations of said map showing that a portion of said premises was a public street.

The foregoing conclusions dispose of the several contentions of the appellant in so far as they relate to the sufficiency of the complaint and of the evidence educed in support of its averments as against a motion for nonsuit.

[5] It remains to deal briefly with certain alleged errors of law claimed to have been committed during the trial of the cause. The first group of these refers to the defendants' objections to the admission in evidence of the deed to Honora Baylis on account of the infirmities above disposed of, and also to the admission in evidence of the other deeds to her successors in the chain of title. As to these later instruments any objection which the defendants might have had to their admission on the ground of defects in their description or in their execution would seem to have been waived by the following colloquy between the trial court and counsel for the defendants after the admission in evidence of the Baylis deed, viz.:

"The Court: Is there any alleged break in the present title of the owner coming down to the city of Petaluma, providing the city of Petaluma could or did convey in the manner plaintiff claims. There is nothing that would require an investigation of those deeds is there?"

"Mr. Dole: I think there is a complete chain of title from the city of Petaluma down."

The remaining objections to the rulings of the trial court are merely stated, but not seriously supported by argument, nor by any citation of authority, and do not appear to present any points worthy of discussion in detail or sufficiently important to justify a reversal of the case. We find no sufficient error in this record to warrant such reversal.

The judgment is affirmed.

We concur: SHAW, C. J.; WASTE, J.; SLOANE, J.; LAWLOR, J.; WILBUR, J.

189 Cal. 335

**REAUGH et al. v. CUDAHY PACKING CO.
et al. (L. A. 7049.)**

(Supreme Court of California. July 27, 1922.)

1. Trial $\hookrightarrow$ 165—Inferences favorable to plaintiff must be adopted on motion for nonsuit.

Motion for nonsuit is in effect a demurrer to the evidence supporting plaintiff's case, which presents to the trial court a question of law, and for the purpose of the motion assumes the truth of all evidence educed by plaintiff, and upon this motion it is the duty of the court to adopt only those reasonable inferences fairly deducible from the evidence which are most favorable to plaintiff.

2. Municipal corporations $\hookrightarrow$ 705(5) — Motor vehicle driver may be negligent though not exceeding speed prescribed by statute.

Motor Vehicle Act, St. 1919, p. 220, § 22, providing that vehicles shall be driven "at a rate of speed not greater than is reasonable and proper, having regard to the traffic and use of the highway," and such as not to endanger any persons, is a statutory reiteration of the rule that drivers shall be watchful in anticipation of the presence of others at places such as crossings, where other vehicles and pedestrians are constantly passing, and in such situations the rate of speed may be negligent although not exceeding that prescribed as lawful by other provisions of the statute.

3. Evidence $\hookrightarrow$ 14 — South Main street and Eighth street, Los Angeles, judicially noticed as busy thoroughfares.

It may be accepted as a matter of judicial knowledge that South Main street and Eighth street in Los Angeles are busy thoroughfares and are usually congested with pedestrians and vehicular travel at 1:20 in the afternoon.

4. Municipal corporations $\hookrightarrow$ 706(6)—Evidence held to raise jury question as to negligence of motor vehicle driver.

Question as to defendant's negligence in view of Motor Vehicle Act, St. 1919, p. 220, § 22, providing for the careful operation of motor vehicles at a rate of speed safe with regard to traffic and use of the highway, for exceeding the speed of 10 miles per hour and driving within 6 feet of a street car when passing it, as prohibited by section 20, subdivision O, held for the jury.

5. Municipal corporations $\hookrightarrow$ 706(7)—Plaintiff, struck by automobile while passing in front of street car, held not negligent as a matter of law.

Plaintiff, who was crossing towards the west in front of a south-bound street car which was about to stop at a street intersection, and was struck by defendant's automobile, within 2 feet of and passing the street car, held not negligent as a matter of law.

6. Municipal corporations $\hookrightarrow$ 705(10)—Pedestrians not bound to stop, look, and listen when about to cross busy thoroughfare.

Notwithstanding the view may be obstructed, there is no positive duty upon pedestrians about to cross busy thoroughfares to stop,

look, and listen at a crossing which is the regular stopping place, for street cars, nor is this duty imposed while pedestrians are proceeding across the street in front of cars at their regular stopping places, especially where they may rely upon automobiles not being driven within 6 feet alongside the cars, as provided by Motor Vehicle Act, St. 1919, p. 217, § 20, subd. O.

7. Negligence $\hookrightarrow$ 136(9)—Contributory negligence question of law, when there is but one inference.

Contributory negligence is a question of law only when the court is impelled to say that from the facts reasonable men can draw but one inference, and that an inference pointing unerringly to negligence of the plaintiff contributing to his injury.

In Bank.

Appeal from Superior Court, Los Angeles County; Charles Monroe, Judge.

Action by Henry T. Reaugh and Hattie L. Reaugh against the Cudahy Packing Company and F. T. Wells. From a judgment of nonsuit, plaintiffs appeal. Reversed.

Frank J. Lavan, of Culver City, and George L. Greer, of Los Angeles, for appellants.

Jennings & Belcher, of Los Angeles, for respondents.

LENNON, J. In this action for damages for personal injuries the plaintiffs, husband and wife, appeal from a judgment of nonsuit entered in favor of the defendants. The motion for a nonsuit was made and granted upon the grounds that the evidence educed in support of the plaintiffs' case failed to show negligence on the part of the defendants, and did show contributory negligence on the part of the plaintiff Hattie L. Reaugh, the injured party, who will be hereinafter referred to as the plaintiff.

The established facts of the plaintiff's case substantially stated are these: At about the hour of 1:20 in the afternoon of October 23, 1920, the plaintiff was struck and seriously injured by a Dodge roadster automobile owned by the defendant the Cudahy Packing Company, and driven by the defendant Wells, who at the time of the accident was agent and employee of the defendant company. Immediately preceding the accident plaintiff was in the act of crossing South Main street in the city of Los Angeles at its intersection with Eighth street, and as she stepped from the easterly curb of South Main street she observed approaching a south-bound electric street car. Upon reaching the middle of the street plaintiff stopped and waited until the street car came to a stop, and then started to cross the tracks, passing in front of the standing street car approximately 10 feet from its front end. The place where the street car came to a stop was its usual stopping place, and it was usually stopped there for the

purpose of permitting pedestrians to cross the street. Plaintiff's left foot had projected across the outer or westerly rail of the street car track, her right foot still being within the space between the two rails, when the automobile driven by the defendant Wells "bore down upon her." The left front wheel of the automobile caught and pinned down plaintiff's left foot, and at the same instant she was struck on the left side of her body by the left front fender of the automobile, and violently thrown backwards to the pavement. At the time plaintiff stood in the middle of the street waiting for the street car to stop, the automobile in question was observed by a witness to the accident to be at a distance of between 100 and 150 feet behind the street car, and traveling at the rate of 25 or 30 miles per hour in the same direction with the street car. The street car was slowing down, but the automobile continued to travel at the speed just stated until it approached to within 10 or 15 feet of the street car, when it slowed down to about 15 miles an hour, and then swung to the right of the street car just sufficiently to make a clearance, and continued its course alongside the street car at a speed of 12 or 15 miles an hour. The front part of the automobile cleared the front steps of the street car by about 2 feet. The rear part of the automobile was further away from the street car, that is to say, the front part of the automobile when it passed the front steps of the street car, was closer to the rail than the rear end of the automobile, which was between 3 and 4 feet of the rail. The brakes of the street car had been applied, and the car itself was almost at a complete stop when the automobile swung to the right and the car was standing still when the automobile, between 2 and 3 feet from the car and 10 feet from the street curb, and still traveling at a speed of 12 or 15 miles an hour, passed the front steps of the street car. The automobile did not slow down its speed below 12 or 15 miles an hour until after it collided with plaintiff. Other pedestrians were present and passing on the street crossing where the plaintiff was struck, and while plaintiff was proceeding across the tracks in front of the standing car she "was looking all around," but because the automobile came so quickly she did not notice its approach until it struck her.

The Motor Vehicle Act (Stats. of 1919, pp. 191 to 217, subd. O, § 20) provides that—

When "passing any * * * street car while passengers are alighting from or boarding the same, vehicles shall be operated or driven on the right hand side of such cars and at a rate of speed not exceeding 10 miles an hour and no portion thereof * * * shall come within six feet of the running board or steps of such cars, and shall at all times be operated with due care and caution so that the safety of passengers shall be assured."

It was a stipulated fact in the plaintiff's case that the distance from the west curb of South Main street to the nearest street car rail is 18 feet and 2 inches. The trial court was evidently of the opinion that the negligence complained of was predicated primarily upon a violation of the Motor Vehicle Act in driving the automobile alongside a standing street car closer than 6 feet and faster than 10 miles an hour, and accordingly held the defendants free from actionable negligence in the absence of any evidence showing that the street car had fully stopped, and that passengers were alighting therefrom at the time the automobile swung to the right of and passed the street car. The plaintiff's case, however, as presented in the amended complaint, did not proceed entirely upon the theory that the injuries to her resulted from the "unlawful manner" in which the automobile was operated, but alleged as well that the accident and the injuries to the plaintiff were the result of the "careless, negligent, and reckless * * *" operation of the automobile by the defendant Wells.

[1] The motion for a nonsuit being in effect but a demurrer to the evidence received in support of the plaintiff's case, presented for the decision of the trial court purely a question of law, and, therefore, for the purpose of the motion, assumed the truth of all the evidence adduced in support of the plaintiff's case. This is the settled and generally well-understood rule, and, taking such evidence as true, it was the duty of the trial court, without regard to the conflicts, if any, appearing therein, to adopt only those inferences, reasonable, of course, fairly deducible therefrom, which were most favorable to the plaintiff. The evidence bearing immediately upon the happening of the accident, as hereinabove outlined, is stated according to its fair and reasonable tendency, and viewing it, as must be done for the purpose of testing the effectiveness of a motion for nonsuit, in the light of inferences most favorable to plaintiff's case, we are constrained to hold that it clearly created a prima facie case of negligence against the defendants.

[2] Conceding, as is contended, that the Motor Vehicle Act, concerning the operation and control of vehicles approaching and passing standing street cars, unloading or receiving passengers, was intended solely for the benefit of passengers, and not pedestrians, and that, therefore, it cannot be said, in the absence of a showing that the street car in question had come to a complete stop and that passengers were alighting therefrom or about to board the same at the time the automobile swung to the right, that defendant Wells was not guilty of negligence per se in passing the street car in question closer than 6 feet and faster than 10 miles an hour. It may also be conceded that the rate of speed at which the defendant Wells was traveling when passing the street car was not

in excess of the 15 miles an hour rate provided and permitted by other provisions of the Motor Vehicle Act (Stats. of 1919, p. 220, § 22), and that therefore actionable negligence cannot be predicated upon a violation of the statute in that particular. But it will be noted that the Motor Vehicle Act (Stats. of 1919, p. 220, § 22) also provides that—

“Any person operating or driving a motor or other vehicle on the public highways shall operate or drive the same in a careful and prudent manner and at a rate of speed not greater than is reasonable and proper, having regard to the traffic and use of the highway, and no person shall operate or drive a motor vehicle or other vehicle on a public highway at such a rate of speed as to endanger the life or limb of any person or the safety of any property.”

This is but a reiteration of the rule, in statutory form, which has always been in force without regard to a statutory promulgation to the effect that drivers or operators of vehicles, and more particularly motor vehicles, must be specially watchful in anticipation of the presence of others at places where other vehicles are constantly passing, and where men, women, and children are liable to be crossing, such as corners at the intersections of streets or other similar places or situations where people are likely to fail to observe an approaching automobile. 2 R. C. L. 1184, § 19.

So, therefore, even though the statutory limitation of speed has not been exceeded, the rate of speed at which an automobile may be traveling may be held under some circumstances to be negligent. That is to say, the operator of an automobile is not necessarily exempt from liability for injuries to other persons occurring in a public street by showing simply that at the time of the accident he was running at a rate of speed allowed by law. He still remains bound to anticipate that he may meet persons at any point of the street, and he must, in order to avoid a charge of negligence, keep a proper lookout for them and keep his machine under such control as will enable him to avoid a collision with another person using proper care and caution, and if the situation requires he must slow up and stop. *Kessler v. Washburn*, 157 Ill. App. 532; *Zarzana v. Neve Drug Co.*, 180 Cal. 32, 179 Pac. 203, 15 A. L. R. 401.

[3] Although not shown in evidence, it may be accepted as a matter of judicial and general knowledge, as it doubtless was by the court below as a fact in the case that both South Main street and Eighth street, in the city of Los Angeles, are business thoroughfares which, at the hour at which the accident in question occurred, are usually congested with pedestrians and vehicular travel of all kinds. *Varcoe v. Lee*, 180 Cal. 338, 181 Pac. 223, and *Fifth Ave. Coach Co. v. New*

York, 221 U. S. 467, 31 Sup. Ct. 709, 55 L. Ed. 815.

[4] The place of the accident, at the intersection of a busy street in the downtown business section, the time of its occurrence, 1:20 in the afternoon of Saturday; the custom of stopping the street car at the point of the accident to permit pedestrians to pass—are all circumstances which make the question of the negligence of the defendants one of fact and not of law which should have been submitted to the jury for deliberation.

[5] It is further contended by respondents that plaintiff was guilty of contributory negligence in failing to exercise a proper degree of care for her own safety. In this behalf it is argued that plaintiff, as a matter of law, was in duty bound to look towards the north to see if any automobile was approaching, and, further, that had she so looked she necessarily must have seen respondent's on-coming car unless her view was obstructed. That is to say, it is insisted if she could have seen the approaching automobile and did not she was negligent, and that if her view was obstructed she was negligent, as a matter of law, in leaving a place of safety and attempting to cross the street.

There is no evidence showing as a matter of law that plaintiff could have seen the machine on her right, or that she heedlessly or carelessly stepped into the path of the moving automobile. There was nothing to warn her that the automobile would turn in toward the car track immediately upon passing the car. She had not passed clear of the car rails, concededly under the circumstances a place of safety, and while she could without effort have seen the traffic to her left, from which source there was no danger, her view to the right must of necessity have been obstructed by the standing car, making it extremely difficult, if not impossible, for her to have observed a vehicle approaching, as was defendant's automobile, in such close proximity to the car. Even had she seen the approaching automobile, she could not have avoided being struck, for the machine, less than 20 feet away and traveling at the rate of 22 feet a second, would have been upon her before she could draw back after first sighting it.

[6] It was not negligence as a matter of law under the circumstances of this case on the part of Mrs. Reaugh to attempt to cross the street merely because her view to the right was obstructed by the street car. To require a pedestrian to refrain from crossing a busy street intersection in the business section of a large city during a rush hour until the street is free from obstructions would be to require more than ordinary care, and to impose upon such pedestrian the degree of care applicable in all its strictness only to travelers at a railroad crossing in looking out for approaching trains. That such a degree

of care was imposed upon pedestrians was negated in *Mann v. Scott*, 180 Cal. 550, 182 Pac. 281, wherein the rules of law with regard to the respective rights and obligations of persons using the public streets were considered by this court, and it was there held that there was no positive duty on the part of pedestrians about to cross a street to stop, look and listen, and that the question of negligence, under the usual rule of ordinary care that devolved on pedestrians, must be examined and applied in the light of all the attending circumstances. From the position of the defendant's automobile with reference to its proximity to the street car shortly before striking the plaintiff, coupled with the fact that plaintiff, having been partly within the space between the two rails just before she was struck, could scarcely have advanced her left foot a distance of 3 feet beyond the outer rail, it is a fair inference that the automobile just before it struck the plaintiff was swinging in toward and closer to the car tracks, thereby lessening the distance between the auto and the rails. Another of the attending circumstances of the instant case was the usual practice of stopping street cars at that particular point to permit pedestrians to pass. There was no reason for plaintiff to anticipate that an automobile would suddenly emerge from a concealed position, going at the rate of 15 miles an hour. *McMullen v. Davenport*, 44 Cal. App. 695, 186 Pac. 796. On the contrary, plaintiff was justified in assuming that the street car had stopped for the purpose of permitting passengers to board the same or alight therefrom, and that therefore motor vehicles traveling to the right of and in the same direction of the street car would, in keeping with the provisions of the Motor Vehicle Act, be driven not closer than 6 feet from the running board or steps of such car. *Mann v. Scott*, supra. If the defendant Wells had been driving the automobile in question at the prescribed distance of 6 feet from the street car, as plaintiff had a right to assume in view of all the attending circumstances, there would, of course, have been no accident, for it is apparent that in such a situation the defendant could not have failed to observe the plaintiff, and she would have had ample opportunity to have seen and avoided the on-coming automobile.

[7] Contributory negligence is a question of law only when the court is impelled to say that from the facts reasonable men can draw but one inference, and that an inference pointing unerringly to the negligence of the plaintiff contributing to his injury. *Zibbell v. S. P. Co.*, 160 Cal. 237, 116 Pac. 513; *Wing v. Western Pacific*, 41 Cal. App. 251, 182 Pac. 969; *Bailey v. Market St. Ry. Co.*, 110 Cal. 320, 328, 42 Pac. 914.

Under the evidence stated the question of the negligence of the defendant and that of the contributory negligence of the plaintiff

were clearly questions of fact for the determination of the jury. The motion for a nonsuit was therefore improperly granted.

The judgment appealed from is reversed.

We concur: SHAW, C. J.; LAWLOR, J.; WILBUR, J.; SHURTLEFF, J.; WASTE, J.; SLOANE, J.

57 Cal. App. 613

BIGELOW et al. v. MERZ.

(Civ. 4211; S. F. 9976.)

(District Court of Appeal, First District, Division 1, California. May 5, 1922. Hearing Denied by Supreme Court July 3, 1922.)

1. Waters and water courses ☞100—Riparian owner is limited to reasonable use of stream arising on his land.

The fact that the stream in controversy is a small one rising from springs on the lands of one of the parties does not give the owner of the land on which it rises any greater riparian rights than he would have in the case of other streams, if there is a water course flowing through a defined channel, but he is limited to a reasonable use thereof, having due regard to the rights of other riparian owners farther down the stream.

2. Waters and water courses ☞87—Testimony that defendant's diversion prevented water from reaching plaintiff authorized denial of nonsuit in suit for injunction.

In an action between riparian owners, defendant's motion for nonsuit was properly denied, notwithstanding his evidence that more water was flowing in the stream below the lowest point at which he diverted any therefrom than farther up, where plaintiff testified that no water flowed through his land when defendant was diverting it above, but a sufficient supply reached him when defendant was not diverting it.

3. Waters and water courses ☞87—Reservation in apportionment of water, giving riparian owners right to bring subsequent proceedings, held not erroneous.

In a suit to enjoin the unreasonable use of water by an upper riparian owner, where the court found plaintiffs were entitled to a portion of the water, but that the evidence did not establish the facts on which an apportionment could be based, a reservation in the decree giving either party the right to institute subsequent proceedings for apportionment of water was not erroneous, as casting a cloud on defendant's title, since it merely stated what would have been the legal effect of the decree, in the absence of such reservation.

4. Appeal and error ☞1071(5)—Findings on issues immaterial to judgment are not prejudicial.

In an action to enjoin the unreasonable use of water by an upper riparian owner, findings by the trial court that at times defendant diverted the whole of the water, and fixing the amount of the water used by plaintiff, if erro-

neous because not supported by evidence, were immaterial to a decree establishing plaintiff's right to a reasonable portion of the water, but not fixing the apportionment.

On Hearing in Supreme Court.

5. Trial $\Leftarrow$ 388(3)—Formal findings need not accompany denial of nonsuit after trial to the court.

Where a cause is tried to the court and a motion for nonsuit is made at the close of plaintiff's evidence, on which decision is postponed for further consideration, and it is not decided until after defendant's evidence has been introduced, formal findings of fact are not necessary to a decision of the motion under Code Civ. Proc. §§ 632, 633.

6. Judgment $\Leftarrow$ 23—Mere announcement or order for judgment for defendant can be disregarded, and the judgment rendered for plaintiff.

Where no formal judgment was rendered, but the court merely announced, as shown by the minutes, that judgment would be given for defendant that plaintiffs take nothing by their suit, the court was at liberty thereafter to disregard the informal announcement or order, and render judgment for plaintiffs without formally setting aside the announcement.

Appeal from Superior Court, Sonoma County; Emmet Seawell, Judge.

Action by Guy J. K. Bigelow and others against G. Merz, to enjoin interference with flow of water. Judgment for plaintiffs, and defendant appeals. Affirmed.

T. Z. Blakeman, of San Francisco, for appellant.

R. M. Barrett, of Santa Rosa, for respondents.

KERRIGAN, J. This action was brought to enjoin the defendant from interfering with the flow of water from his land to that of the plaintiffs. The complaint set forth that the plaintiffs and the defendant were the owners of lands riparian to a stream of water having its source in springs situated upon certain described land and upon the land of the defendant, and flowing thence down to and upon the plaintiffs' lands; that said plaintiffs had for a number of years used a specified amount of the water of said stream for domestic purposes and for irrigation, and that it was necessary that they have the continued use of said water; that the defendant had diverted the whole thereof for his own purposes, and prayed for an injunction against him to prevent such diversion. The prayer of the complaint also contained a demand that the court apportion the waters of said stream among the parties to the action. The answer denied the material allegations of the complaint with certain exceptions, and set forth that the water diverted by the defendant came en-

tirely from springs arising upon his own land, and that the only water which reached the plaintiffs after the run-off of the winter rains had ceased was such as the defendant permitted occasionally to escape from his dams constructed to impound the waters of said springs. It also set up the claim that the right to the use of the water flowing from said springs belonged solely to the defendant as the owner of the land upon which they arose, and that no other person whatever had a right to the use of any of said water save and except and only to the extent that the defendant permitted any of it to escape from his said land, and claimed the right also to prevent such escape.

The court found that there was a creek flowing through the lands of the defendant and the plaintiffs, taking its source from seepage and percolating waters and in springs located on defendant's land, and flowing thence in a well-defined water course on, to, and through the lands of the plaintiffs; that the lands or portions of them of all the parties to the suit are riparian to said stream, and that each of said parties is entitled to a reasonable share of the water thereof for household and domestic purposes, for watering stock and for irrigation. It further found that the defendant had by means of dams, reservoirs, and a system of pipes diverted and appropriated the full flow of said water, but had not used the whole thereof for household or domestic purposes or for watering stock or irrigating land, permitting some to go to waste. Among the findings of the court is one to the effect that—

"The evidence introduced at the trial is insufficient to enable the court to determine the extent of the riparian rights of each of the parties to said action, and by reason of such insufficiency of evidence the question of determining the proportions of water to which each party is entitled is left open as an undetermined issue, which may hereafter be determined in a proceeding brought by either or any of the parties to this action, or the successor in interest of such party or parties, for such purpose."

As a conclusion of law the court decreed that each of the parties to the action is a riparian owner in and to the waters of said creek, and entitled to an undetermined portion thereof, and that neither party take judgment against the other for costs.

The defendant appeals, and makes several contentions in support thereof, the first of which relates to the action of the court upon a motion for nonsuit which the defendant made at the conclusion of the plaintiffs' case. The motion was not immediately acted upon, but was taken under advisement, and at a time some months before the filing of the findings of fact above referred to the court

made an order, which was entered in its minutes, that "Judgment be, and the same is hereby given the defendant, plaintiffs to take nothing by action." It is contended by the appellant that this order was in effect the granting of his motion for nonsuit, and that the court had no jurisdiction thereafter to make findings of fact in conflict with said order without first vacating it on notice to the defendant.

This order did not purport in terms to be a disposition of defendant's motion for nonsuit, but an order for judgment in his favor. But, since there was a trial the court was required, in the absence of a waiver by the parties, to give its decision in writing and file the same with the clerk. Code Civ. Proc., § 632. Such decision, setting forth separately the facts found and the conclusions of law, forms the basis of the judgment (Code Civ. Proc. § 633); and until rendered in accordance with those sections of the Code there is no authority for entering judgment. *Crim v. Kessing*, 89 Cal. 486, 26 Pac. 1074, 23 Am. St. Rep. 491; *Delger v. Jacobs*, 19 Cal. App. 197, 207, 125 Pac. 258. Being an order for judgment merely, it was not final nor binding; and the decision in writing subsequently filed with the clerk, being inconsistent with such order, superseded it.

It is next contended by the appellant that the motion for nonsuit should have been granted. The grounds advanced for this contention are: First, that the evidence, as he contends, shows that the only water diverted by him in the summer time was used on his own land for beneficial purposes, and was from the springs and creek which arose within and on his own land; and, second, that more water flowed in the creek past the lowest point of diversion by defendant than flowed at any point above, and the water flowing past said lowest point of diversion was not obstructed or interfered with by the defendant, but flowed on down the course of the creek toward plaintiffs' lands.

[1] As to the first ground, it is based upon the assumption that, since the source of the water was upon defendant's own land, he had the right to use the whole of it for beneficial purposes; and this idea is reproduced in his argument that his rights with regard to said water were not riparian in character, nor could the plaintiffs have any riparian rights therein. The contention is seriously advanced that a landowner cannot be riparian to a stream which has its source within and upon his land; and is attempted to be supported by the following quotations from decisions of the Supreme Court:

"The right of a riparian proprietor in or to the waters of a stream flowing through or along his land is not * * * right of ownership in or to those waters." *Hargrave v. Cook*, 108 Cal. 77, 41 Pac. 18, 30 L. R. A. 390.

A riparian proprietor has no "title or own-

ership in the water of a stream before it reaches his land," and has "no title to the water except as it passed in front of his land and constituted a stream." *Duckworth v. Watsonville*, 150 Cal. 525, 89 Pac. 338.

"It is held by * * * all the better authorities that the right of the riparian owner to the natural flow of the stream by or across his land, in its accustomed channel, is an incident to his estate." *Benton v. Johncox*, 17 Wash. 277, 49 Pac. 495, 39 L. R. A. 107, 61 Am. St. Rep. 912.

"All riparian owners through or by the side of whose land a stream naturally flows may enjoy the privilege of using it." *Kinney on Irrigation and Water Rights* (2d Ed.) vol. 1, § 455.

It is obvious that these citations do not support the contention of the appellant, and, indeed, the rule is otherwise.

"Water in a spring is water in a water course, however small, if it runs in a defined channel with a tendency to regularity." 1 *Wiel*, *Water Rights* (3d Ed.) § 336.

"Under the common law, each riparian proprietor had a right to ordinary use for domestic purposes of water flowing in a defined stream past or through his land. In the case of *Geddeis v. Parish*, 1 Wash. 587, 21 Pac. 314, the Supreme Court of Washington Territory held that a lower riparian owner was entitled to, and could exercise, this right, even though the waters of such stream originated in a spring upon the land of the person seeking to divert them from the natural channel." *Nielson v. Sponer*, 46 Wash. 14, 89 Pac. 155, 123 Am. St. Rep. 910.

"If the stream flows at its source by the operation of nature, that is, if it is a natural stream, the rights and liabilities of the party owning the land at its source are the same as those of the proprietors in the course below." *Broom's Legal Maxims* (8th Ed.) p. 297.

As to both such owners those rights must be exercised with due regard to the rights of others, and the situation is one to which has been applied the maxim: Enjoy your own property in such a manner as not to injure that of another person; "sic utere tuo," etc. This rule, so far from being departed from, has been extended in California to percolating waters. *Cohen v. La Canada Land, etc., Co.*, 142 Cal. 437, 76 Pac. 47. The claim, therefore, of the appellant to a paramount and exclusive right is untenable.

[2] The second point made by the appellant under his contention that his motion for nonsuit should have been granted, namely, that the evidence showed that more water flowed in the creek past the lowest point of diversion by the defendant than flowed in the creek at any point above, has little significance, in view of the testimony of plaintiff *Bigelow* tending to show that when the defendant was not diverting the water it reached his land, and he was able to procure an ample supply, but that when the defendant's dams and diverting pipes were in full operation no water reached him. Upon the motion for nonsuit the court of necessity ac-

cepted this testimony as true, together with its legitimate inferences.

[3] A further point is made by the appellant that the judgment is not in accord with or supported by the case made by the complaint and embraced within the issues. This objection has reference to a provision of the judgment to the effect that—

"Either or any of the parties hereto or his or her successor in interest may hereafter bring and maintain an action or proceeding for the purpose of determining the quantity or proportion of water that such party or parties are legally entitled to use for beneficial and useful purposes."

The occasion of this provision of the judgment was the demand contained in the prayer of the complaint that the court apportion the waters of the stream among the parties to the action. It is urged that the effect of this provision is to cloud and tie up indefinitely the title to the defendant's land. We see little merit in this contention. We do not perceive how it gives to any of the parties any right which they would not have had if such provision had been omitted from the judgment. In effect the court merely denied part of the relief sought, namely, a specific apportionment of the water basing its denial upon lack of facts necessary to enable it to make such apportionment. It found the issues in favor of the plaintiffs. Those issues were the ownership of land by each of the parties to the action riparian to a certain stream of water, and the necessity and convenience for each of them to use a reasonable portion of such water. If in the subsequent exercise by any of the parties of the rights confirmed or given by such decree it should become necessary to seek a specific apportionment, the right to such relief would spring from the fact of riparian ownership, and would necessarily exist independent of the clause of the decree reserving such right. If this be so, reservation of that right in terms does not cloud the defendant's title to his land. A similar provision in a decree adjudging riparian rights was upheld in *Bathgate v. Irvine*, 126 Cal. 135, 58 Pac. 442, 77 Am. St. Rep. 158; *Coleman v. Le Franc*, 137 Cal. 214, 69 Pac. 1011; *Strong v. Baldwin*, 154 Cal. 150, 97 Pac. 178, 129 Am. St. Rep. 149.

[4] Finally, complaint is made by the ap-

pellant that material parts of the findings are not supported by the evidence, citing as examples the finding that at a given time the defendant diverted the whole of the water of the creek in question to his own uses, and also a finding as to the amount of said water used by the plaintiff Bigelow. Assuming this criticism by the appellant to be justified, it avails him nothing, since the judgment actually entered does not depend upon such findings. The judgment determines only that the lands of the plaintiffs and defendant are riparian, and that each has a right to a reasonable use of the stream. The findings attacked are immaterial to the judgment actually entered; and therefore, if erroneous, would afford no ground for reversal. *Zihn v. Zihn*, 153 Cal. 405, 95 Pac. 868.

Judgment affirmed.

We concur: TYLER, P. J.; KNIGHT, Justice pro tem.

Opinion of the Supreme Court in Bank.
Denying Hearing.

PER CURIAM. The petition for rehearing in the Supreme Court is denied.

[5] In so far as the opinion of the District Court of Appeal may seem to imply that, when a motion for a nonsuit is submitted to the court at the close of the plaintiff's evidence and a decision thereon is postponed for further consideration, and it is not decided until after the defendant's evidence has been introduced, formal findings are necessary to accomplish a decision of such motion, we cannot approve of it. It is true that a formal judgment against the plaintiff must be entered, but no findings are necessary.

[6] In the present case, however, no such judgment was entered, and the announcement which the minutes indicate that the court made prior to its final decision in the case cannot be considered as a judgment on the motion for nonsuit, nor as anything more than a mere announcement or order. Never having been entered as a judgment, the court was at liberty to disregard it and render a judgment contrary thereto.

SHAW, C. J., WASTE and SLOANE, JJ., and RICHARDS, Justice pro tem., concur.

58 Cal. App. 33

PEOPLE v. WHITESIDE. (Cr. 873.)

(District Court of Appeal, Second District, Division 2, California. May 29, 1922. Hearing Denied by Supreme Court July 27, 1922.)

1. False pretenses —34—Allegation held to charge that defendant received money.

In an indictment for obtaining money by false pretenses, an allegation that another was induced to pay over and deliver to defendant \$3,000 in money meant that defendant received the money.

2. Criminal law —370, 371(3)—Evidence of similar false representation held admissible to show knowledge and intent.

Evidence of similar false representations made by defendant to the same person for the purpose of obtaining property, or to others shortly before or after the representations for which defendant was on trial, is admissible to prove either defendant's knowledge of their falsity, or a criminal intent, or both, and in a false pretenses prosecution evidence of similar statements made to the publisher of a newspaper two months after the transactions charged in the indictment was admissible.

3. Criminal law —1036(5)—Objection that evidence given without objection was hearsay cannot first be urged on appeal.

In a prosecution for obtaining money by false pretenses, where witness stated that his account was debited with a check for \$3,000 which he had given defendant and produced the check and showed that it was indorsed by defendant and was marked as paid, in view of Code Civ. Proc. § 1963, subd. 20, it might be presumed that the check had been paid from the bank account of the witness, which testimony having been given without objection, defendant cannot urge first on appeal that it was hearsay.

4. False pretenses —9—Reliance on representations need not be sole cause of parting with money.

In a prosecution for obtaining money by false pretenses, though the evidence must show beyond a reasonable doubt that the witness believed the representations were true and relied upon them, such representations need not be shown to have been the sole cause of parting with his money.

5. False pretenses —14—Proof of offense complete when shown that witness parted with money.

The proof of the offense is complete when it has been shown that the prosecuting witness was induced to part with his money or property in reliance upon fraudulent representations of defendant, and it was not a defense to show that the victims had sold stock received by them.

6. False pretenses —49(1)—Corroboration may be of similar statements made to others.

In view of Pen. Code, § 1110, requiring, in trials for cheating by false pretenses, proof by two witnesses, on corroboration, the corroboration may consist of statements made to

others similar in character to the fraudulent ones relied upon by the witness.

Appeal from Superior Court, Los Angeles County; Russ Avery, Judge.

B. D. Whiteside was convicted of obtaining money by false pretenses, and he appeals. Affirmed.

Muhleman & Crump and Ford & Bodkin, all of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., John W. Maltman, Deputy Atty. Gen., and Lorrin Andrews, of Los Angeles, for the People.

CRAIG, J. The defendant was convicted on three counts of an information, each of which charged obtaining money by false pretenses. He was the president and manager of the Montebello Oil Company No. 1. Soon after he became acquainted with John R. Crowley and his wife, defendant told them that he had three oil wells at Montebello; that his first well was giving 5,000 barrels a day and that he had two other wells about to come in; that the Union and Standard Oil Companies were piping the first well off for him; that all there was for him to do was to check it up every week or month; that his oil was of the finest grade in all California. On June 10th the Crowleys sold a lease and furniture of an apartment house, which they owned, to the defendant. On June 20th defendant requested the Crowleys to come to his office. This was on a Sunday. He told them that he appreciated the sale of the lease to him, and that he wanted to do something nice for them; that a friend in the East had sent him 3,000 shares of stock in an oil company; that the well had run one week, giving 3,000 barrels a day; that he had capped it; that his friend did not know that the oil well was flowing; that, if the Crowleys wanted the stock, the defendant would let them have it at cost; that the defendant could go out on the street and obtain \$6,000 for it, but that he wanted to do them a favor. Crowley stated that he had no money except what he had received for the lease, and that he wanted to keep that to buy an apartment house. Defendant said that he would let them have an apartment house after July 10th, and that while they were waiting they could make \$10,000 by buying the oil stock. Crowley said that he knew nothing about oil stock, to which the defendant replied that he was 62 years old and had never wronged any one; that he and his wife were living only to help others; that he had all the wealth he needed. Crowley gave the defendant his check for \$3,000 on the Security Trust & Savings Bank of Los Angeles and received a certificate of stock from the defendant. Later, on the 9th of July, Whiteside asked Crowley to turn over

the stock to him, saying that he could sell it for a lot of money. On the following day defendant called at Crowley's house and was given the stock. At this time he gave Crowley \$200 in cash and a note for \$2,800, stating that the note was security for the stock, and that he could get lots more money for it by sending the stock back to Iowa, but that it would take six or seven days before his agent in Iowa could return the stock or the money. Crowley never received his money, nor the return of his stock, although he later demanded an accounting of Whiteside, but was told that he (Crowley) had no interest in the company and would have to go to court to get his money. The principal facts testified to by witnesses for the people were disputed by the defendant. There was substantial evidence to show that the defendant's representations to the effect that Montebello oil well No. 1 had flowed 5,000 barrels were false; that neither the Union nor Standard Oil Companies ever piped any of the oil from defendant's wells or made any arrangement to do so; that such oil as flowed from defendant's well No. 1 was intermingled with water and mud and was not the finest in California, but, on the contrary, was of a low gravity.

Concerning the charge set forth in the second and third counts of the information, it appears that defendant stated to Godfrey and Berkeley that oil well No. 1 was a gusher; that, if he should remove the steel cap from the well, the whole valley in which the well was situated would be flooded with oil; that the well had a 3,000-barrel capacity per day when first brought in and would settle down into at least 2,000 barrels; that the oil was of high gravity and had been contracted for and sold to the Standard and Union Oil Companies; and that the Standard Oil Company was to pipe the oil off. Godfrey testified that, basing his action upon these representations, he gave the defendant a check for \$600 on the Guaranty Trust & Savings Bank of Los Angeles, which was subsequently indorsed by defendant, paid, and debited to Godfrey's account. Berkeley heard the same statements and gave a check for the sum of \$400 on the Los Angeles Trust & Savings Bank, which he testified was indorsed by Whiteside and also paid and debited against Berkeley's account. Both received stock in Montebello Oil Company No. 1 for their checks. In addition to the falsity of the representations already mentioned, it appears that the well referred to never did more than run over the surface two or three inches with water, oil, and mud. The defendant controverted the material parts of the testimony given against him, and especially that he had made the representations of fact concerning the transaction with Crowley. He testified that he did not sell the stock, but had merely borrowed \$3,000

from Crowley which he had offered to repay, but that Crowley did not want the money.

[1] It is claimed that appellant's objection to the introduction of evidence in support of the first and third counts should have been sustained. The objection was based on the ground that these counts failed to state facts sufficient to constitute a public offense. The part of the first count of the information which is under criticism in this regard reads as follows:

"That the said John R. Crowley * * * was induced * * * to pay over and deliver to the said B. D. Whiteside \$3,000 in money."

There is no direct allegation in this count that John R. Crowley actually paid over and delivered \$3,000 or anything else to B. D. Whiteside, or that Whiteside obtained anything from Crowley. It is obvious that, regardless of the false pretenses which the defendant may have made which were persuasive enough to have amounted to an inducement to Crowley to pay over and deliver money, no crime was committed unless Crowley in fact paid the money over and delivered it to the defendant.

In each of the cases cited by the people to sustain the pleading in question there is a positive allegation that property was obtained by the defendant. In *People v. Griesheimer*, 176 Cal. 48, 167 Pac. 522, the language used was "did then and there deliver." In *People v. Flowers* (Cal. App.) 201 Pac. 468, it was, that was "paid to appellant the sum of \$130." In *People v. Haas*, 28 Cal. App. 182, 151 Pac. 672, it was "did sell and dispose of." A good pleader would not fail to make a direct allegation in charging an offense of this nature that property was in fact obtained by the defendant. However, in *State v. Brown*, 143 Wis. 405, 127 N. W. 956, an indictment containing similar language was held sufficient against an attack upon the same ground as in the case at bar. In that case the language was "did * * * induce said Marinette county to pay." It was there held that these words would, in their ordinary acceptance, be held to mean that the defendant obtained the money. The same may be said of the words used in the instant case. They convey the meaning that Whiteside received the money charged to have been obtained by false pretenses. The evidence shows clearly that he did receive it, and that his case was not prejudiced by the lack of directness in the pleading. Therefore we conclude that as to this ground the judgment must be sustained. What we have said as to the first count applies also to count No. 3 in so far as the objection to the introduction of evidence is concerned.

[2] The witness Stivers, the editor of a newspaper published in Montebello, was permitted to testify that in August, 1920, two months after the transactions charged in the various counts of the indictment had taken

place, the defendant came to the office of the paper and said that "he had a perfectly dry hole producing pure oil"; that he gave the gravity as 30 or 32 gravity and said that the well would run around 2,000 barrels a day. It is claimed that the trial court erred in admitting this evidence over the objection of the defendant because of the remoteness in point of time of the conversation from the acts for the commission of which the defendant was convicted. While the cases in other jurisdictions are not uniform, the better rule would seem to be that the admission of evidence of similar representations is not to be determined so much by the time they were made as by their relevancy and tendency to show criminal intent and guilty knowledge in the making of the pretenses upon which the prosecution is predicated. *People v. Whalen*, 154 Cal. 472, 98 Pac. 194; *People v. Emmons*, 13 Cal. App. 497, 110 Pac. 151. In these and other California cases, where proof of similar offenses has been upheld, the element of time has been given no particular consideration. Of course, proof may be made also of other false representations than those made in connection with the crime under investigation where they tend to establish a plan and scheme to defraud, thus also involving proof of guilty knowledge and criminal intent. The general rule is stated in 16 *Corpus Juris*, § 1162, as follows:

"Evidence of similar false representations made by defendant to the same person for the purpose of obtaining property, or to others shortly before or after the representations for which defendant is on trial, is admissible to prove either defendant's knowledge of their falsity or a criminal intent, or both."

In the instant case the statements testified to by Stivers might fairly be regarded as additional evidence of a general scheme to defraud anyone who might be directly or indirectly induced to buy stock. It might also be reasonably inferred that, if defendant made these statements to Stivers which were shown to be false and at a time when he must have been aware of their falsity, the statements made to Crowley, Godfrey, and Berkeley were also made with knowledge of their falsity and with an intent to defraud. Such an inference might fairly have been drawn by the jury. Therefore proof of the statement made to Stivers was relevant to issues necessarily involved in the decision of each of the charges contained in the information in the instant case. If viewed with respect to its relevancy as tending to show that the facts constituting the charge contained in the information were a part of a scheme to defraud the public as distinguished from a single individual, it was not necessary, in order that Stivers' testimony be admissible, that an attempt be shown to have been made to sell him any stock or that the evidence, if accepted as true, should tend to

show the commission of an offense like in character to the one charged. *State v. Briggs*, 74 Kan. 377, 86 Pac. 447, 7 L. R. A. (N. S.) 281, 10 Ann. Cas. 904.

[3] Appellant's third contention is clearly untenable. Crowley testified that he had an account at the Security Trust & Savings Bank; that the account was debited with the check for \$3,000 which he had given Whiteside. The check was produced and showed that it was indorsed "B. D. Whiteside," and was marked on the back as paid. From this it might be presumed that the check had been paid from the bank account of Crowley. Such a result would be expected from the ordinary course of business. Section 1963, Code Civ. Proc. subd. 20. Crowley's testimony that his account was debited with the check was given without objection. Appellant now insists that this was hearsay and should have been disregarded by the jury and must be excluded by this court in reviewing the matter on appeal. If the evidence in this regard was hearsay, counsel for the defendant had every opportunity to bring the fact out on cross-examination. Crowley's testimony that his account was debited with the check is uncontradicted and unimpeached, and therefore the jury had the right to conclude that Whiteside received the money as alleged in the information, and that he secured it by cashing the check given him by Crowley. *People v. Whalen*, 154 Cal. 473, 98 Pac. 194. The testimony of Godfrey and Berkeley in support of this phase of the charges, as set forth in the second and third counts, is substantially the same as that of Crowley.

[4] Appellant insists that there is absolutely no testimony that Crowley was induced to part with his property by reason of any pretenses set forth in count No. 1 of the information. It is true that this prosecuting witness did not testify directly that he relied upon any particular representation which he said Whiteside made to him, nor did he name any such statement of Whiteside as the inducement which impelled him to part with his money. But he did testify that Whiteside had said concerning the well of Montebello Oil Company No. 1 that he had had it running for one week, and that it flowed 3,000 barrels of oil a day, and that he had capped it. The witness also recited that "we," meaning Mrs. Crowley and himself, told the defendant that they had never owned any oil stock, and that this was practically all the money they had, and they did not want anything that was not perfectly good; that defendant said he could get \$6,000 for the stock on the street, but wanted to do something nice for the Crowleys. As claimed by appellant, there was also talk about the resale of the stock and the purchase of an apartment house by the Crowleys from the defendant, he having given them an assur-

ance that they could make \$10,000 by buying the stock while waiting for the apartment house, and that he would sell it to them even though they did not have a cent to pay on it. Although the evidence must show beyond a reasonable doubt that the prosecuting witness believed the representations were true and relied upon them, such representations need not be shown to have been the sole cause of his parting with his money. This and the question as to what representation or consideration influenced his action is one for the jury. Underhill on Criminal Evidence (2d Ed.) § 442. In the instant case the evidence warranted the jury in concluding that the complaining witness believed the representations made by White-side and was thereby induced to deliver to him the check, which was later cashed.

[5] Appellant's contention that, because Godfrey and Berkeley resold their stock, they were not injured, and that therefore the offense charged was not shown to have been committed, is squarely met by *People v. Bryant*, 119 Cal. 595, 51 Pac. 960. In that decision the principle is clearly stated that the proof of the offense is complete when it is shown that the prosecuting witness is induced to part with his money or property in reliance upon the fraudulent pretenses of the accused.

[6] Appellant next contends that the testimony of Godfrey is not sustained because it was not corroborated as required by section 1110 of the Penal Code. This corroboration may consist, as it did in the instant case, of statements made to others similar in character to the fraudulent ones relied upon by the prosecuting witness. *People v. Wymer* (Cal. App.) 199 Pac. 815. The witnesses Crowley, Mrs. Crowley, Stivers, and Manners all testified to such corroborative statements which we think are sufficient to comply with the requirements of section 1110 of the Penal Code.

No error of a prejudicial character appearing to have been committed in the trial of the case, the judgment is affirmed.

We concur: FINLAYSON, P. J.; WORKS, J.

58 Cal. App. 123

PEOPLE v. MACKEY et al. (Cr. 869.)

(District Court of Appeal, Second District, Division 2. California. June 16, 1922.)

1. Criminal law § 823(9)—Instruction on unexplained possession of property held not erroneous, in view of other instructions.

In a prosecution for larceny, an instruction as to unexplained possession of stolen property as a circumstance of guilt held not erroneous, in view of the other instructions given.

2. Criminal law § 456, 465—Witnesses § 327—Question as to whether witness was subject to delusions held improper.

In a prosecution for larceny, a question asked the divorced wife of a witness for the prosecution as to whether she had noticed during their married life that her husband was subject to delusions was improper, under Code Civ. Proc. § 2051, providing how witnesses may be impeached, and section 1870, subd. 10, providing that the court may receive opinions as to the sanity of a person if the reason for the opinion is given, and where the witnesses had been separated for 2½ years.

3. Witnesses § 345(4)—Record showing where witness had pleaded guilty to a felony held inadmissible after passing through probation period.

Under Pen. Code, § 1203, providing that a person convicted of a felony may be placed on probation, and shall be released from all penalties and disabilities after fulfilling the conditions of the probation, the record of conviction of such a person is inadmissible as impeaching evidence under Code Civ. Proc. § 2051, when acting as a witness in another action after passing through the probationary period.

4. Criminal law § 1186(4)—Refusal to permit witness to give version of conversation between defendant and another regarding purchase of the property stolen held error.

In a prosecution for the theft of calves, the refusal to permit a witness to give his version of a conversation he overheard between defendant and another person after defendant had detailed the conversation, which conversation evidenced a contract for the purchase of the calves by defendant from the other person, was reversible error, notwithstanding Const. art. 6, § 4½.

Appeal from Superior Court, Imperial County; Franklin J. Cole, Judge.

James Mackey and Albert Mackey were prosecuted for larceny. James Mackey was acquitted, and Albert Mackey was found guilty. From the judgment of conviction, and an order denying his motion for a new trial, defendant Albert Mackey appeals. Reversed and remanded.

Harry W. Horton, of El Centro, and Ernest R. Utley, of Calexico, for appellant.

U. S. Webb, Atty. Gen., and Arthur W. Keetch, Deputy Atty. Gen., for the People.

WORKS, J. Defendants, who are brothers, were informed against together and were tried together for the larceny of 14 calves from the ranch of one Forsberg. Defendant James Mackey was acquitted of the charge, but defendant Albert Mackey was found guilty. The latter appeals from the judgment of conviction and from an order denying his motion for a new trial.

The stolen calves were in the possession of defendants at the time of their arrest, and at the trial appellant testified to a state of

facts which, if the jury had believed him, would have amounted to a sufficient explanation of defendants' possession of the calves. The trial court gave to the jury the following instruction:

"The mere possession of stolen property, unexplained by the defendants, however soon after the taking, is not sufficient to justify a conviction; it is merely a guilty circumstance, which, taken in connection with other testimony, is to determine the question of guilt. Yet, if you believe from the evidence that the defendants were found in the possession of the property described in the evidence, or claiming to be the owner thereof, this is a circumstance tending in some degree to show guilt, but not sufficient, standing alone, and unsupported by other evidence, to warrant you in finding them guilty. There must be, in addition to proof of possession of property stolen, proof of corroborating circumstances tending of themselves to establish guilt. These corroborating circumstances may consist of acts or conduct or declarations of the defendant, or testimony of other witnesses, or any other circumstances tending to show the guilt of the defendants.

"If the jury believes from the evidence the property mentioned in evidence, to wit, 14 calves, were stolen, and was seen in the possession of the defendants shortly after being stolen, the failure of the defendants to satisfactorily account for such possession, or to show that such possession was honestly obtained, is a circumstance tending to show their guilt, and the defendants are bound to explain the possession in order to remove the effect of the possession as a circumstance to be considered in connection with other suspicious facts, if the evidence disclose any such."

[1] Except as to minor and unimportant details, this instruction is identical with one approved by this court in *People v. Alba* (Cal. App.) 199 Pac. 894, but appellant nevertheless contends that the giving of the instruction was error. It will be noted that, in the opinion in *People v. Alba*, a certain instruction D9 is referred to as in some degree clarifying the instruction in that case, which is practically a prototype of the instruction which we have quoted above as having been given in this case, the approval of the questioned instruction in *People v. Alba* being largely grounded on the fact that instruction D9 accompanied it. Appellant here contends that no instruction like D9 was given in the present case, and that is true; but an instruction did go to the jury in which they were told that—

"If all you find from the evidence here before you is that the defendants were found in possession of calves alleged and described in the information, you cannot find the defendants guilty of the charge here brought against them. The mere possession of stolen property is not sufficient to maintain a charge of grand larceny, but such possession, if in this case there is any evidence of such possession, must be corroborated by other evidence in some way connecting the defendants with the charge of larceny, sufficient to satisfy your minds beyond a rea-

sonable doubt that they are guilty of the crime here brought against them, to wit, that of larceny, which, according to the Penal Code of the state of California, is the felonious stealing, taking, carrying, leading or driving away of personal property of another, and, unless you are satisfied beyond a reasonable doubt that such evidence, if any such you find, is sufficient to corroborate the possession of stolen property, you cannot find the defendants guilty of the charge here brought against them."

When we come to consider the effect of the instruction to which exception is taken by appellant, we must view it in connection with the instruction just set forth above, as a matter of course. Taking the two together, it is apparent that the only cause for complaint on the part of appellant, if any there be, lies in the fact that the instruction to which objection is made contains in its first paragraph the words "unexplained by the defendants," and in its second the words, "the failure of the defendants to satisfactorily account for such possession, or to show that such possession was honestly obtained." Appellant contends that these two expressions amount to an instruction that appellant had actually failed to explain the possession of the calves by him. Undoubtedly, it were better if the trial court had framed the two expressions, respectively, thus:

"Unexplained by the defendants, if you find from the evidence that such possession has not been explained to your satisfaction," and "the failure of the defendants to satisfactorily account for such possession, or to show that such possession was honestly obtained, if it appears to you from the evidence that they have not satisfactorily accounted for such possession, or shown that such possession was honestly obtained."

Notwithstanding, however, that the assailed instruction was not as skillfully drawn as it might have been, we are not prepared to say that it was error to let it go to the jury in the form in which it was given. The jury was not actually told that appellant had failed to explain his possession of the calves. In truth, it was told in effect that, the defendants were "satisfactorily" to account for the possession to someone, and, a few lines further on in the instruction, that "the defendants are bound to explain the possession," etc., the italics being ours. All of these expressions as to an explanation of the possession must be construed together with instructions elsewhere given by the court. These were to the usual effect, that "It is the duty of the jury to decide whether the defendant be guilty or not guilty of the offense charged considering all the evidence submitted to you in the case"; that "it is your duty * * * to take into consideration all of the testimony given by the witnesses, and to weigh the same with care"; and that "the jury are the exclusive judges" of the credibility of witnesses. In addition to these

stock expressions, the jury was instructed that—

"The interest of a defendant in the result of an action does not deprive him of the benefit of his own testimony. The law makes him a competent witness in his own behalf, and his testimony is entitled to consideration by you, the same as that of any other witness, and, in considering the defendant's testimony, you should be governed by the same rules that control you in weighing the testimony of other witnesses who have given testimony before you in this trial. A defendant in a criminal action is considered innocent until the prosecution establishes the contrary by convincing proof and beyond a reasonable doubt. His evidence is entitled to full credit when you believe that he has spoken the truth, and the evidence of such witness is sufficient proof to any fact to which you believe he has truthfully testified."

During the trial the defendants made a determined attempt to account by their testimony for the possession of the calves, as we have already observed. It was impossible for the jury not to have realized that this evidence showed an effort to make the "explanation" referred to in the instructions. Considering the several parts of the charge to the jury, which told its members of their functions as judges of the facts, and considering especially the instruction in which the jury was carefully and forcefully informed as to the attitude which it must hold toward the testimony of the defendants, it appears to us that its members must have understood clearly that the "explanation" was for their ears alone, and that the credence which was to be given it was for their exclusive judgment. We are convinced that the instruction of which complaint is made, despite the inaccuracies we have noticed in it, worked no prejudice to the rights of appellant, and that it was not error to give it, at least when all the instructions are taken together.

[2] Among the witnesses for the prosecution was one Leistikow. The divorced wife of this witness was called by the defense, and was asked if, during her married life with him, she had ever noticed that he was subject to "delusions—to see and tell things he never did see." An objection to the question was sustained, and the ruling is assigned as error. We can conceive of no theory upon which the question was proper. It was not an impeaching question, under the provisions of the Code of Civil Procedure, § 2051, providing how witnesses may be impeached. The query was not proper under subdivision 10 of section 1870 of the same Code, to the effect that on a trial the court may receive "the opinion of an intimate acquaintance respecting the mental sanity of a person, the reason for the opinion being given," as it did not call upon Mrs. Leistikow for an opinion respecting the "mental sanity" of her former husband. On the

whole, the propounded inquiry was nothing but a call for the statement of a conclusion of the witness on the stand. Finally, it is to be noted that the question sought to elicit an answer concerning a state of facts existing, not at the time when Leistikow testified, but during the period of his married life with Mrs. Leistikow, the record showing that at the time of the trial the two had been separated for more than two and a half years.

[3] The next question to be considered is both novel and interesting. Ruston, the principal witness against appellant, had been charged with the commission of a felony, and had pleaded guilty to the charge. He had been admitted to probation, and his probationary period had been passed and he had been discharged prior to the trial of the present action. After his testimony against appellant had been received the defense offered in evidence the record in the case, in which he had entered a plea of guilty. This offer was made for the purpose of impeaching Ruston under the terms of the Code of Civil Procedure, § 2051, to the effect, in part, that a witness may be impeached by showing by "the record of the judgment that he had been convicted of a felony." Objection was made to the offer by the district attorney, and the objection was sustained. It is now contended that the ruling was erroneous.

It is provided in paragraph (5) of section 1203 of the Penal Code that, as to "every defendant who has fulfilled the conditions of his probation for the entire period thereof," "the court shall thereupon dismiss the accusation or information against such defendant, who shall thereafter be released from all penalties and disabilities resulting from the offense or crime of which he has been convicted." This legislative mandate seems somewhat akin to the common-law rule under which one who has been pardoned through the exercise of executive clemency for the commission of a criminal offense is made a "new man," the effect of a pardon being, among other things, as stated in an early case, "to remove from the offender that disability to testify as a witness in a court of justice which, by the rule of the common law, was consequent upon his conviction of a felony." *People v. Bowen*, 43 Cal. 439, 13 Am. Rep. 148. We have long ago departed from the rule referred to in this quotation—that is, the rule of the common law which rendered convicted felons incompetent as witnesses. This departure has been taken in many jurisdictions in this country, including our own, and the rule has been displaced with great uniformity by one allowing proof of the conviction of such persons as affecting their credibility when they are offered as witnesses. The question now to be determined is: Does section 1203, Penal

Code, set aside the right to so impeach such a witness where, after conviction, he has been admitted to probation and has passed through the probationary period? If we look to the case of pardons for an analogy in answering this question we find that the granting of that executive clemency does not destroy the right thus to impeach. Undoubtedly the general rule is that, although the grant of a pardon makes a "new man" of the pardoned individual, his manhood is not revived to the extent that he may not be confronted with the record of his conviction whenever he testifies as a witness. Despite the pardon he is still a convicted felon whenever the right to impeach him as such is brought in question. 28 R. C. L. tit. "Witnesses," § 212; note to *Rittenberg v. Smith*, 47 L. R. A. (N. S.) 215. This, however, is far from settling the present question. The language which we have above taken from section 1203 is so strong and direct that it may destroy the right to impeach convicted felons who have been discharged after probation, notwithstanding that the exercise of the pardoning power in a given case does not have that effect. The bearing of section 1203 upon the present question turns upon the construction to be given to two words in it. Is a convicted felon's liability to impeachment by the production of the record against him to be regarded either as a "penalty" or as a "disability"? Webster defines the word "penalty" in part, as:

"Penal retribution; * * * the suffering in person, rights, or property which is annexed by law or judicial decision to the commission of a crime or public offense; * * * disadvantage, loss, or hardship due to some action, esp. to a transgression or error."

That lexicographer gives the following definition of "disability," quoting it in full:

"State of being disabled; deprivation or want of ability; absence of competent physical, intellectual, or moral power, means, fitness, or the like; an instance of such want or deprivation. Disabilities to perform what was covenanted.—Milton. Chatham refused to see him, pleading his disability.—Baneroft. Want of legal qualification to do a thing; legal incapacity, incompetency, or disqualification; also, an instance or cause of such incapacity."

If these two key words of section 1203 were to be taken alone, as thus defined, the liability of a convicted person to be impeached as a witness by the production of the record made against him probably could not be regarded as a disability, although that liability might justly be regarded as a penalty; but they are not to be taken alone. The two words are together to be given a broad and far-reaching construction, because the Legislature has coupled with their use the mandate that, where a convicted felon who has been admitted to probation has passed the period of probation, "the

court shall thereupon dismiss the accusation or information against such defendant." Of course, after a dismissal in such a situation, the defendant involved, if not still a convicted felon, remains in a practical sense one who has been convicted of a felony. We cannot avoid the conclusion, however, that the Legislature intended in a legal sense, by directing a dismissal under such circumstances, to wipe out absolutely the entire proceeding in question in a given case, and to place the defendant in the position which he would have occupied in all respects as a citizen if no accusation or information had ever been presented against him. Such is the legal effect of the dismissal of a criminal charge before conviction, and we are convinced that the lawmaking body intended, by section 1203, that the same effect should attend a dismissal after conviction. This view seems the more just when we consider the introductory portion of section 1203, the italics being ours:

"After plea or verdict of guilty, where discretion is conferred upon the court *as to the extent of the punishment*, the court, upon oral suggestions of either party, or of its own motion, that *there are circumstances* which may properly be taken into view, either in aggravation or mitigation of the punishment, may in its discretion refer the same to the probation officer, directing said probation officer to investigate, and to report, recommending either for or against release upon probation, at a specified time."

On the whole, we conclude that the Legislature intended by the enactment of section 1203 that no convicted person discharged after probation thenceforth should be regarded as one possessed of the degree of turpitude likely to affect his credibility as a witness. The trial court did not err in excluding the record against Ruston.

Ruston was not present at the trial in the superior court, the testimony above referred to as given by him having been presented to the jury by means of a reading of the transcript of his testimony before the committing magistrate. At the trial appellant objected to the presentation of Ruston's testimony in that form, and now complains of its admission as error, the point made being that the district attorney failed to use due diligence in procuring the personal attendance of Ruston at the trial. That officer presented much testimony going to show the efforts pursued by him in an endeavor to locate and to serve subpoena upon the missing witness, and we have carefully read it all. Without reciting the contents of the record on the subject, we state our conclusion that sufficient diligence in the premises was shown, and that the trial court did not err in allowing the reading to the jury of Ruston's testimony given at the preliminary hearing.

[4] Having now considered all the points made by appellant which are likely to arise upon a new trial, with the exception of the one question which requires a reversal of the judgment, we now approach a discussion of that question. It is presented by a complaint which appellant makes of a palpable error committed by the trial court. Appellant when on the witness stand detailed a conversation between himself and Ruston which occurred on a certain day at the former's ranch. This conversation evidenced a contract for the purchase by appellant from Ruston of the calves which defendants were charged with having stolen, it therefore being directly explanatory of the possession of the calves by defendants at the time of their arrest, and, if believed by the jury, establishing the innocence of both defendants. Appellant also testified that the conversation occurred in the presence of one Wiley Johnson. The latter was called to the stand and testified that he was at the ranch on the day on which appellant had sworn that the conversation with Ruston took place. Johnson was then asked if he had overheard a conversation concerning calves between appellant and Ruston at the time and place which had been fixed by the former in his testimony, and he answered that he had. He was then asked to state the conversation. To this question the district attorney made the utterly untenable objection that it called for hearsay, and that appellant himself could testify to the conversation, "but no other person can testify to what he heard," and the objection was sustained. The Attorney General seeks to avoid the effect of this manifest error by asserting the claim, on two grounds, that the rights of appellant were not prejudiced by the ruling. The first of these grounds is that Johnson was permitted to testify that he had overheard the conversation between appellant and Ruston, although he was not allowed specifically to detail it, the jury thus being left to understand that Johnson vouched for the conversation as sworn to by appellant. We cannot adopt this view. In the first place, Johnson did not say that he had heard the conversation stated by appellant. Taking question and answer together, his only statement was that he overheard "a conversation concerning calves" between Ruston and appellant. Whether this was the same conversation detailed by appellant could only have been determined by the jury after Johnson had been permitted to give his version of it. This would seem to conclude the point, but it may be remarked further that, if the jury understood Johnson's answer to adopt the conversation as stated by appellant, the ruling of the court in effect told them to disregard anything coming from Johnson as to the subject-matter of it. This erroneous view was presented to the jury three times

by the trial judge, the question having arisen twice when Johnson was on the witness stand at different times, and in the third instance when the father of appellant was a witness, and was apparently about to detail the conversation between Ruston and his son.

As a second ground upon which to avoid the effect of the error of the trial court in excluding Johnson's testimony as to the subject-matter of the conversation between appellant and Ruston the Attorney General points to section 4½ of article 6 of the Constitution, providing that no judgment shall be set aside or new trial granted "unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice." In view of this contention of the Attorney General, we have read carefully the voluminous record made in the trial of the case. After that reading we cannot uphold the contention. There was a sharp conflict on practically every material point in the evidence. Both defendants denied strenuously that they had committed the crime with which they were charged, and they denied specifically the various items of evidence offered to fasten the offense upon them. Aside from some slight testimony by Leistikow, the only direct evidence of appellant's guilt was the testimony of Ruston, who, be it known, was originally charged jointly with the Mackeys with the theft of the calves, the charge against him having been dismissed before the preliminary hearing. Ruston's reputation for veracity was impeached by several witnesses. The credibility of Leistikow was assailed in the same manner, and by an equal number of witnesses. On the face of the record a perfect alibi was established as to both defendants by at least four witnesses, this evidence being substantially corroborated by a fifth witness as to some of its features. Although there was but little difference in the evidence as to the two defendants, the testimony of Ruston being equally incriminating as to both, defendant James Mackey was acquitted, while appellant was convicted. After declaring appellant's guilt, the verdict contained the statement: "The jury ask leniency."

Both of the defendants appear to have been men of business standing in Imperial Valley, where the theft of the calves occurred. They owned a dairy in the valley at which from 90 to 105 cows were being milked at the time of the theft with which they were charged. No attempt was made to impeach their veracity. Under all these circumstances, it is quite possible that an acquittal of appellant might have resulted if he had been allowed the benefit of the corroboration of Wiley Johnson as to the conversation he had detailed as having oc-

curred between Ruston and himself. As far as the record discloses, Johnson was a disinterested witness, and his testimony, if given, might very well have turned the tide in favor of appellant. We must say, as a final consideration in disposing of this question, that a reading of the record in the cause leaves us with grave doubts as to the guilt of appellant. The jury may have had good cause to view the question differently, as they had the opportunity of observing the appearance and demeanor of the various witnesses in giving their testimony. This opportunity is, of course, denied us. We can view the evidence only as the pages of the typewritten record present it to us, and can determine the effect of the constitutional question upon that view alone as a basis. We are of the opinion that the case of the people is not aided by the provisions of section 4½ of article 6.

The judgment and the order denying the motion for a new trial are reversed, and the cause is remanded.

We concur: FINLAYSON, P. J.; CRAIG, J.

58 Cal. App. 255

WALKER et al. v. MATHEWS. (Civ. 2403.)

(District Court of Appeal, Third District, California. June 21, 1922.)

1. Appeal and error ⇐773(4)—Failure of appellant to file brief will be deemed an abandonment.

The failure of appellant to file a brief or otherwise present an argument in support of the appeal will be deemed an abandonment of the appeal, and the judgment appealed from will be affirmed.

2. Appeal and error ⇐1126—Where appellant files no brief, respondent may submit case on the record.

Where appellant fails to file a brief, that respondent failed to move to dismiss the appeal after notice given, did not affect his right to submit the case on the record.

Appeal from Superior Court, Plumas County; J. O. Moncur, Judge.

Action by A. T. Walker and Edward Keenan, doing business under the firm name and style of Walker & Keenan, against William Mathews. Judgment for defendant, and plaintiffs appeal. Affirmed.

L. H. Hughes, of Quincy, for appellants.

J. J. Henderson, of Sacramento, and M. C. Kerr, of Quincy, for respondent.

HART, J. The plaintiffs brought this action to recover from the defendant certain personal property, or for judgment in the sum of \$700, the alleged value thereof, the

complaint charging that the defendant wrongfully obtained and likewise still retains the possession of certain cooking and kitchen utensils, consisting of a range, dishes, knives, forks, "counter tools," cash register, and "all restaurant equipment formerly used in the operation of a restaurant and lunch counter," the property of plaintiffs. The defendant, by answer, denied the allegations of the complaint, and, by way of special defense, alleged that the said property belonged to him: that the plaintiffs had wrongfully deprived him of its possession, and still wrongfully withhold possession thereof from him; that the property, when so wrongfully taken from his possession, was used by him in the carrying on of a restaurant, and that the wrongful acts of plaintiffs in so taking from him and detaining said property had caused him to suffer damage in the sum of \$500. He asked for a judgment restoring to him the possession of said property, or, in lieu thereof, for the sum of \$700, the alleged value thereof, and for damages in the sum of \$500.

It appears that the property had been in the possession of the defendant and used by him for the purpose of carrying on the restaurant business as alleged in his answer and that the plaintiffs on bringing this action in claim and delivery by the aid of the sheriff took possession of the property.

The jury by whom the cause was tried awarded a verdict to the defendant by the terms of which the plaintiffs were to return to defendant said property or pay to defendant the sum of \$700, found to be the value thereof, and also awarded defendant \$250 as damages. Judgment was entered accordingly.

On the 12th day of May, 1921, the plaintiffs served and filed a notice of appeal from said judgment, and on August 21, 1921, the record on appeal was filed in this court. The appellants have filed no briefs in support of their appeal, although on November 30, 1921, they were given, by stipulation with the attorney for the defendant, until the 15th day of December, 1921, within which to file an opening brief, said stipulation having been committed to writing and so filed in this court. Nor did the appellants make any appearance by counsel or otherwise when the cause was regularly called for hearing and argument at the June term of this court, although due notice of the time fixed for such hearing and argument was given the attorney of record for the appellants. Therefore, when the cause was called for hearing at the time stated, the attorney for the defendant submitted the case upon the record.

[1, 2] The failure to file a brief or otherwise present an argument in support of the appeal must be construed as an abandonment of the appeal by the appellants, in which case we are justified in affirming the judgment. Counsel for the defendant could have accom-

plished practically the same result by a motion to dismiss the appeal on notice given (rule 2, subdivision 4, and rule 5, Supreme and District Courts of Appeal [176 Pac. viii, ix]), but, not having pursued this course, he was authorized to take the course adopted by him, viz. submit the case upon the record.

While, under the circumstances stated, we are not required to examine the record in search of prejudicial errors, or to ascertain whether the record is free from such errors, we have done so, nevertheless, with the result that we have found no substantial ground for complaint against the manner in which the cause was tried by the court below. In other words, we have found no prejudicial error.

The judgment appealed from is accordingly affirmed.

We concur: FINCH, P. J.; BURNETT, J.

58 Cal. App. 137

BENSON et al. v. KERN COUNTY.
(Civ. 3849.)

(District Court of Appeal, Second District, Division 2, California. June 16, 1922. Hearing Denied by Supreme Court Aug. 14, 1922.)

Highways 113(4)—Evidence held to show that county road contract was canceled by mutual agreement.

In an action by a road contractor against a county for eliminating a portion of the contract before the work was completed, evidence held to show that the uncompleted portion was eliminated in pursuance to a mutual agreement of the parties.

Appeal from Superior Court, Ventura County; Merle J. Rogers, Judge.

Action by George S. Benson and others, copartners doing business under the firm name of George S. Benson & Sons, against the County of Kern. Judgment for defendant, and plaintiffs appeal. Affirmed.

E. T. Sherer and Emmet H. Wilson, both of Los Angeles, for appellants.

U. S. Webb, Atty. Gen., J. R. Dorsey, Dist. Atty., and R. B. Lambert, Deputy Dist. Atty., both of Bakersfield, and T. M. McNamara, of Taft, for respondent.

WORKS, J. This is an action to recover damages for the breach of a contract entered into between plaintiffs and defendant whereby plaintiffs engaged to construct a certain highway for defendant. Judgment went for the latter, and plaintiffs appeal.

The contract between the parties provided for the building of nearly eleven miles of

road. Appellants had entered upon the performance of the work, had fully completed more than four miles of the road, and had done the preliminary work of clearing the land throughout the remainder of the distance, when the uncompleted portion of the highway was "eliminated" from the contract. Notice of this elimination was given orally to appellant, according to some of the testimony, by the engineer and certain members of the highway commission of respondent, and appellants were by the engineer, according to his own testimony, ordered to "shut down" the work under the contract. Later, on December 6, 1917, the clerk of the board of supervisors of respondent wrote appellants that on that day the board had by resolution "eliminated that portion of the work provided for by contract and specifications" which had not been completed, the portion thus "eliminated" being particularly described in the letter. The notice to shut down work on the uncompleted part of the highway and the elimination of that part of it from the contract constitute the principal breach of which appellants complain. There is also an allegation in the complaint to the effect that appellants were damaged in a certain amount by reason of respondent's delay for a specified number of days in furnishing a quantity of broken stone and screenings to be used in the work and agreed by respondent to be furnished by it therefor. This allegation apparently refers to materials used in constructing the completed portion of the road, but as the trial court found the averment to be untrue and as the finding is not assailed by appellant, we shall consider the action as if it were one commenced to recover damages alone for what we have termed the principal breach of the contract.

It was alleged in the answer, and found by the trial court, that the elimination of the uncompleted portion of the highway from the contract was made pursuant to a mutual agreement of the parties to that end. Appellant contends that the court's finding on this subject is not supported by the evidence, and, as we view the case, the determination of the appeal depends upon the solution of this question alone. One of the members of the board of supervisors of respondent testified, in part:

"I had a conversation with the plaintiffs in this case concerning the contract now before the court. I do not remember the exact date, but it was some time during the fall of 1917. The conversation was with Mr. Paul Benson. * * * I cannot give the exact words. * * * As I understand, Mr. Benson's position was that if they were compelled by the county to complete the entire contract, there was a doubt whether there would be funds enough to pay them. * * * I cannot give the exact language, but Mr. Benson was attempting to ascertain from me what the disposition of the board

of supervisors of the county would be toward settling the contract in full, and they got me to admit in my judgment there wouldn't be money to pay them. * * *

"The Court: Q. Do you mean * * * Mr. Benson asked you what would be the attitude of the board of supervisors? A. Yes, sir. Q. He said he thought there was not funds? A. And I agreed with him. * * * He stated that it would interfere with his business for the county to compel him to carry out the contract when it was a general rumor that there wouldn't be funds enough to settle for the work if he did it, and then he went to ask me some questions as to what the board thought about that, and then afterwards he took up with me the question of [if (?)] it, the contract, a portion of it was eliminated, then what would the board of supervisors do toward paying him for the necessary work to complete what he called the long haul of the contract. * * * I had several conversations with the same gentleman concerning this contract. The second conversation was in the office and he introduced his father. We talked along the same lines somewhat at that time, and I recall another time that he was in the board of supervisors' room, not where we were in formal session, but we were all up there, I mean the board of supervisors. * * * Mr. Claude Benson brought his father in and introduced him. * * * I had another conversation about the contract in question in the supervisors' room. I think all of the members of the board of supervisors were there. * * * The conversation that was had in the presence of these supervisors was in reference to the amount which would be right to be paid Mr. Benson for the excess cost of the work which was completed. The substance of the conversation was that the board of supervisors would be willing to pay this additional cost if there was money enough in the fund to pay it and the district attorney would advise us it was a legal charge against the county. By the extra work I mean that Mr. Benson explained to me that owing to the other work that he had been expecting to do, the entire contract, and also owing to the fact that the pieces that he was to complete were further away from his hauling point, that it would cost more than the average if he had the entire contract, and that it wasn't fair to ask him to do the hard end of the contract and have the easy or lowest average eliminated. I agreed with him on that point, and I assured him that I was satisfied that the board of supervisors wouldn't insist upon his completing the entire contract as long as there was doubt as to being enough money in the fund to pay for it if completed. * * * At the particular time in my office Mr. Benson stated that there was doubt as to whether there was money enough to pay for the entire contract if it was completed. * * * I have related all that I can recall at this time of the conversation I had with Claude Benson, one of the plaintiffs in this action, concerning the contracts in question. I do not recall any other reason being stated in any of these conversations with Claude Benson why he and his partners desired to be relieved from the contract except what I have stated. He desired to be relieved of it owing to the condition of the

funds. I have no recollection of any proceedings in the matter except the resolution passed eliminating that portion of the work."

This testimony was all given on direct examination, and it was followed by a cross-examination which served to strengthen the witness' story as to the conversations between him and Claude Benson. We reproduce but two of the statements of the witness on cross-examination:

"I know we both [he and Benson] agreed in regard to the fairness of canceling the contract instead of demanding that they go on, and also as to the fairness of his being paid the right figure for the work he had completed and was going to complete in order to use up the material on the ground as I understood it. * * * I do not think he [Benson] put it in the manner that the highway commission had eliminated it, but putting it rather as a suggestion that the contract would be partially cancelled and after I agreed with him either at that time or at subsequent meetings, why, we went on and discussed the amount of what would be fair to him in the matter of payment for the part that he had completed."

This testimony was substantially corroborated by a witness who was a member of the highway commission of respondent during the year 1917, as he testified to similar conversations with one or more of appellants. Among other things, this witness said, on cross-examination:

"I cannot fix the various dates upon which I had conversations with Benson & Sons concerning this contract because there were so many of them. Whenever Benson & Sons came into the office that matter would be talked of. The substance of the conversation with Benson & Sons regarding the elimination of a portion of the work to be done under that contract was that under the existing conditions of the supposed shortage of funds and the trouble we had had in supplying the material, their desire was that we come to an agreement to conclude the contract or the part that was already under construction, to finish that. As I understood at that time, the other portions of the road was to be left, that no further work was to be done."

On December 5, 1917, and after the time of the various conversations referred to by these two witnesses, appellants addressed to the highway commission of respondent a letter, the body of which was as follows:

"As you have eliminated that portion of our contract on the Wasco-McFarland road from station 0.30 to station 351.00 (except such portion as has already been completed), we ask for release on same in order that we may have our bond cancelled. Hoping you may see fit to grant the same, we are, respectfully. * * *"

There is apparently one feature of this communication which accords with the claim

of appellants that the "elimination" was made unilaterally by respondent and that appellants were "ordered" to cease work under the contract by the engineer of the highway commission. That feature is exhibited in the opening words of the letter: "As you have eliminated that portion of our contract," etc. These words of the missive, however, may have been used because of the fact that in a sense respondent was primarily chargeable with the elimination through its failure to keep intact the fund referred to in the testimony of the two witnesses; but whatever the reason for their use, other deductions may be drawn from the letter—deductions entirely consistent with the claim of respondent that the contract, as to the uncompleted work, was abandoned through the mutual consent of the parties. Why, for instance, was the letter written before any formal action in the matter of "elimination" had been taken either by the highway commission or by the board of supervisors? Prior to December 5, 1917, nothing had developed on the subject except by way of oral communication between the parties. If appellants were opposed to the "elimination," why did they not say so in their letter? The communication is devoid of the slightest assertion that they were not agreeable to a cessation of the work under the contract. If they were not agreeable to such a termination of the obligations of the contract on both sides, why did they ask so submissively "for a release on same in order that we may have our bond for that portion cancelled"? If the arrangement had not been satisfactory to them, their natural course would have been to keep the bond in force, as well as to preserve in every respect an attitude indicating that they not only stood ready and willing to complete the work, but that they insisted on the right to do so.

On the receipt of the letter from appellants, on December 6, 1917, the highway commission transmitted it to the board of supervisors with the recommendation "that the request be granted by your board." On the same day the latter body adopted the resolution referred to in the letter of its secretary, already mentioned, which in terms, it will be remembered, eliminated the uncompleted work from the contract. The resolution recited, by way of preamble, the receipt of appellants' letter by the highway commission, and also the fact that the commission had recommended that appellants' request be granted.

We cannot but conclude that the record discloses ample evidence to support the finding to which objection is made.

Judgment affirmed.

We concur: FINLAYSON, P. J.; CRAIG, J.

58 Cal. App. 275

SNELL v. TASHJIAN. (Civ. 2476.)

(District Court of Appeal, Third District, California. June 22, 1922.)

1. Landlord and tenant — 223(5)—Cross-complaint held properly dismissed.

In an action for rent under a two-year lease of a vineyard, a cross-complaint, alleging that during the first year the plaintiff lessor prosecuted an action of unlawful detainer against defendant lessee for recovery of possession of the vineyard without just and probable cause, for the purpose of harassing and annoying defendant and unjustly depriving him of the premises, was properly dismissed.

2. Appeal and error — 1071(5)—Finding that lessee of vineyard voluntarily sold crop and suffered no damage held immaterial in view of other findings.

In an action for the second year's rent of a two-year lease of a vineyard, where it was found that the lessee executed a lease with knowledge that the first year's crop was contracted to be sold to a raisin company, a finding that the lessee voluntarily sold the crop and suffered no damage thereby was immaterial, since the lessee could not complain of any burden which he voluntarily assumed.

Appeal from Superior Court, Tulare County; W. B. Wallace, Judge.

Action by E. C. Snell against Harry Tashjian. Judgment for plaintiff, and defendant appeals. Affirmed.

Farnsworth, McClure & Burke, of Visalia, for appellant.

Leroy G. Smith, of Dinuba, for respondent.

FINCH, P. J. Plaintiff leased his vineyard to the defendant for a term of two years. The rental for the first year was paid, and this action was brought to recover that of the second year.

By way of counterclaim the defendant alleged that prior to the execution of the lease the plaintiff had contracted with the California Associated Raisin Company to sell "all of the raisins raised and produced on said vineyard" during the first year of the lease term; that defendant had no knowledge of such contract at the time the lease was executed; that by reason of such contract the defendant was compelled to sell his 1920 crop of raisins to the said company, to his loss in the sum of \$4,000. By cross-complaint the defendant alleged that during the year 1920 the plaintiff prosecuted an action of unlawful detainer against him for recovery of possession of the vineyard without just or probable cause, for the purpose of harassing and annoying him and unjustly depriving him of the premises.

[1] The court properly dismissed the cross-

complaint. *Clark v. Kelley*, 163 Cal. 207, 124 Pac. 846.

The court found that the plaintiff did not enter into the alleged contract with the raisin company, but that his predecessor in interest had made the contract alleged; that at the time of the execution of the lease the defendant had knowledge of such contract; and that he voluntarily sold his crop of raisins to the said company.

Appellant contends that there is no evidence to support the finding that the defendant had knowledge of the raisin contract when the lease was executed. The evidence shows that the raisin company's sign was in a conspicuous place on the premises, and the plaintiff testified that during the negotiations leading up to the making of the lease the defendant said: "I will give you \$7,000 for it, but I'd rather give you \$8,000 if it wasn't in the association."

[2] Appellant urges that the evidence does not support the findings to the effect that the defendant voluntarily sold his crop of raisins to the raisin company, and that he suffered no damage by reason of such sale. These findings are immaterial by reason of the finding that the defendant entered into the lease with knowledge of the raisin contract which would bind him, if he was so bound, to sell his crop to the company. Appellant cannot complain of any burden which he knowingly assumed. No other points are raised by the appeal.

The judgment is affirmed.

We concur: PREWETT, Justice pro tem.; BURNETT, J.

58 Cal. App. 22

In re WILKIE. (Civ. 2431.)

(District Court of Appeal, Third District, California. May 27, 1922.)

Aliens — 68—No appeal can be taken from a judgment denying citizenship.

Under Const. U. S. art. 1, § 8, giving Congress power to establish uniform rules of naturalization, and Act Cong. June 29, 1906 (U. S. Comp. St. §§ 4351 et seq.), giving certain state courts jurisdiction of naturalization proceedings and making no provision for an appeal from such decisions, a refusal of citizenship to an alien by either a state or federal court cannot be reviewed on appeal.

Appeal from Superior Court, Sacramento County; J. E. Prewett, Judge.

In the matter of the application of Peter Jules Wilkie for naturalization. From an order denying petitioner's application to become naturalized citizen of the United States, the petitioner appeals. Appeal dismissed.

Hilton & Christensen, of San Francisco, for appellant.

J. T. Williams, T. J. Sheridan, and F. N. Littleton, all of San Francisco, for respondent.

HART, J. The petitioner, a native of Scotland and a subject of Great Britain, appeals from an order or judgment of the superior court in and for the county of Sacramento denying his application to become a naturalized citizen of the United States.

The ground upon which the appeal is predicated is that the court below, in passing upon the evidence, abused its discretion in denying the application.

In limine the respondent, United States of America, through the United States district attorney for the Northern district of California, has filed a motion to dismiss the appeal upon the following grounds:

"First, that the court has no jurisdiction of said appeal; second, that the order attempted to be appealed from is not an appealable order; third, that under the acts of Congress, providing for the naturalization of aliens and authorizing a petition for naturalization to be heard by state courts of record, it is not contemplated or authorized that any appeal be taken from any order made by any state court or United States District Court in the premises."

The three grounds above stated involve practically the same proposition, to wit: That an order or judgment of any court, vested with jurisdiction to hear and determine such matters, denying the application of an alien to become, by proceedings in naturalization under the act of Congress of 1906 (chapter 3592, 34 Stats. at L. 596; U. S. Comp. St. Supp. 1911, p. 529 [U. S. Comp. St. § 4351 et seq.]), a citizen of the United States, is not an appealable order or judgment, and this by virtue of the fact that the said act of Congress does not authorize an appeal from such an order or judgment; that therefore there is no authorized means whereby an appellate court may be clothed with jurisdiction to review proceedings in naturalization which have culminated in an order or judgment either denying or allowing an application for citizenship.

The cases in which the act of Congress of June, 1906, has been considered and construed sustain the contention thus advanced by the respondent upon reasons which appear to be sound and quite impregnable.

Section 8, art. 1, of the federal Constitution provides that—

"The Congress shall have power * * * to establish a uniform rule of naturalization."

In obedience to the power thus expressly conferred upon the Congress, naturalization laws were enacted at a very early stage after the organization of the federal government by the adoption of the national Constitution, and have, as modified or amended from time

to time in certain particulars, since remained in existence. Down to the time of the enactment of the act of Congress of 1906, and in a few instances even after the passage of that act, judgments of United States courts in naturalization proceedings have been reviewed by the appellate courts, and the right to such a review was never questioned, so far as we are contrariwise advised, until the decision in the case of *U. S. v. Dolla*, 177 Fed. 101, 100 C. C. A. 521, 21 Ann. Cas. 665. In that case the congressional legislation of 1906 authorizing the naturalization of aliens and prescribing the procedure in such proceedings, to which, it may here be suggested, new rules, designed for the more effectual safeguarding of the country against the admission of undesirable foreigners to the rights of citizenship therein, were added by said act, was elaborately reviewed. In said act of Congress no right of appeal from a judgment in citizenship proceedings was expressly granted or authorized, and it was held, in the case just mentioned, that the omission to provide in said act for an appeal in such proceedings was by the Congress thus extended, *ex industria*, to deny or foreclose such right. The reasoning of the court, in supporting its conclusion, is so forceful and so plainly unimpeachable, and the question to which it is addressed of such singular importance at the present time, that we may pardonably reproduce herein an extended excerpt from the court's opinion as follows:

"Under the naturalization law of June 29, 1906, the jurisdiction is conferred upon the courts, the petition for naturalization is to be filed addressed to the court, notice is to be given by posting, witnesses may be summoned, the United States are given the right to appear and oppose and call witnesses, every final hearing shall be had in open court before a judge or judges, and final orders are to be under the hand of the court and entered of record. Under the first naturalization act (Acts March 26, 1790, c. 3, 1 Stat. 103), jurisdiction was conferred upon state courts only, but since 1802 it has been extended to District and Circuit Courts of the United States. Naturalization has always been an act or judgment of a court, but never until the act of 1906 has it been suggested that the special proceedings authorized constituted a case, action, or cause that could be reviewed on writ of error under any judiciary act, state or federal. If, by the additional provisions and restrictions with which naturalization is guarded by the act of 1906, an application for naturalization is made a case within the meaning of section 6 of the Courts of Appeals Act of 1891, then it must follow that all applications for naturalization in all courts, state and federal, are reviewable by appeal or writ of error, as the several judiciary acts may read, at the suit of the rejected applicant or the United States. We may say, further, if naturalization proceedings under the act of 1906 constitute a 'case,' it is a case at law, not in equity nor in admiralty; and if such a case is reviewable under present laws it can only be on writ of error, and only

errors of law appearing of record can be reviewed. It is unnecessary to point out that such review would be fruitless in all cases where the forms provided by the law are followed. Any review of naturalization proceedings in an appellate court, to be worth while, must be a review of the facts as well as law, and this can only be on appeal, and an appeal must be provided by statute. As the act of 1906 is silent with regard to any appeal or writ of error, while sedulous in placing guards and restrictions around the proceedings and fully protecting the United States by authorizing a suit to annul any certificate fraudulently obtained or improperly granted, it is not to be supposed it was the intention of the said act to make a reviewable case of every application for naturalization. The mischief to be remedied was not in that line, but was the hasty and improvident way in which many of the courts under the prior laws naturalized aliens without examination and proper proof. Naturalization of aliens is an act of grace, not right, and it is not necessarily a business of the courts. It is lodged in the courts for convenience, and, at the pleasure of Congress, can be taken entirely away and lodged in the Bureau of Commerce and Labor, which is now charged with supervision of the operations under the act, or with any executive officer, as is now lodged the right and power to determine whether certain aliens shall be permitted to come into the country at all. See *Lee Lung v. Patterson*, 186 U. S. 168, 22 Sup. Ct. 795, 46 L. Ed. 1108. If naturalization is a judicial act, it is because done by judges. We therefore conclude that the action and proceedings of the District Court on Abba Dolla's petition for naturalization did not constitute a 'case' within the meaning of the sixth section of the judiciary act of 1891, and this court is without jurisdiction to review the same."

In *United States v. Neugebauer*, 221 Fed. 938, 137 C. C. A. 508, the United States Circuit Court followed the above decision, and denied the right of appeal by the government from a judgment of the United States District Court admitting said Neugebauer to citizenship.

In *United States v. Ness*, 245 U. S. 319, 38 Sup. Ct. 118, 62 L. Ed. 324, the United States Supreme Court declared that an appeal will not lie in a naturalization proceeding. It is true that the question did not come before that court directly in that case, which was a suit to secure a decree canceling a certificate of naturalization issued to Ness by an Iowa state court upon the ground that the same was procured by fraudulent representations and means. However, the court took occasion to say in that case:

"Opposition to the granting of a petition for naturalization may prevail, because of objections to the competency or weight of evidence or the credibility of witnesses, or mere irregularities in procedure. A decision on such minor questions, at least of a state court of naturalization, is, though clearly erroneous, conclusive even as against the United States if it entered an appearance under section 11. For Congress did not see fit to provide for a direct

review by writ of error or appeal. But where fraud or illegality is charged, the act affords, under section 15, a remedy by an independent suit 'in any court having jurisdiction to naturalize aliens in the judicial district in which the naturalized citizen may reside at the time of bringing the suit.' "

It will be interesting, as in confirmation of the view expressed in *United States v. Dolla*, supra, that provision for appeal was purposefully or designedly omitted from the naturalization act of 1906, to note the following brief history of the legislation in question as given in the footnotes of *United States v. Ness*, supra:

"The bill submitted by the Commission on Naturalization provided for such appellate proceedings, and its proposal was recommended to the House by the Committee on Immigration and Naturalization as § 13 (Report of Feb. 6, 1906, p. 5); but after debate in the Committee of the Whole (40 Cong. Rec. pp. 7784-7787) was stricken from the bill. The bill proposed by the Commission and recommended by the House Committee contained in addition (as section 17) the provision for cancellation proceeding enacted as section 15."

But, while it is not denied by the petitioner here that the rule as confirmed by the more recent decisions construing the act of Congress of 1906 is that there is no appeal in citizenship proceedings had in the federal courts, it is nevertheless contended that the government, having invoked the aid of the state courts of general jurisdiction (which are courts of record, having seals) in the matter of the administration of naturalization laws, concedes to such state courts the right to follow their own procedure, and to the applicant before the state court (for naturalization) the guaranty of due process of law, which includes all the processes whereby a litigant citizen's rights may be finally and definitely determined. In other words, the claim is that (and we now appropriate petitioner's own language), "if the applicant is denied a fundamental right in proceedings which culminated in an opinion or judgment, the opinion or judgment is infected with the same infirmity and the method of review provided for such judgment is a part of due process of law." Hence, so it is argued, "the review provided by the state of California by appeal is a part of the due process of law."

It would seem that a sufficient answer to the contention thus stated is to be found in the language itself of the fourth subdivision of section 8 of article 1 of the federal Constitution that Congress shall have power "to establish an uniform Rule of Naturalization." This language, it seems to us, can mean nothing less than that the administration of the law or laws governing the naturalization of aliens must be uniform or the same in all the tribunals to which the Congress has specifically intrusted that duty;

that is to say, the proceedings must be conducted, whether in a state or a federal court, according to the rules promulgated by the statute itself, and not according to the rules of procedure in state courts, where the proceedings are had before the latter court. But this proposition has been directly passed upon by the courts of several state jurisdictions, and by those courts it is held that, in committing to state courts of record the duty or the right of hearing applications for naturalization, Congress thus merely employed said courts as agencies through which the general government "is discharging one of its peculiar functions of national sovereignty." *Eldredge v. Salt Lake Co.*, 37 Utah, 188, 106 Pac. 939; *State v. Superior Court*, 75 Wash. 239, 134 Pac. 916, Ann. Cas. 1915C, 425.

In the Utah Case just named, it is, among other things, said:

"It seems to us too obvious to require either argument or the citation of authorities that in naturalization proceedings the United States government exercises sovereign functions which exclusively belong to that government, and, further, that, in authorizing the state courts to act in such proceedings, the national government selects such courts and the clerks thereof as government agencies through whom said government is discharging one of its peculiar functions of national sovereignty. Whatever may have been the theory of some courts regarding the power of Congress to confer such authority upon the state courts in the past, the question is now settled that Congress has such power, and that state courts may constitutionally exercise the same when authorized by Congress to do so. Among other cases, we refer to the following: *Levin v. United States*, 128 Fed. 826, 63 C. C. A. 476; *Robertson v. Baldwin*, 165 U. S. 275, 17 Sup. Ct. 326, 41 L. Ed. 715; *State v. Libby*, 47 Wash. 481, 92 Pac. 350. The question as to whether the state courts continue or cease to be state courts while acting in naturalization cases, while interesting, is not material. It is enough for the present to know that in so doing such courts are merely agencies of the national government."

In the Washington Case it is said, quoting the syllabus:

"Under the Const. U. S., art. 1, § 8, giving Congress power to establish uniform rules of naturalization, and Act June 29, 1906, c. 3592, § 3, 34 Stat. 596 (U. S. Comp. St. Supp. 1911, p. 529), giving certain state courts jurisdiction of naturalization proceedings, the state courts, in exercising that jurisdiction, exercise it as a function of the national government, and the procedure is controlled by the laws enacted by Congress."

Again, it is said in that case:

"Under the federal naturalization law, there is no right of appeal from the decision of the court hearing the application, and therefore the state appellate courts cannot entertain appeals from such hearings in the state courts."

The above cases were decided after the enactment of the act of Congress of 1906 and deal entirely therewith.

The appellant cites the case of *In re Naturalization of Bura*, 5 Ohio App. 334, which also was decided subsequently to the enactment of the naturalization act of 1906, and which supports the position taken herein by him. In that case the court brushes away the arguments and the reasoning leading to the conclusion arrived at in the Washington and Utah cases above referred to and emphatically holds, as indicated in the syllabus, that—

"The Congress of the United States having by apt legislation conferred upon certain state courts the power to admit aliens to citizenship and to administer the naturalization laws of the country, sharing with such courts the jurisdiction of the federal courts over that subject, the power may be exercised according to the laws of procedure governing the state courts, as an incident to the power conferred, including any right of review to which an aggrieved party may be entitled by state law; and this although such right of review is withheld when naturalization laws are administered in the federal courts."

But, with due deference to the Ohio court, we think that, upon a reasonable degree of reflection, it will readily be perceived that the decisions in the Washington and Utah cases are crystallized from the sounder reasoning.

The theory upon which Congress excluded the right of appeal in naturalization proceedings evidently is that, since the matter of the naturalization of aliens is one of grace, and not of right, it would be sufficient to submit the question whether an alien shall or shall not be admitted to the rights of citizenship of this country to the exclusive decision of the courts to which the duty of hearing such applications is intrusted, allowing such courts a wide discretion in the determination of the matter and disallowing any review of such decisions by the higher courts, except where an independent suit may be brought, as authorized by the law itself, to set aside or cancel any certificate of naturalization which has been procured by fraudulent means.

Finally, it is to be observed that obviously there could be no uniformity in the administration of the naturalization laws, as is clearly contemplated by the federal Constitution respecting that subject, if from the judgment in the proceedings in one of the two forums to which the administration of the naturalization laws is assigned by the act of Congress of 1906 an appeal would lie, while in the other it would not. There is no conceivable reason why so unjust a discrimination should be imputed to the intention of Congress, nor why a construction should be given the act leading to such re-

sult. It is not for a moment to be supposed that Congress intended that neither aliens applying for naturalization in the state courts nor the government should be entitled in such proceedings to an appeal in the federal courts and allowed the same right in the state courts.

But it is unnecessary to pursue the discussion further. We are firmly of the opinion that it was not intended that a judgment in citizenship proceedings, whether in the state or the federal courts, should be subject to review by the courts of appeal.

Accordingly the motion of the respondent to dismiss the purported appeal in this case will be, and the same is hereby, granted.

We concur: FINCH, P. J.; BURNETT, J.

58 Cal. App. 76

POOLE v. CLOVER. (Civ. 2417.)

(District Court of Appeal, Third District, California. June 2, 1922.)

Animals §=50(4)—Animals driven away by wrongdoer not running "at large."

Under county ordinances penalizing one permitting domestic animals to run "at large" and authorizing constables to collect a fee for impounding such animals, an owner of animals driven off his premises by a wrongdoer is not liable for the fees to a constable who impounded them.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, At Large.]

Appeal from Superior Court, Yolo County; W. A. Anderson, Judge.

Action by David Poole against Isaac Clover. From judgment for defendant, plaintiff appeals. Reversed.

Grant & Bailey, of Woodland, for appellant.

C. C. McDonald, of Woodland, for respondent.

FINCH, P. J. Plaintiff brought this action to recover possession of six head of horses. The answer alleges that—

At all times mentioned in the complaint the defendant was the constable of Woodland township; that the horses were by the owner "permitted to run and be at large and to go unrestrained and to pasture and graze upon the public highways within the boundaries of the said Woodland township, * * * contrary to the provisions of section 1 of * * * Ordinance No. 63 of Yolo county; that * * * the defendant, acting in his official capacity as constable of said Woodland township, took up and impounded the said domestic animals * * * under and by virtue of the provisions of said Ordinances No. 63 and No. 94 of Yolo

county"; and that plaintiff refused to pay the "fees, expenses, and costs due the defendant by reason of the impounding of the said animals under the provisions of said Ordinance No. 94."

Section 1 of Ordinance No. 63 provides:

"No person or persons owning or having the care, custody, possession or control of any domestic animal of the species of horse, mule, donkey, cattle, sheep, goat, or swine, shall hereafter permit the same to run or be at large or to go unrestrained elsewhere than upon his own premises, or to permit the same to pasture or graze upon the public highways, within the corporate limits of the county of Yolo."

Section 2 provides:

"Any person violating any of the provisions of this ordinance shall be deemed guilty of a misdemeanor, and be punished by fine not exceeding one hundred and fifty dollars, and not less than fifteen dollars, or imprisonment in the county jail not exceeding ninety days, or by both such fine or imprisonment."

Ordinance No. 94 provides:

"It shall be lawful for, and the duty of, the constables of the various townships of Yolo county to take up and impound in a secure place any and all domestic animals running or being at large, or permitted to go unrestrained, or pasturing, or grazing upon the public highways of Yolo county in their respective townships, contrary to the provisions of Ordinance No. 63 of Yolo county; * * * and it shall be lawful for the constable of each of the aforesaid townships to collect from the owner or owners of each of the aforesaid animals so taken up or impounded the sum of \$2 per head for each animal so taken up and impounded for his services in taking up and impounding the same, and in addition to the aforesaid sum each of the constables shall also be entitled to collect from the aforesaid owner or owners of each of the aforesaid animals so taken up and impounded the sum of 50 cents per head per day for his services in feeding and caring for the said domestic animals while in his keeping while impounded."

The ordinance further provides that the constable shall give notice of the taking up of such animals in the manner usually required in cases of estrays, and sell them, if not claimed by the owner, and the fees and charges paid within a prescribed time, and gives the constable a lien on the animals impounded for the amount of his fees and charges. The owner is permitted, at any time prior to the sale of the animals, to retake possession thereof upon payment of the accrued fees and charges.

At the trial the court sustained the defendant's objection to the plaintiff's attempt and offer to prove—

"that the six head of horses in question were driven off the premises by servants of Mr. Conway, over whom the plaintiff in this action had no control; that they were driven off against the will and without the consent and without the knowledge of the plaintiff in the action; * * * that the plaintiff immediately

tried to locate the horses for the purpose of recovery, and that he had absolutely no opportunity either at that time or any time subsequent to claim the horses before they got into the hands of the constable."

The question is thus presented whether under the terms of Ordinance No. 94 an owner without fault, whose domestic animals have been driven off his premises against his will and without his knowledge or consent and left to run at large upon a highway, is required to pay the fees and charges specified in the ordinance in order to recover such animals from an officer who has impounded them.

Ordinances 94 and 63 must be construed together. The latter is made a part of the former as fully as if it were set forth at length therein. The latter, only, makes it unlawful for the animals named to run at large or graze upon the highways. Ordinance 94 authorizes the constable to impound animals only when they are at large or upon the highway "contrary to the provisions of Ordinance No. 63." The constable must look to the latter ordinance to ascertain whether the animals are upon the highway under such circumstances as to justify him in impounding them under the authority of the former.

The provisions of Ordinances 63 and 94 are similar to those of the statute of 1874, which provided that—

No stock of any kind shall be "allowed to pasture upon any public highway, and it shall be the duty of all roadmasters and deputy roadmasters, within their respective districts, to take up all animals found pasturing upon the public highways."

In *Thompson v. Corpstein*, 52 Cal. 653, in reversing the judgment of the trial court, it is said:

"The court below found that the plaintiff's cattle had been driven from the plaintiff's land to Wolf creek upon the Stephen's creek road for the purpose of being watered, and while there in charge of a herder, who seems to have fallen asleep for the moment, were found pasturing upon both sides of the road. There is no pretense that the plaintiff or the herder intended that the cattle should pasture upon the road. That they were found eating the grass there was owing solely to the accident of the herder falling asleep for the moment while in charge of the cattle. Had he fallen down in a fit, or been disabled by a sudden attack of disease, the same consequence might and probably would have ensued, but we do not think that in the one case more than in the other, the cattle would be subject to proceedings under the act."

There is no difference in principle between that case and this, except that it may be said that the herder there was negligent in falling asleep, while here the plaintiff offered to prove that he was wholly without fault. *Thompson v. Corpstein* seems to be the only

case in this state directly in point on the question under consideration, and must be held to be controlling. In other jurisdictions the decisions are conflicting. The terms "at large" and "permitting animals to run at large" have often been defined in cases arising under penal statutes and those involving questions of negligence or contributory negligence. In such cases it has generally been held sufficient for the party charged to show that he was without fault. *Gentry v. Little*, 16 Ky. Law Rep. 26; *Evans v. Holman*, 202 Mo. 284, 100 S. W. 624; *Ball Ranch Co. v. Hendrickson*, 50 Mont. 220, 146 Pac. 278; *Railroad Co. v. Stephenson*, 24 Ohio St. 48; *Howrigan v. Bakersfield*, 79 Vt. 249, 64 Atl. 1130, 9 Ann. Cas. 282; *International & G. N. R. Co. v. Seiders*, 50 Tex. Civ. App. 568, 110 S. W. 997; *Willis v. Gerking*, 109 Wash. 382, 186 Pac. 1064. In a number of states, where statutes or ordinances made it the duty of officers to impound cattle found running at large, it has been held to be no defense, as against fees and charges for impounding such animals, to show that the owner was without fault. *Swander v. Wakefield*, 84 Ill. App. 426; *Gentry v. Little*, supra; *Bruce v. White*, 4 Gray (Mass.) 345; *McVey v. Barker*, 92 Mo. App. 498; *Peck v. Liesmann*, 142 Mo. App. 476, 127 S. W. 107; *City of Paris v. Hale*, 13 Tex. Civ. App. 386, 35 S. W. 333. In *Evans v. Holman*, supra, the first section of the ordinance provided that—

"Whoever shall permit his domestic animals to run at large within the city limits, shall, upon conviction thereof, be deemed guilty of a misdemeanor and fined in any sum not exceeding \$100."

The second section provided that—

"It shall be the duty of the city marshal to take up any and all * * * domestic animals found running at large within the city limits and securely impound the same * * * and keep said animals in said pound until sold or redeemed" in accordance with the terms of the ordinance.

The court said:

"In order to authorize the imposition of a penalty for permitting the animals to run at large * * * it must appear that such running at large * * * was with the knowledge or consent of the owner. In other words, that he in fact permitted such animal or animals to run at large."

It was held, however, that—

Where animals were impounded under authority of the second section of the ordinance, "where no penalty is imposed upon the owner, it is of no consequence how the animals came to be at large, whether with the knowledge, consent or permission of the owner."

In *Sloan v. Hubbard*, 34 Ohio St. 583, the first section of the act made it unlawful for owners of animals "to suffer the same to run

at large in any public road or highway." Section 4 provided that in a prosecution for the penalty prescribed by the first section it should be a defense to show that the "animal was at large without the knowledge of the owner or keeper, and without his fault." Section 6 made it the duty of the officers therein named "to take up and confine any animals mentioned in the act, found at large contrary to its provisions." Since ignorance of the fact that the animals were at large was expressly made a defense under the fourth section and not under the sixth, it was held that it was not the intent to make want of knowledge a defense in a case arising under the sixth section. See, also, *Burdett v. Allen*, 35 W. Va. 347, 13 S. E. 1012, 14 L. R. A. 337.

In *Beeson v. Tice*, 17 Ind. App. 83, 45 N. E. 614, 46 N. E. 154, the case of *Thompson v. Corpstein*, supra, is cited and followed. In *Wolf v. Nicholson*, 1 Ind. App. 222, 27 N. E. 505, where animals were impounded under a statute authorizing them to be taken up when "found running at large upon the roads," it is held that—

"Animals which escape from an inclosure * * * cannot be regarded as animals running at large where owner endeavors to recover them when he learns of their escape."

In *Stephenson v. Ferguson*, 4 Ind. App. 230, 30 N. E. 714, under a statute requiring "road supervisors to cause animals running at large * * * to be impounded," the supervisor impounded certain animals. "Some unknown person or persons, without the knowledge or consent of the appellant, * * * threw down a portion of the fence by which the pasture was inclosed, and thereby released the cattle." The owner immediately went in search of them, and found them the next morning in the supervisor's possession. The supervisor refused to give them up except on payment of \$12 as his charges. The court held that the supervisor could not so hold the cattle where the owner was not at fault. In *Carolina-Florida Planting Co. v. Malge*, 64 Fla. 234, 60 South. 346, animals were taken up under a statute making it "unlawful for any live stock to run at large," and providing that "any person may take up and impound any live stock running at large," and collect from the owner certain charges and sell the live stock taken up where the owner fails to pay such charges. It was held that "a mere accidental or unknown escape of cattle does not make them 'running at large' within the statute."

Respondent correctly states that the ordinance should be construed with reference to the object intended to be accomplished. It is also true, as said in *Dorris v. McKamy*, 40 Cal. App. 267, 180 Pac. 645, that "the word 'permit' is a word of considerable elasticity." But, construing the two ordinances together, nothing contained in Ord-

nance 94 indicates an intent to authorize the constable to impound any animals except such as are at large or upon the highways in violation of penal Ordinance No. 63. If the constable has authority to hold plaintiff's animals under the circumstances which plaintiff offered to prove in this case, then he may so hold animals under similar circumstances in all cases. It is not unusual for owners to confine several thousand sheep in a single field, securely fenced. If, under such circumstances, some miscreant at night and without the knowledge of the owner should tear down the fence and drive the sheep upon the highway and leave them there, would the constable have authority to impound them under the provisions of the ordinance and hold them until the owner paid \$2 a head and other charges for the constable's services in taking them up and caring for them? If so, then the provisions of the ordinance authorizing the impounding of animals would, in many cases, be more penal than the penal section. It cannot be presumed that the supervisors intended any such consequences.

It is not necessary to decide whether an ordinance would be valid which required animals running at large or grazing upon the highways, irrespective of the owner's fault, to be impounded and held until payment of reasonable charges therefor. It is sufficient to say that such does not appear to have been the intent in the passage of the ordinances in question here.

The judgment is reversed.

We concur: HART, J.; BURNETT, J.

57 Cal. App. 731

CARLSEN v. DIEHL. (Civ. 4201.)

(District Court of Appeal, First District, Division 1, California, May 22, 1922.)

1. Municipal corporations ☞705(10)—Last clear chance rule not applicable where truck injured plaintiff after front end thereof had passed him in safety.

Where plaintiff was injured by the rear wheels of a truck after the front end of the truck had passed him in safety, his peril was not one which was apparent to the driver of the truck, so that the doctrine of last clear chance, which requires knowledge of the peril, cannot apply.

2. Municipal corporations ☞705(10)—Person working in street but not compelled to do so must exercise care of pedestrian.

The rule, that a person who is required to do his work in the street need not exercise the same diligence to avoid accident as pedestrians or others who use the streets merely as a medium of passage, does not apply where plaintiff was working in the street loading a truck at

the time he was injured, but was not compelled by the nature of his work to be in the street.

3. Municipal corporations ☞706(3)—Res ipsa loquitur does not apply to street accident where inference of negligence was not necessary.

The doctrine of res ipsa loquitur, the effect of which is to lighten the burden of proof resting upon the plaintiff by permitting the jury to indulge in a presumption that the defendant was negligent, does not apply in an action for injuries to a person in a street where there was direct testimony as to the cause of the accident, or where the facts would permit an inference that it was due to a cause other than defendant's negligence as reasonably as that it was due to negligence.

4. Master and servant ☞349—Compensation Act at time of accident governs.

Where the accident to an employee happened before the amendment to the Workmen's Compensation Act in 1917 took effect, the rights of the employee to recover against a third person whose negligence caused the injury, notwithstanding recovery of compensation from his employer, is governed by the provisions of Workmen's Compensation Act 1913, § 31, which prohibited any evidence as to the amount of compensation paid.

5. Master and servant ☞400—Under Compensation Act prior to amendment, employer and insurer were necessary parties to action against third person.

Under Workmen's Compensation Act 1913, § 31, making a claim for compensation an assignment to the employer of the right to recover damages from a third person, the employer and the insurance carrier were necessary parties to an action by the employee against such third person after compensation had been paid, and, if they refused to join as plaintiffs, they should be joined as defendants.

6. Appeal and error ☞977(1)—New trial ☞6—Ruling on motion for a new trial is largely within trial court's discretion.

The granting or refusing of a new trial is largely within the discretion of the trial court, and its ruling will not be reversed unless the discretion has been abused.

Appeal from Superior Court, City and County of San Francisco; Bernard J. Flood, Judge.

Action by Thomas Carlsen against Fred W. Diehl to recover damages for personal injuries. From an order granting a new trial after verdict for the plaintiff, plaintiff appeals. Affirmed.

Donald McKisick, of Sacramento, and J. J. Dunne, of San Francisco, for appellant.

Ford & Johnson, of San Francisco, for respondent.

KERRIGAN, J. This is an appeal by Thomas Carlsen, plaintiff, from an order granting a new trial. The action was insti-

tuted by Carlsen to recover damages for personal injuries sustained by him while engaged in loading a truck near the driveway of the entrance to what is known as the Oakland Harbor ferry. This ferry is used for the purpose of transporting vehicles and passengers across San Francisco bay. The entrance on the western side of the bay is south of the Ferry building in San Francisco, access to the ferry slip being from East street. On the left side of said drive leading to the slip is a ticket office of the company operating the ferry, and in front of said ticket office is a scale. The testimony indicates that the truck of the defendant herein, operated by one William B. Robertson, stopped opposite the scale, Robertson procured a ticket, and proceeded to drive toward the boat. To the left or north of the driveway stood a wagon of the Union Transfer Company which the plaintiff and another were loading. The automobile truck of the defendant (respondent) in moving from its place upon or opposite the scale proceeded toward the boat along the extreme northerly part of the driveway, and in doing so approached and passed the truck which the plaintiff was engaged in loading. There is a sharp conflict in the evidence as to the precise location of this truck, the plaintiff contending that the loading point was approximately ten feet north of the driveway, and defendant insisting that the distance was only four or five feet. In any event in driving toward the ferry slip the truck came in close proximity to the plaintiff; the front end of the truck passed him, and, as testified by its driver:

"I felt the back of my truck come down with a thud, and I looked around to the rear part of my truck, and I saw that Mr. Carlsen had just been run over."

Testimony was adduced in behalf of plaintiff to the effect that the course taken by the truck was at an angle toward the plaintiff instead of in a direct line to the ferry slip; also, that its driver had stated that his truck skidded. On the other hand, the driver, as a witness, testified that the truck did not skid, and, on the contrary, imputed any change in the relative positions of the plaintiff and the moving truck to a movement by plaintiff. He said:

"I saw the shoe mark, a side shoe mark like that, of his big toe and the heel where it had slipped out, extending about two feet."

It is uncontradicted that the front end of the truck passed Carlsen and did not interfere in anywise with his movements loading the transfer wagon. This being so, and it appearing that Robertson was driving at an angle toward the boat it is hard to realize that the accident could have happened in any other way than by the rear wheels of the truck skidding to the north, or Carlsen slipping backward (to the south), as, obvi-

ously, if the truck continued in the course testified to, the rear wheels would be in a more southerly position than those in front.

In this connection it might be well to consider the contention of the respondent, made in support of the action of the trial court in granting his motion for a new trial, that the instruction to the jury on the doctrine of the "last clear chance" was prejudicial error.

The instruction complained of was to the effect that even if the plaintiff was negligent, "still, if you find that the collision referred to in the testimony might have been prevented by the use of ordinary care upon the part of Robertson, and if you find that Robertson did not exercise such care, but carelessly caused the collision to occur, then your verdict should be for the plaintiff and against the defendant herein. The principle applicable here is that even if you find that the plaintiff was negligent on the occasion in question, still if Robertson in the exercise of ordinary care had the last clear chance to avoid the collision, but did not avail himself of that chance, then such negligence of the plaintiff would not excuse the defendant." Respondent claims that this instruction entirely deprived the defendant of his defense of contributory negligence, and fails to include elements essential to the application of the doctrine it attempts to define.

While this instruction, as one dealing with the situation of a person having the last clear chance to avoid an unintentional injury to another, is far from satisfactory—the first part of it being correct only if entirely subordinated to the later explanatory language—the principal cause for criticism on the part of the respondent is, we think, that the state of the evidence did not justify the giving of it; and being given, the jury was apt to conclude from it that any negligence on the part of the defendant would warrant a verdict against him.

[1] In the instant case it appears from the testimony that Robertson, the driver of the truck, was shielded by a cab; that the head end, including the front wheels, had passed Carlsen, and, according to Robertson's version of the accident, the first he knew that anything was wrong was by feeling a thud. Since the front wheels of the truck passed Carlsen without injuring him, there was no ground for apprehending that the rear wheels would not do likewise. The peril, therefore, from which the plaintiff suffered, namely, being struck by the rear wheels of the truck, was not one which can properly be said to have been apparent to its driver. To charge a person, upon the doctrine of last clear chance, with responsibility for injuring another whose own negligence proximately contributes to such injury, a knowledge of the impending danger is essential. In the case of Wallis v. Southern Pacific Co.,

184 Cal. 662, 195 Pac. 408, 15 A. L. R. 117, it was said that—

"The defendant must not only be aware of the danger in time to avert it, but must also know or have reason to believe that the plaintiff is oblivious of the danger, and is in a position where he cannot extricate himself from it"—citing *Arnold v. S. F. O. T. Rys.*, 175 Cal. 1, 164 Pac. 793; *Basham v. S. P. Co.*, 176 Cal. 320, 168 Pac. 359; *Young v. S. P. Co.*, 182 Cal. 369, 190 Pac. 36.

The case of *Wallis v. S. P. Co.*, supra (184 Cal. 672, 195 Pac. 408, 15 A. L. R. 117), holds that if there is not sufficient evidence to justify submitting an instruction on the last clear chance to the jury, it is reversible error.

In a later case (*Read v. Pacific Elec. Co.*, 185 Cal. 520, 197 Pac. 791), where a motion for a new trial was granted by the trial court without specifying any particular ground as the basis upon which it was made, the court stated the rule to be, in substance, that—

"Although it appears that the contributory negligence of the decedent was one of the proximate causes of his death, yet, if the defendant's agents having charge of the instrumentality which caused the death perceived that the decedent, by his own negligence, had placed himself in a position of peril from which he probably could not escape, and after perceiving his perilous position failed to exercise ordinary care and prudence to avoid injuring the decedent * * * the plaintiff could recover."

[2] Respondent makes the claim also that the court's instruction to the jury on the question of degree of care required of plaintiff was erroneous. The instruction complained of reads as follows:

"I charge you that the rights of a person whose duties require him to be in places used by vehicles, with respect to such vehicles, cannot be determined by the same rules applicable to pedestrians who have no occupation requiring their presence in such places; not that such person is bound to exercise any less care, but because the care to be exercised must be determined from a different standpoint. In such cases his care or want of care is a fact to be determined from all the circumstances surrounding him at the time; but he is not called upon to exercise the same degree of diligence in avoiding accidents as pedestrians or others who use the place merely as a medium of locomotion; and such a person is not bound to neglect his work in order to avoid injury due to the want of ordinary care on the part of operators of vehicles. If therefore, you find from the evidence before you that Mr. Carlsen, the plaintiff in this action, was a person whose duties required him to be in places used by vehicles, then I charge you that the rules which I have just referred to would be applicable to him, and that you should weigh and consider the same in arriving at your verdict in this cause."

The evident effect of this instruction was to give to the party injured the benefit of the well-settled rule that a person compelled by the nature of his work to be at a particular place is to be held free from negligence. Appellant insists that the instant case is not the same as that of a pedestrian, and that he should not be called upon to exercise the same diligence to avoid accidents as pedestrians or others who use the streets merely as a medium of passage. To support this view he cites *King v. Green*, 7 Cal. App. 473, 94 Pac. 777.

We are of the opinion that the rule does not extend to a person in the situation of the appellant, and that the case cited is against his contention. Carlsen was not forced to work in that particular spot; and the placing of responsibility for an injury to a person working alongside a driveway, when said person is not compelled to be there, should be a matter for the jury to decide by applying the ordinary rule as to negligence. As was said in the case last cited:

"Negligence is a comparative and not a positive term, and its use is relative whether applied to the negligence of the defendant or that of the plaintiff. For this reason in most cases it becomes a question of fact for the jury to determine who was negligent under the circumstances of the case. * * * It was for the jury to determine what would have been the conduct of a person of ordinary prudence under the circumstances of the case, as well as to determine whether or not the facts showed negligence."

Under these circumstances we do not feel that the rule should be extended to include persons working in a hazardous position, as in this case, with the permission of the owner of a public place, such as railroad stations and the like, and not forced to remain in a particular place as a matter of duty.

[3] The third point suggested by the respondent as a proper ground for the order of the court appealed from is the instruction by the court on the doctrine of *res ipsa loquitur*. The court gave to the jury the meaning of the Latin phrase and the definition as follows:

"When a thing which causes injury is shown to be under the management of defendant, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from want of care."

The respondent's contention in this regard must be sustained. The facts of this case were not, we think, such as to make applicable the doctrine of *res ipsa loquitur*, the effect of which is to lighten the burden of proof resting upon the plaintiff by permitting the jury to indulge in a presumption that the defendant was negligent. That presumption only arises, as was stated in the

case of *Tower v. Humboldt Transit Co.*, 176 Cal. 602, 169 Pac. 227, "where the occurrence is such as ordinarily does not happen without negligence on the part of the party charged, as, for example, in the case of the explosion of a boiler (*Posey v. Scoville*, 10 Fed. 140), or of a powder mill (*Judson v. Giant Powder Co.* [107 Cal. 549]), or the fall of a workman's tool from a building upon a person on the street (*Dixon v. Pluns*, 98 Cal. 384)." It does not apply where there is direct evidence of the cause, or where the facts are such that an inference that the mishap was due to a cause other than the defendant's negligence could be as reasonably drawn as that it was due to his negligence. 29 Cyc. 624. It was held in *Tower v. Humboldt Transit Co.*, supra, that it should not be applied to a collision between a street car and a pedestrian; and while the plaintiff at the time of his injury was not a pedestrian his situation was similar. He had taken a position so close to passing vehicles that a very slight movement on his part would bring him in contact with them. And the fact that the front wheel of the defendant's truck had passed the plaintiff without coming in contact with him makes the case very similar to that of a collision between a vehicle and a pedestrian, since it increases the probability that the contact was due to a movement on the part of the person injured. The burden was on the plaintiff to show that his injury was occasioned by the defendant's negligence. This instruction permitted the jury to find against the defendant upon mere proof of the injury, and must therefore be regarded as erroneous and prejudicial.

[4] Much is said in the briefs on both sides with regard to the necessary parties to the action. It appears that suit was brought in the name of the plaintiff alone, although he had received compensation from his employer. The accident happened November 6, 1917. While the Workmen's Compensation Act was amended in 1917, the amendment did not become effective until January 1, 1918 (St. 1917, p. 831). Consequently the action should have been controlled by the provisions of section 31 of the act as it stood prior to such amendment (Stats. 1913, p. 295). Under that section as it read at that time the making of a lawful claim for compensation operated as an assignment to the employer of any right to recover damages which the injured employee or his per-

sonal representatives or other person had against any other party for injury or death. Any excess recovered was held for the benefit of the injured employee or other person entitled. The section also prohibited the putting in evidence in any action brought of any testimony relative to the amount of compensation paid. Nevertheless during the course of the trial it was brought out that plaintiff had received compensation and medical services, and the court gave an instruction to the effect that a lien was granted to those paying the compensation upon any judgment plaintiff might recover. Obviously this took the provisions of the act as amended in 1917 into consideration rather than the provisions in effect at the time of the injury. Inasmuch as the case will have to be retried, these matters can be given due consideration by the litigants and the trial court.

[5] The point is also raised as to the right of the plaintiff to sue alone and not make his employer or insurer parties plaintiff or defendant. *Stackpole v. Pac. Gas & Elec. Co.*, 181 Cal. 700, 186 Pac. 354, is on all fours with the present case. It was there held that the injured party could not sue directly if suitable objection were made, for the reason that the employer and insurer were *necessary parties* (italics ours). The plaintiff could have maintained the action jointly with the employer or insurance carrier; or, if they were not willing, he could have sued alone and joined them as defendants. *Stackpole v. Pac. Gas & Elec. Co.*, supra. This condition is changed by the 1917 amendment, but such amendment has no bearing here.

[6] While the order of the court granting a new trial does not specify the particular ground thereof, the error of the court in giving the instructions adverted to may well have appeared to it to constitute a sufficient ground for such order; and if so, its action will not be disturbed by this court in view of the well settled rule that the granting or refusing of a new trial are matters largely within the discretion of the trial court, and that it is only when this discretion has been abused that an appellate court will reverse the order. *Merralls v. S. P. Co.*, 182 Cal. 19, 22, 186 Pac. 778.

For the reasons given the order is affirmed.

We concur: TYLER, P. J.; KNIGHT, Justice pro tem.

57 Cal. App. 707

BASSI v. SPRINGFIELD FIRE & MARINE INS. CO. (Civ. 4223.)

(District Court of Appeal, First District, Division 2, California. May 19, 1922. Hearing Denied by Supreme Court July 17, 1922.)

1. Evidence ⇨589—**Court at liberty to accept testimony of insured when in conflict with that of insurer in making finding of fact.**

The trial court was at liberty to accept the testimony of insured in conflict with that of insurer's agent, on which to base its finding that there was no new consideration to support the attempted modification of the policy and that insured did not at the time understand or agree to it.

2. Insurance ⇨144(1)—**Mere forbearance to cancel policy not consideration for modification.**

Mere forbearance by insurer to cancel policy upon discovery that iron-safe clause was not in policy, without a definite agreement by it not to cancel, would not be a sufficient consideration for modification of the policy to include an iron-safe clause.

3. Estoppel ⇨90(2)—**Insured retaining policies after unauthorized modification not estopped to deny validity of modification.**

That insured kept policies and failed to notify insurer that he would not accede to the provisions of a clause attached after the delivery of the policies did not estop him from denying the validity of the clause as an unauthorized modification of the policy, where it did not appear that insurer intended to serve notice of cancellation if insured refused to be bound by such clause.

4. Insurance ⇨144(1)—**Fire insurance policy cannot be modified or changed by attachment of separate riders after delivery without insured's consent.**

Under St. 1909, p. 404, a fire standard insurance policy cannot be modified, changed, or added to except by the attachments of separate riders before delivery of policy to insured, or afterwards, with his consent; and the insurer is not granted by such policies the right to change their provisions at will, without insured's consent.

Appeal from Superior Court, Imperial County; M. W. Conkling, Judge.

Action by A. C. Bassi against the Springfield Fire & Marine Insurance Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Hearing denied by Supreme Court; SLOANE and WASTE, JJ., dissenting.

W. W. Hindman, of Los Angeles, for appellant.

Louis Lamy and Frank C. Weller, both of Los Angeles, for respondent.

LANGDON, P. J. This is an appeal by the defendant from a judgment against it for \$15,000 upon two policies of fire insurance.

The facts, as found by the court, are: On November 28, 1920, and for more than four years prior thereto, the plaintiff was engaged in the business of selling and buying new and secondhand goods, wares, and merchandise, consisting of household goods, men's furnishings, etc., at the city of Calexico, county of Imperial, Cal. On March 6, 1920, the defendant issued and delivered to plaintiff a certain policy of fire insurance in the amount of \$12,500, covering said stock of merchandise. On May 7, 1920, defendant issued and delivered to plaintiff another policy covering the same property and in the amount of \$2,560. Plaintiff paid the respective premiums upon said policies as the policies were delivered to him. At the time of the issuance of said policies, and at the time of the fire which occurred later, the personal property covered by the said policies was contained in a certain brick building in the city of Calexico and said property was solely and exclusively owned by plaintiff and was of the value of more than \$20,000. On November 28, 1920, said stock of goods was destroyed by a fire which originated in a building two doors north of plaintiff's said place of business.

The trial court also found that said fire and loss occasioned thereby were not caused through any fault, negligence, or fraud on the part of plaintiff, and that said plaintiff had done no act or thing to invalidate or cancel said policies of insurance; that preliminary proofs of loss were furnished to defendant in due form, and that on February 2, 1921, defendant notified plaintiff that it repudiated any liability on account of said insurance and refused to pay to plaintiff the amount of said policies.

The sole defense offered by defendant was that the plaintiff had not complied with what is termed the "iron-safe clause," alleged to have been a part of said policies. Said clause provides, in effect, that as a part of the consideration for the policy, the assured covenants and agrees to keep a set of books, showing a complete record of business transacted, together with an inventory of stock taken within 12 months prior to the date of any loss, and to keep said books and inventory securely locked in a fireproof safe at night and at all times when the building mentioned in the within policy is not actually open for business. Said clause also provides that, in case of loss, the assured agrees to produce such books and inventory, and, in the event of a failure to produce the same, the policy is to be null and void.

It may be admitted at the outset that the plaintiff did not comply with the provisions of this clause. The testimony shows that his inventory and books were customarily kept in a safe which actually proved to be fire proof. The fire occurred early Sunday

morning. On the Saturday evening before the fire, plaintiff worked until very late in the evening on his books and accounts because he desired to collect as much money as possible so as to meet his outstanding obligations. When he left his office some time after 10 o'clock on Saturday night, he expected to return on Sunday morning and complete the work on his accounts and contracts. He therefore left the books on his roller top desk where he had been working, pulling down the top of the desk to cover them, instead of placing them in the safe as usual. The fire occurred very early the next morning and the books and accounts were destroyed. As to whether or not the inventory which plaintiff testified he had taken was sufficient is a question which need not concern us here, because it must be conceded that in one important particular, at least, the plaintiff did not comply with the conditions of said "iron-safe clause," in that he did not put his books and inventory into a fireproof safe. Under these facts, the record presents but one question, i. e. whether or not said "iron-safe clause" was a part of either or both of the policies upon which recovery was had.

Upon this issue, the trial court found, with reference to the \$12,500 policy, that said "iron-safe clause" was not attached to said policy at the time the same was executed by defendant and delivered to plaintiff; that about a month or six weeks after the execution and delivery of said policy, defendant's agent called upon plaintiff at his place of business and attached said "iron-safe clause" to said policy, and that there was no new consideration passed between said parties, and that there was no consideration whatever to support the modification or attempted modification of said policy, and that plaintiff did not at the time understand the same or agree thereto.

Defendant's agent admitted the facts as found by the court regarding the condition of the policy when it was delivered by him to plaintiff, and his subsequent attempt, weeks later, to add the "iron-safe clause" rider to the policy. The only conflict in the testimony, with relation to the findings above, is as to whether or not plaintiff agreed to the attachment of the rider. On this point the plaintiff testified that at the time the policy was delivered to him he had had no conversation with defendant's agent concerning the attachment of any rider to the same; that some time later Mr. Grieves, defendant's agent, came to plaintiff's store and wanted to attach a clause to the policy, "and I handed him the policy and he attached the clause and I never looked at it." He also testified that Mr. Grieves told him he was attaching an iron-safe clause, but he did not know what that meant. Mr. Grieves, testifying for the defendant, stated that aff-

er the policy had been delivered by him to plaintiff, the insurance company wrote a letter asking its agent to attach an "iron-safe clause" to this policy; that Grieves, accordingly, wrote up such an indorsement for the policy and took it to plaintiff, some weeks after the policy had been delivered; that said Grieves told plaintiff that the company required him to "keep the books in the safe, and that class of business was not liked by insurance companies, and that was the only way they would carry insurance"; that plaintiff objected at the time, and Grieves told him "that the company required it or they would not take care of the insurance," and thereupon plaintiff assented to it and Grieves attached said rider to the policy.

[1] Although this testimony supports appellant's position that the plaintiff agreed to the attachment of the rider, nevertheless the trial court was at liberty to accept the plaintiff's testimony where it was in conflict with that of defendant's agent, and to find, as we have recited, regarding the matter of the attachment of said "iron-safe clause" to said policy of insurance.

As to the second policy for \$2,500, the court has found that at the time of its execution and delivery to plaintiff the said "iron-safe clause" was not a part thereof; that said clause was in fact never attached thereto; that several days after the delivery of said policy to plaintiff, defendant's agent forwarded by mail to plaintiff a rider containing said "iron-safe clause," and requested that plaintiff attach the same to his policy; that plaintiff refused to comply with said request and never attached same to his policy; that there was no consideration whatever for said attempted modification of said policy.

The agent of defendant admitted that said clause was not attached to said policy when it was delivered to plaintiff; that, later, he forwarded by mail to plaintiff a rider containing said clause and requested plaintiff, in a letter sent therewith, to attach same to his said policy. It is true that defendant introduced into evidence an affidavit made by plaintiff after the loss occurred, in which plaintiff said that he had intended to attach said rider to said policy but had overlooked doing so. This affidavit was written by defendant's insurance adjuster, and plaintiff signed same upon the solicitation of said adjuster and Grieves, the agent of defendant. In relation thereto plaintiff testified that the adjuster had asked him to sign this affidavit in order to make the policies uniform and to facilitate the settlement of the loss, and assured him that the loss would be settled. Under such circumstances, the statement therein is not conclusive upon the trial court, particularly in view of plaintiff's positive testimony at the trial that he never agreed to put this rider on his policy; that he read it and did not want to attach it, and that he

put it in a pigeon hole in his desk. The trial court has found in accordance with this testimony and has concluded that this rider never became a part of the contract between plaintiff and defendant.

[2] But whether or not said clauses were physically attached to said policies, or whether or not plaintiff consented to accept them, are matters which are not decisive of this case. A mere nudum pactum cannot be enforced against plaintiff, and the really important question is whether or not there was any consideration to support this modification of the existing contracts between the parties. Appellant urges that the finding of the trial court that there was no consideration for the attachment by plaintiff of the riders in question to his policies is erroneous. It is urged that as the policies contained a clause permitting the defendant to cancel the same at any time by giving five days' written notice of cancellation to the insured, the defendant's failure to exercise this privilege at the time it became aware that the "iron-safe clause" had not been made a part of said policies was a consideration for the inclusion of said clauses in said policies. This argument overlooks the fact that defendant did not deprive itself of the privilege of cancellation secured to it by its policy, either in whole or in part or for any length of time. It entered into no agreement which precluded it from giving notice of cancellation to plaintiff at any time. It gave up no right or privilege. Its right to cancel the policies remained unimpaired, whether the clause in question was accepted by plaintiff or not. Under such circumstances, there was no mutuality to the alleged supplemental agreement between the parties. Mere forbearance to cancel the policy would not be a sufficient consideration without a definite agreement not to cancel. *Shadburne v. Daly*, 76 Cal. 355, 359, 18 Pac. 403; *Estate of Thompson*, 165 Cal. 296, 131 Pac. 1045.

Policies of insurance are written contracts between the parties and are governed by the same rules which are applicable to contracts generally. The principle of law applicable her is stated in the case of *Main Street, etc., Co. v. Los Angeles Traction Co.*, 129 Cal. 301, 61 Pac. 937, wherein it is said:

"There can be no doubt of the principle contended for by the appellant that an agreement adding to the terms of an existing agreement between the same parties, and by which new and onerous terms are imposed upon one of the parties without any compensating advantage, requires a consideration to support it; though this, of course, may consist either in a new consideration or in some favorable modification of the original contract."

[3] Does then the principle of estoppel enter into the situation, as contended by appellant, and supply the want of a consideration? It is argued that because plaintiff

kept the policies and did not notify the defendant that he would not accede to the "iron-safe clause," he is estopped to deny the validity of said clause.

But there is no evidence in the record that the defendant intended to serve upon plaintiff notice of cancellation of said policies in the event plaintiff did not consent to be bound by the "iron-safe clause," and no evidence that plaintiff's failure to notify defendant that he refused to be bound by said clause caused defendant to forego sending such notice. The person claiming the benefit of an estoppel must show that he was misled by conduct of the other party. *Washington v. Black*, 83 Cal. 290, 294, 23 Pac. 300. The party claiming estoppel must have relied upon conduct of the other and have been induced by it to do something which he would not otherwise have done. *McCormick v. Orient Ins. Co.*, 86 Cal. 260, 263, 24 Pac. 1003. It is an essential element of estoppel by conduct that the party setting it up should have relied upon the conduct of the other and should have been induced thereby to do something which he otherwise would not have done. *Barnhart v. Fulkerth*, 93 Cal. 497, 29 Pac. 50; *First Nat. Bank v. Maxwell*, 123 Cal. 360, 55 Pac. 980, 69 Am. St. Rep. 64; *Wheaton v. North British, etc., Ins. Co.*, 76 Cal. 415, 432, 18 Pac. 758, 9 Am. St. Rep. 216.

So far as this claim of appellant is concerned, the record is lacking in the essential proof that the failure of plaintiff to take some affirmative action in reference to the riders sent to him influenced the conduct of the defendant to its injury.

[4] Claim is made by appellant that the policies themselves grant to the insurer the right to change their provisions at will; that such a privilege is a part of the original consideration for the issuance of the policies. This claim is based upon the following: The policies sued on are in the standard form required by the Legislature of the state of California. Act approved March 18, 1909; Stats. 1909, p. 404. Each of said policies provides:

"This policy is made and accepted subject to the foregoing stipulations and conditions and those hereinafter stated, which are hereby specially referred to, and made part of this policy, together with such other provisions, agreements or conditions as may be indorsed hereon or added hereto."

Section 10 of said act, approved March 18, 1909 (Stats. 1909, p. 404), provides:

"Except as herein otherwise provided, clauses may be attached to the standard form by separate riders in type larger than pica imposing specified duties and obligations upon the insured and limiting the liability of the insurer."

It is contended that, in view of this provision of the act establishing a standard form

of insurance policy, the clause above quoted contained in the policies under consideration gave to the insurer the right, at any future time, and from time to time, to modify and change the policies and add new conditions thereto. Such a construction would strain the language used and would violate basic principles of contract law. It would leave no contract between the parties which would be of any value to the insured, because the insurer might, from time to time, add such provisions and conditions as would absolutely nullify all provisions beneficial to the insured. Furthermore, the provisions of section 10 of said act contemplate an "attachment" of separate riders. The policy becomes the property of the insured after delivery and the insurer could only "attach" riders thereto before delivery to him, or afterwards, with his consent. Said act clearly contemplates a physical attachment.

An insurance policy is subject to the same general rules as other contracts. The provision relied upon by the appellant clearly means that the policy is accepted by the insured subject to all the conditions and stipulations contained in the standard form of policy, and also subject to the provisions of any special riders or indorsements which are a part thereof "at the time he accepts the same." Any other construction would make the contract lacking in mutuality, by making it binding upon the insured, but subject to be changed about at will by the insurer. Such a construction is not warranted by the language employed nor by the general policy of the law to construe contracts, if possible, in a way that will render them valid and enforceable.

The cases cited by appellant in support of this contention are not in point here. They involve changes in by-laws of mutual benefit associations where the beneficiary agreed to be bound by the laws of the association and that the same might be changed from time to time. It was held that parties may contract in reference to laws of future enactment and may agree to be bound and affected by them as they would be if such laws were existing. The policies under consideration in those cases contained an express provision that the by-laws of the association might be changed from time to time. Such a provision clearly relates to the future and we find nothing in the language of the policies involved in the present case which is analogous thereto.

Under our conclusion that these riders never modified the terms of the policies because of the fact that they were supported by no new consideration, and plaintiff was not estopped to set up the want of consideration therefor, it becomes unnecessary for us to pass upon the further questions raised in the briefs, such as whether the provisions of said "iron-safe clause" constitute a war-

ranty or a representation, and whether or not the record shows a substantial compliance therewith by the plaintiff. These matters become entirely immaterial if the plaintiff was never bound by the provisions of said "iron-safe clause."

The judgment is affirmed.

We concur: NOURSE, J.; STURTEVANT, J.

58 Cal. App. 145

WALKER et al. v. SMITH et al. (Civ. 4204.)

(District Court of Appeal, First District, Division 1, California. June 19, 1922.)

1. Deeds $\S$ 211(4) — Substantial compliance with terms of certificates as to independent advice and explanation held shown.

Evidence in action to avoid an aged woman's deed of her farm to one of her children held to show substantial compliance with terms of certificates to the deed, that grantor was given independent advice and explanation of the effect of the deed, though as matter of law this was superfluous.

2. Deeds $\S$ 196(3) — Grantee in deed from mother held to have overcome presumption of undue influence.

Defendant, in action to avoid the deed to him of a farm by his aged mother, living with him alone, held to have overcome any presumption of undue influence cast on him by C. Code, $\S$ 2235, as to transactions between persons in trust relation.

Appeal from Superior Court, Mendocino County; J. Q. White, Judge.

Action by Lillie M. Walker and others against A. L. Smith and others. Judgment for defendants, and plaintiffs appeal. Affirmed.

Olin L. Berry, of San Francisco, for appellants.

W. D. L. Held and Keith C. Eversole, both of Ukiah, for respondents.

KERRIGAN, J. This is an action brought by certain of the heirs of Ana J. Smith, deceased, to have declared fraudulent and void a deed made by said Ana J. Smith to her son A. L. Smith. A. L. Smith is the principal defendant; the rest of the defendants are heirs of the deceased, who refused to join as plaintiffs in the action. From a judgment in favor of the defendants the plaintiffs appeal.

The property over which this controversy arose consists of 160 acres situate in the county of Mendocino. Prior to March 9, 1902, Thomas Smith and Ana J. Smith, the parents of the parties to this action, resided on the property. Thomas Smith died on said date, leaving a will in which he devised to

his daughters, Lillie M. Walker, Daisy C. Farley, Maggie J. Cobb, and his grandson Ernest L. Simpson, share and share alike, said land, reserving a life estate therein for Ana J. Smith, his wife, and providing a small cash bequest for the remaining children. The will was admitted to probate, and Ana J. Smith became vested with the title to the property; the probate court setting the same aside to her as a homestead. After the death of Thomas Smith all of the children, with the exception of A. L. Smith, married and left the ranch. A. L. Smith remained at home and took care of his mother, who was getting well along in years and unable to do any work, and also carried on the ranch. He remained with his mother practically all the time. On March 29, 1913, Ana J. Smith executed a deed in favor of A. L. Smith, which deed was recorded on April 2, 1913. Ana J. Smith died intestate December 13, 1915, and this action was filed March 18, 1918, to set aside the deed.

The circumstances surrounding the execution of the deed upon which the appellants rely to sustain their cause of action are with regard principally to certain certificates signed by the notary and the witnesses at the time of the execution of the deed and attached to it, and a declaration of the grantor incorporated in the deed. Said declaration is to the following effect:

"The grantor herein does hereby state and represent that in the execution of this deed she has had the independent advice of persons not interested therein, and that the execution and delivery of this deed is the result of her own volition, and that she understands the effect and result of her act in so doing, and understands fully that her execution and delivery thereof is irrevocable; that she has read this deed; that she is of sound mind and memory, and in this transaction she is not acting under any duress or influence of any kind whatever. By the acceptance hereof the grantee assumes the payment of the promissory note secured by mortgage recorded in Book 67 of Mtgs. p. 175."

The certificate of the notary was in the ordinary form, but with the following addition:

"At said time I did, without the presence of the grantee therein named and prior to the execution of this instrument, give to said grantor the benefit of a full, free and private preliminary conference, and did then and there fully explain to her the effect and result of the execution and delivery of said deed; that at said time the grantor was of sound mind and memory and not acting under the influence of any person whatever, but was acting solely of her own volition and fully understood the nature, effect and result of her act, and under such circumstances and at such time she did sign said deed and acknowledge the same before me as notary public."

A certificate of two witnesses to substantially the same effect as the certificate of the notary was appended to the deed.

It is the claim of the appellants that the very fact that these certificates were used, and the grantor's said declaration incorporated in the deed, affords a strong inference that the mental condition of the grantor was such as to raise a suspicion concerning her understanding of the transaction.

The testimony of A. L. Smith indicated that up to a few months before the deed was made he had no idea of becoming the owner of the ranch, and that the idea was finally brought home to him by his sister Mary E. Tracey. The ranch was evidently very dear to Ana J. Smith, for the record indicates that after returning to the ranch from a visit to one of her daughters in San Francisco in 1912 she did not again care to leave it.

It may be well at this point to examine briefly into the home life of the family and the intelligence of Ana J. Smith. Mrs. Smith was educated during the early years of her life in the Spanish language. After coming to California she entered Notre Dame College in San Jose, where she received further education for a year or so. Later she married Thomas Smith, and from about the year 1858—being at that time about 23 years of age—lived in Mendocino county upon the ranch here in question. There she lived her life and raised her family—five girls and two boys. Of this large family but one remained with the mother in her declining years, A. L. Smith. The record is vague as to the particular time the mother became too feeble and ill to do any work around the house, but suffice it to say that for a number of years prior to her death she was unable to do any work whatsoever. According to the statement of Daisy Farley, she was in 1912 so physically weak that she was unable to go to church and return without becoming exhausted; and later on she was subject to sinking spells immediately after eating. This witness and other of the plaintiffs told of certain delusions under which Ana J. Smith labored. Such being the case, we must of necessity take into consideration the effect of all this on a man having the responsibility and charge of the old lady, and in addition the burden of carrying on the ranch. It appears that in 1912 and 1913 the condition of Mrs. Smith was such that on account of her rheumatism it was necessary for her son A. L. Smith to wash her face, comb her hair, do the cooking and washing for both, the chores around the place, the housekeeping, and in addition put in a crop.

We have heretofore shown that Mrs. Smith was a woman of intelligence, educated in her native language, and possessing that extensive and practical experience and wisdom to be derived from raising a family of seven children. Even though it appeared that physically she was in a bad way, still, as plaintiff Farley testified, her mind was in a pretty good condition, excepting she

would get alarmed at night. It is at this time that we first find the thought taking root in the mind of Mrs. Smith of deeding the property to her son A. L. Smith. Coming home from a visit to her daughter Mrs. Farley, in San Francisco, in company with her niece, Emily Tracey, she informed Emily that she intended to leave everything to A. L. Smith, giving as her reason that she was disgusted with the way she had been treated while away from home, and that she knew that with Louis (A. L. Smith) she would be perfectly happy the rest of her life. Whether the trip to San Francisco caused this attitude we do not know, but coming at this time it seems significant, especially in view of the fact that, according to the testimony of Mary Tracey, another daughter, the visit with Mrs. Farley was not entirely harmonious. However that may be, the fact remains that Mrs. Smith left her daughter Mrs. Farley and finished her visit to San Francisco with another daughter, Mrs. Tracey, returning to the ranch in June, 1912, accompanied by the latter's daughter.

We find a further expression of Mrs. Smith concerning her intention regarding the disposition of her ranch in February of the following year. It appears that Mary E. Tracey was at the ranch on a visit, and during a conversation with her mother learned that she was kindly disposed toward Louis, stating that he was so kind and considerate, and she wanted to leave the place to him; that she had lived there so long, and that he never urged her to sell as did the others. Mrs. Tracey, although one of the heirs, told her mother at that time that she would not object to such a course, and communicated the conversation to her brother Louis. He at first said that he did not wish to have the property, but later stated that it would be agreeable to him to receive it, and he spoke to his mother on the subject. She said it would be all right. Smith was a notary, but evidently wishing to prevent any taint attaching to the transaction, wrote to his attorney at the county seat, explained the circumstances, and shortly thereafter the deed with the certificates hereinbefore described were sent to him by said attorney ready for execution. Arrangements were made for two witnesses, neighbors, and for a notary, and on the 29th of May, 1913, the deed was executed; the grantee not being present at the time. So far there appears to have been a substantial compliance with the terms of the certificates: the notary read the deed in the presence of Mrs. Smith and the witnesses, and in this connection A. L. Smith likewise testified that he also read the deed to his mother. The deed being signed by Mrs. Smith, the notary took her acknowledgment, and the witnesses signed the prepared certificates.

The only contrary evidence appears from the witness Hathaway, who, after two or

three statements that he insisted on knowing what the document was before he signed, testified that he asked Mrs. Smith if she wanted them to sign the document, and that she answered, "Yes." He also claimed that no one read the deed to her or told her what it was, which is contrary to the testimony of the notary and the other witness. We can only infer that the testimony of Hathaway was disbelieved by the trial court. The record shows that he was very evasive in many of his answers, and, moreover, his reputation for veracity was directly impeached by character witnesses.

[1] The principal contention of the appellants is that the grantor in the execution of the deed had no independent advice nor opportunity therefor, this claim being based upon the fact that, although the certificates recited that independent advice was given, still the effect of the execution of the document was not explained, which, it is argued, strengthens the suspicion attaching to the preparation and use of these certificates, and tends to show that the grantor did not understand the transaction, or was under undue influence.

Taking all the facts into consideration, we are of the opinion that the circumstances surrounding the execution of the deed were not such as to show fraud or undue influence; and, as to the use of the certificates, they were prepared by an attorney, to whom the task of drawing the conveyance was intrusted, with the idea of inviting the particular attention of all parties concerned to the nature of the transaction as being between a woman of advanced age and a son who was to benefit thereby. The deed was read to the grantor, and undoubtedly those present at the time gave to the certificates all the attention which they thought they required. The attorney who drew the certificates was not present, and as a consequence the performance of the conditions which he was disposed to insist upon may not have been as thorough as desired; but, as before stated, a review of the circumstances shows a substantial compliance with their terms. Of course, as a matter of law they were entirely superfluous. There was no attempt made by either of the parties to the deed to keep its execution a secret, and it was in fact soon known to some of the relatives, as of course immediately to the two witnesses and the notary. It was recorded a few days after its execution. There is also evidence to the effect that at least one of the plaintiffs knew of the deed, and it was testified by A. L. Smith that he was informed by that person that an attempt would be made to set it aside.

[2] Appellants make the further contention that, the grantee being a son, a confidential relation existed between the parties to the deed, throwing the burden upon him to prove that its execution was entirely free

from undue influence. They cite numerous cases to sustain the theory that one who holds a confidential relation towards another may not take advantage of that relation for his own benefit, or deal with the other on terms of his own making, and that any transaction with the other by which he benefits will be presumed to have resulted from an undue exercise of the influence arising from the existence of such relationship.

The rule relied upon by the appellants as laid down in the cases cited must be conceded, and is well established. For the purpose of this case, then, we must concede that the burden was on the defendant A. L. Smith to show that the deed was not the result of his undue influence over his mother, and thus overcome the presumption of undue influence cast upon such a transaction by the provisions of section 2235 of the Civil Code.

The case of *Broadbudd v. James*, 13 Cal. App. 464, 110 Pac. 158, is precisely applicable to the facts of this case. Except that the property was deeded to a daughter, and that the parties seeking to set aside the deed were children of the grantee's sister, instead of sisters and brothers, the case is on all fours with the instant case. In that case the grantor lacked but a few days of being 100 years of age, and according to the evidence was less intelligent than Ana J. Smith. She was also hard of hearing, infirm, stone blind, and a cripple. It would seem that in the *Broadbudd* Case the validity of the deed was more doubtful than here. However, the following language in that case applies to this case:

"The position of respondents in relation to the voluntary character of the transfer is equally impregnable. The testimony of the defendants and of the three witnesses, who were present at the execution of the deed, justifies the conclusion of the court that the grantor was free from undue or any improper influence of the grantee or any other person. The evident affection that existed between mother and daughter, the kindly and continued ministrations of the latter to the comfort and happiness of the former, and the declaration of the grantor as to her reason for making the deed are all significant circumstances tending to rebut any unfavorable inference against the grantee. As clearly indicative that she was following her unaided inclination and volition, we find, according to the testimony, the old lady declaring: 'Mary Ann was good and kind to her and she didn't know how she could have got along without her, and she said she wanted her to have what property she had. She had deserved it all.' Upon the theory of the uniform kindness of said Mary Ann to her mother, which finds abundant support, and in view of the fact that her attentions had continued for so many years, and that she was the only living child, the conveyance is easily explicable, and seems entirely reasonable. While her considerate and tender care of her mother was no more than required by filial duty, yet the great infirmities of the aged woman, while rendering the duty no less imperative, imposed an onerous burden and

responsibility, and the acceptance and acquittance of this duty with cheerful and persistent zeal deserve unstinted commendation and generous reward."

As was noted in the case cited, so here, the disposition made by Ana J. Smith in favor of her son was the natural and proper reward of years of service and devotion to an aged and infirm mother, a burden cheerfully assumed and patiently borne, with little, if any, co-operation on the part of his brothers and sisters, whose natural obligation to their aged and all but helpless parent was as great as his. It would, indeed, have been a matter of surprise if Mrs. Smith had not made precisely the disposition of her property that she did.

Speaking of the presumption of undue influence the court in the same case said:

"It is a circumstance, of course, inviting careful consideration to the transaction, but before it can justify the inference of undue influence there must be added, imposition, fraud, importunity or something of that kind. * * * Cases of this kind plainly turn upon the exercise of actual undue influence and not upon any presumption of invalidity. A gift from parent to child is certainly not presumed to be invalid." 13 Cal. App. 472, 110 Pac. 161.

In the same opinion the court also uses this language:

"It must be apparent, however, that if the evidence is sufficient to support the conclusion that the grantor fully understood the nature of the transaction and that the conveyance was the effect of her untrammelled and voluntary act, the questions as to consideration and independent advice become unimportant. This follows from the incontrovertible right of every one, in the absence of fraud, to dispose of his own property according to his volition. The first inquiry suggested, then, is, can a rational conclusion be drawn from the evidence that the grantor had sufficient understanding to appreciate the nature of the transaction and to realize the significance of the conveyance?" 13 Cal. App. 468, 110 Pac. 159.

The court in the case at bar found that the deed was executed for a good and valuable consideration; that the same was neither void nor fraudulently procured; that Ana J. Smith executed the deed of her own volition, and had the independent advice of persons not interested therein, and she then and there fully understood that the execution and delivery thereof was irrevocable, and she realized that she was conveying the property to A. L. Smith.

Considerable testimony was adduced as to the unsoundness of mind of the grantor, several witnesses reciting certain traits and delusions which it was alleged she had. Other than the testimony of the plaintiffs there was no evidence of these traits and delusions; while on the other hand a number of witnesses, neighbors and relatives testified that she had no such traits or delusions.

We see no reason, therefore, to interfere with the finding of the court that at the time of the execution of the deed Ana J. Smith was of sound mind and memory, and not acting under duress or influence of any kind whatever.

Taking into consideration the circumstances surrounding the home life of Ana J. Smith, and the further fact that there is nothing to indicate a frame of mind to deed the property otherwise than it was actually deeded, and drawing the inference, as was said in *Mackall v. Mackall*, 135 U. S. 167, 10 Sup. Ct. 705, 34 L. Ed. 84, that, "Right or wrong, it is to be expected that a parent will favor the child who stands by him, and give to him, rather than the others, his property," it would seem only natural, as already indicated, that A. L. Smith would be the favored child.

We are clearly of the opinion that the finding of the trial court is amply supported by the evidence, and we see no reason to interfere with the conclusion reached.

The judgment is affirmed.

We concur: TYLER, P. J.; KNIGHT, Justice pro tem.

58 Cal. App. 161

TROUGHTON et al. v. EAKLE. (Civ. 2435.)

(District Court of Appeal, Third District, California. June 19, 1922. Hearing Denied by Supreme Court Aug. 17, 1922.)

1. Vendor and purchaser — 170—Under contract making payment condition precedent, tender by purchaser not good if coupled with condition that conveyance be made before money paid.

Where a contract to sell realty provided that performance by purchasers of their covenants was a condition precedent to vendor's obligation to convey title, to put vendor in default purchasers' offer of the price must not be coupled with the condition that conveyance be made before the money passed, as purchasers had to pay before they could call on vendor to act at all.

2. Vendor and purchaser — 170—Under contract making payment condition precedent methods of putting vendor in default stated.

Where a contract to sell realty provided that performance by purchasers of their covenants was a condition precedent to vendor's obligation to convey title, if purchasers had paid the price or offered to pay and vendor refused to accept payment, or if vendor's conduct prevented the making of such an offer and purchasers had deposited in a bank in vendor's name the required amount as authorized by Civ. Code, §§ 1500 and 1511, subd. 1, purchasers would be in a position to compel performance.

3. Vendor and purchaser — 170—Offer of payment by one unable to pay held not to put vendor in default.

Where contract made payment of the price a condition precedent to the duty to convey,

an offer to pay by one unable to pay until conveyance was made to a third party could not put vendor in default, in view of Civ. Code, § 1495, providing that an offer of performance is of no effect if offeror is unable to perform according to the offer.

4. Vendor and purchaser — 170—Under time of the essence provision offer to pay on day following last day stated held too late.

Where a contract for the conveyance of realty provided that time was of the essence, a tender made on the day after the last day on which payment could be made came too late.

5. Contracts — 318—Rule of strict construction against forfeitures held not to require court to resort to strained construction.

Civil Code, § 1442, providing that a condition involving a forfeiture must be strictly interpreted against the party for whose benefit it is created, does not require the court to resort to a strained construction defeating the clearly expressed intention of the parties.

6. Vendor and purchaser — 335—Party suffering forfeiture entitled to relief on making compensation.

Where under a conditional sale contract purchasers paid part of the price and remained in possession of the land two years, and then forfeited these payments by failing to make additional payments, their remedy was to proceed under Civ. Code, § 3275, providing that a party may be relieved from a forfeiture on making full compensation to the other party, except in case of grossly negligent, willful, or fraudulent breach of duty.

Appeal from Superior Court, Colusa County; Ernest Weyand, Judge.

Action by A. F. Troughton and another against Martha A. Eakle. Judgment for plaintiffs, and defendant appeals. Reversed.

Frank Freeman, of Willows, and Brown & Alberty, of Colusa, for appellant.

Thomas Rutledge and Seth Millington, Jr., both of Colusa, for respondents.

BURNETT, J. [1] Plaintiffs had judgment for the sum of \$6,330, which they had paid defendant on a contract for the sale of real estate in Colusa county executed on September 6, 1918. The portions of said contract material to the inquiry herein are as follows:

"Said vendor (Martha A. Eakle), in consideration of the covenants, agreements, and promises of said vendees (A. F. Troughton and E. L. Lewis) hereinafter set out, agrees to sell and convey unto said vendees the said lots of land hereinabove described; and said vendor agrees to convey said above-described land to said vendees upon the performance of, and compliance with, the following agreements, covenants, stipulations, and conditions, which said agreements, covenants, stipulations, and conditions, and each of them, are hereby considered conditions precedent to the fulfillment hereof

by said vendor, viz.: That said vendees shall and will pay to said vendor for the above-described land the sum of \$32,000 in lawful money of the United States to be paid at the times and in the manner hereinafter set out, to wit: \$1,100.00 part and parcel of said purchase price to be paid on the execution and delivery of this contract; \$400 further part and parcel of said purchase price is to be paid on or before October 1, 1918; \$3,000.00 further part and parcel of said purchase price is to be paid on or before October 1, 1919, together with the interest on the unpaid portion of said purchase price from the date of this agreement to October 1, 1919, at the rate of 6% per annum, to be paid on or before October 1, 1919; \$3,000.00 further part and parcel of said purchase price together with interest on the unpaid portion of said purchase price from October 1, 1919, to October 1, 1920, is to be paid on or before October 1, 1920, at the rate of 6% per annum; in event the full sum of \$7,500 on the purchase price of said premises, together with interest on all deferred payments to the 1st day of October, 1920, at the rate of 6% per annum, have been paid in full, said vendees are entitled to demand of and receive from said vendor and said vendor in that event shall be required to make and deliver to said vendees a grant, bargain and sale deed for the above-described property, conveying said property to said vendees free and clear of incumbrances except taxes for the years 1919 and 1920, on condition that said vendees execute and deliver to said vendor a first mortgage upon said above-described premises, for the balance of the purchase price thereof, to wit, the sum of \$24,500, which amount is to be evidenced by a promissory note executed by said vendees to the order of said vendor payable five years after date, and which shall bear interest at the rate of 6% per annum, to be compounded every twelve months if not paid. * * *

"Said vendees agree to purchase the above-described land from said vendor and pay therefor the amount above mentioned at the times and in the manner and with interest on all deferred payments hereinabove set forth and in event of the conveyance to them of the land as hereinbefore provided for they further agree to make, execute and deliver to said vendor their promissory note for the sum of \$24,500.00 for the remainder of the purchase price of said premises, and also securing same by a first mortgage lien upon said premises to said vendor as hereinabove provided. * * *

"It is agreed as a condition of the contract that said vendees shall and will secure the payments of both principal and interest hereinabove agreed to be paid on or before the 1st day of October, 1919, and on or before October 1st, 1920, by crop mortgages on the crops to be raised on said premises during the year 1919 and 1920. * * *

"As a further consideration for the contract of sale and purchase said vendees are to pay all state, county, and other taxes or assessments upon said real property for the year 1919 and 1920.

"Should said vendees fail to perform any and all of the foregoing covenants and agreements and conditions upon their part to be performed, they are to forfeit and lose all right in said land and all right in, under, and through this

contract, and in such event said vendor is to retain all sums which may theretofore have been paid her as and for rental and for as and for liquidated damages, and it is agreed that such sums are to be so considered as rental and liquidated damages, and also in such event said vendor is hereby authorized, and it is hereby agreed that she may immediately enter upon said land and exclude all persons therefrom and take full possession of the same to the exclusion of said vendees.

"It is further covenanted, understood, and agreed that time shall be and is of the essence of this contract and of each of the provisions and conditions herein contained."

Plaintiffs did not pay the taxes for 1919, and they did not pay the money that was due on October 1, 1920.

To excuse their failure to pay said taxes they allege:

That "defendant had taken barley belonging to plaintiffs of the value of \$330, for the purpose of paying the said taxes, but the defendant had willfully neglected to pay said taxes, notwithstanding that she had received the said property of plaintiffs so to do, and that plaintiffs, notwithstanding that defendant had already received more than enough money to pay said taxes, made a second offer far in excess of the amount required."

This was denied in the answer, but, as the other point is of decisive importance, we pass to its consideration.

[2] In view of the plain language of the contract, it cannot be doubted that plaintiffs could not put defendant in default without paying or offering to pay the sum of money that was due on said October 1, 1920. The parties were very careful to provide that the performance by plaintiffs of their covenants was to be a condition precedent to the obligation of defendant to convey the title. When plaintiffs paid the money or made a valid offer to do so, they could demand a conveyance, and not before. The covenants are not concurrent or reciprocal, as sometimes termed, and hence it necessarily follows that plaintiffs' payment of the money or offer to pay could not be coupled with the condition that the conveyance be made before the money was transferred. Plaintiffs' obligation was absolute and unconditional to pay before they could call upon defendant to act at all. But, if they paid according to their agreement, or offered to pay and defendant refused to accept the money, or if by the conduct of defendant plaintiffs were prevented from making such payment or offer, by depositing the money as provided by the statute (section 1500, Civ. Code), they would be in a position to compel conveyance or to recover the money already paid. This seems plain on principle and is in consonance with the authorities cited by appellant, a few of which may be noticed.

In *Glock v. Howard*, 123 Cal. 1, 55 Pac.

713, 43 L. R. A. 199, 69 Am. St. Rep. 17, the court said:

"In the case at bar the payment of the final amount under the contract, at the time and in the manner agreed upon, was a condition precedent to the right of the vendee to demand a conveyance. Upon his failure to make payment the vendee committed a breach, and no affirmative act upon the part of the vendor was necessary to bring about this result. * * * The vendor, in refusing to accept the tender and to repay the money, is neither violating this contract nor rescinding it, nor treating it as at an end. He is standing squarely upon its terms. * * * The contract is made to depend upon a condition precedent. By its terms no right is to vest in the vendee until certain acts of payment have been done by him, and a court of equity no more than a court of law will relieve a vendee under such circumstances from the penalties arising from the breach of such condition, in the absence of an equitable showing to excuse his default."

In the concurring opinion therein by Mr. Justice Harrison it was said:

"Under the agreement between the plaintiff and the defendant, neither could maintain an action thereon against the other without having performed all of the conditions previously to be performed by him. The plaintiff could not maintain an action for a conveyance of the land until he had paid or tendered the money which he was to pay therefor. * * * Whether the action be to enforce the contract, or to recover damages for its breach, it is incumbent upon the plaintiff in such action to show a performance on his part of all the acts required to be performed by him, before he can call upon the other to comply with his part of the agreement, or to respond in damages for a failure so to do."

The contract therein was similar to the one involved herein in that—

"Time was made of the essence of the contract, and performance by the plaintiff was made a condition precedent whereon depended the agreement of defendant to convey, and, if plaintiff failed to perform his covenants, defendant was to be released from all obligations to convey, and plaintiff was to forfeit all moneys paid and all rights under the agreement."

In *Schwerin Estate Realty Co. v. Slye*, 173 Cal. 170, 159 Pac. 420:

"Time was expressly made of the essence of the agreement of January 18, 1913, and failure to perform by defendants, under the terms of said contract, would work a forfeiture of all rights of the vendees leaving the sums previously paid in the possession of the vendor as liquidated damages."

The court said:

"We cannot escape from the conclusion that by failing to prove their readiness, ability, and willingness to perform their part of the contract within the time limited therein the defendants utterly failed to establish their right to any relief. * * * Under the terms of the

contract no affirmative act on the part of the vendor was necessary to place the vendees in default. It expressly made failure to comply with its terms within the time limited 'by the parties of the second part' [the vendees] an automatic termination of all of the vendor's obligations in law and equity."

And quotation was made from the Glock opinion as embodying the doctrine that was applicable to the facts of the case.

Unless we are to depart radically from the terms which the parties herein deliberately adopted to express their intention, we must hold that plaintiffs were required to perform their agreement or offer to do so before they could place defendant in default.

But if their performance was made precedent and unconditional, it necessarily follows that, if they relied upon an offer of performance or tender, it must also be absolute and unconditional in order to impose upon defendant an obligation to convey. An offer to perform could, of course, be no more nor less than a legal effort to do what the contract required; that is, to pay the money unconditionally. But respondents admit that—

"The plaintiffs did not have the money themselves to make the final payment falling due October 1st, and, in order to prevent their forfeiture, made arrangements with a Miss Forgeus by which she agreed to advance the money to them for this purpose upon the condition that the respondents would convey the land to her, Miss Forgeus, making it a condition that the money should not be paid over to Mrs. Eakle except upon condition that Mrs. Eakle execute her deed."

The evidence presented by plaintiffs show, however, a more complicated situation than is thus indicated by their statement.

J. M. Stovall, the cashier of the bank of Williams, who was the custodian of the money, testified that his authority was conferred by telephone from Miss Forgeus; that she told him "to pay Mrs. Eakle \$5,000 on a deed to the place"; he called Mrs. Eakle on the phone and could not get her, but on that day she came into the bank, about noon the 1st day of October; that he "made a tender of the money, and she refused it, and it was never placed to her credit, as she refused to have it transferred on the books." The following questions and answers also appear on his direct examination:

"Q. Did she give any reason for refusing? A. I don't recall. Q. Did you offer any money to her upon any condition? A. No, sir. Q. It was a straight unequivocal offer? A. Yes, sir. Q. Without any qualifications? A. Yes, sir. Q. Did you specifically tell her that that was the money to cover the Troughton and Lewis payment? A. No. Q. Did she know what it was for? A. Yes; because she was talking to Mr. Troughton at the time; she knew that that was the transaction. Q. Did she say anything about executing the deed or not, or was it mentioned? A. Nothing mentioned."

Quite a different color was given to the foregoing by his testimony on cross-examination. Therein he testified that he received on said day a telephonic communication from Miss Forgeus, which she confirmed by letter a day or two after. Then followed these questions and answers:

"Q. Well, I understood you to say that the telephonic communication was that the money the \$5,000 was to be given to Mrs. Eakle upon a deed to Miss Forgeus; you were transacting the business for Miss Forgeus? A. Yes, sir. Q. You were not representing Mr. Troughton or Mr. Lewis or Mrs. Eakle? A. No. Q. You were representing her entirely? A. Yes, sir. Q. This money was to be paid over to Mrs. Eakle upon title being conferred to Miss Forgeus? A. Yes; a title to Miss Forgeus. Q. So your transaction had nothing to do with any relationship between Mrs. Eakle and Mr. Troughton and Lewis at all? A. Excepting we had to have the deed.

"The Court: From what? A. From Mrs. Eakle to Miss Forgeus.

"Mr. Freeman: Q. And she would not make that deed and said you need not deposit that money for any such purpose? A. Yes, sir; she refused to have it placed to her credit."

In the redirect examination appear the following questions and answers:

"Q. On the 1st of October did you tell Mrs. Eakle anything about that deed to Miss Forgeus or did you even know about it at that time? A. She phoned to us about the deed, and as to this money, and said to pay Mrs. Eakle on the delivery of the deed. Q. What did you tell Mrs. Eakle? A. I told her there was \$5,000 there, on the delivery of the deed."

In the recross-examination we find the following:

"Q. The fact is that you had this \$5,000 from Miss Forgeus, and that it was her money, and it was to be applied upon a purchase of that property by her? A. Yes. * * * Q. You would not have given up this money to Mrs. Eakle until you got that deed? A. No. Q. Or to anybody else? A. No. Q. And that deed would have been to Miss Forgeus with a clear title? A. No; not a clear title at that time, because there was no mention made of a clear title in the office. Q. But it was Miss Forgeus' money? A. Yes; until the deed. Q. Until the deed to Miss Forgeus had been executed and delivered to you? A. Yes; that was her instructions."

While in the direct examination the witness speaks of a "tender" of the \$5,000, there is no claim that he actually proffered the money. If he had intended to make an unconditional payment, he would, of course, have offered her the money or its equivalent. However, if from this part of his testimony it could be said that by her refusal to accept his proposal he was excused from actually producing the money or depositing it in her name, and thus a case was made out within the contemplation of section 1500 of the Civil Code, providing:

"An obligation for the payment of money is extinguished by a due offer of payment, if the amount is immediately deposited in the name of the creditor, with some bank of deposit within this state, of good repute, and notice thereof is given to the creditor"

—it is quite plain from the consideration of the whole of the testimony of the witness that a very different situation is presented. While there is an apparent conflict between his direct and cross examination, there can be no doubt that he promised to pay the money only upon condition that a deed be executed either to plaintiffs or to Miss Forgeus. As we have seen, this was not such offer as the contract required. Indeed, the fair inference from the whole of his testimony is that he insisted upon a conveyance to Miss Forgeus as a condition precedent to the payment of the money. Manifestly, appellant was under no obligation to give heed to that proposal. Her duty was to convey to plaintiffs upon their payment or unconditional offer of payment of said sum.

[3] Moreover, under section 1495 of the Civil Code:

"An offer of performance is of no effect if the person making it is not able and willing to perform according to the offer."

It clearly appears from the testimony of the witness that he could not and would not pay over the money until he got the deed for Miss Forgeus. Hence he had neither the ability nor willingness to make the payment in accordance with the contract of the parties herein. The fact is that the witness was acting for Miss Forgeus, and his chief concern was to secure for her the conveyance of the property.

Under the circumstances, whatever offer or promise was made by Mr. Stovall did not put appellant in default. At least it involved a condition which he had no right to impose. But if it could be said that an offer to pay the money if appellant would execute a deed might be regarded as satisfying the requirements of the contract, and that Mr. Stovall disregarded his instructions and made such offer, the promise was futile because of his inability to perform. *Doak v. Bruson*, 152 Cal. 17, 91 Pac. 1001; *Allen v. Chatfield*, 172 Cal. 60, 156 Pac. 47.

It is to be observed that the complaint of plaintiffs does not allege a tender of the money on said October 1, but:

That they "deposited said sum of \$3,000, together with the interest due on the unpaid portion of said purchase price from October 1, 1919, to October 1, 1920, in the bank of Williams to the credit of said defendant, and that plaintiffs were ready and willing on said 1st day of October, 1920, to execute and deliver to said defendant the said mortgage and promissory note, but the defendant refused to meet with said plaintiffs for the purpose of accept-

ing said note and mortgage and to convey said property.

"That immediately upon the deposit of said money said defendant was notified to come and take it, and was notified that said plaintiffs were ready and willing to execute and deliver said promissory note and mortgage, but defendant refused to accept said money or said promissory note and mortgage and refused to execute and deliver said deed, and defendant willfully concealed herself so that plaintiffs could not demand said conveyance."

As we read the record, all these allegations are unsupported by the evidence. They did not deposit the money to the credit of appellant; they were not able and willing to execute the note and mortgage, since they had not made nor suitably offered to make the payment, which was a precedent condition to the execution of said instruments, and we find no evidence that defendant refused to meet with plaintiffs for said purpose, to accept the money, or to execute the deed as required by the contract.

We may add in this connection that particular emphasis is placed upon the circumstance that appellant on said October 1st went to the city of Colusa, and it is claimed that this was for the purpose of concealing herself. The proof to the contrary is that she presented herself at the bank in Williams in the forenoon, and thus afforded respondents an opportunity to make the payment and demand the conveyance, and the uncontradicted testimony of U. W. Brown, Esq., her attorney, who testified that she came to his office in Colusa about 2 o'clock in the afternoon of that day; that Troughton called Mr. Brown by telephone shortly after 2 o'clock and said he was going to Colusa, and the latter informed him that Mrs. Eakle was then in his office, and Troughton said he was coming over "to prepare and execute the papers"; that Mr. Brown went to work preparing the deed and mortgage, deed from Mrs. Eakle to Troughton and the mortgage from Troughton and his wife to Mrs. Eakle, and Troughton said he would be right over. Mrs. Eakle then came to Mr. Brown's office several times to know if Troughton had come, and the last time she was there was about 5 o'clock, and she said she was obliged to return to Williams by 6 o'clock. On Mr. Troughton's arrival there Mr. Brown asked him why he had been so long in reaching Colusa, and he said he was trying to get into communication with his wife in Woodland. Mr. Brown's veracity is unimpeached, and his testimony is not disputed, and that there was anything surreptitious or sinister in the conduct of appellant is entirely inconsistent with his statements on the witness stand.

Any payment or offer of payment on the part of plaintiffs would have been excused, of course, on principle, as well as by authority of subdivision 1 of section 1511 of the Civil

Code, if appellant had concealed herself or had refused an unconditional offer of the money, but we find no such situation. We regard the only reasonable inference from the testimony to be that appellant went to Colusa for the purpose of consulting her attorney as to how she might protect her own interest and also be prepared to carry out her contract if plaintiffs met the situation, but that respondents failed to perform or offer to perform the primary obligation resting upon them, and hence appellant was not called upon to take any affirmative action.

It may be, as suggested by respondents, that if she had accepted the conditional offer, she would have received the money and the note and mortgage would have been executed, but she had the legal right to stand upon her contract and to insist that respondents comply with its terms.

[4] It may be added that respondents rely also upon what occurred the following day set forth in the complaint as follows:

"That on the 2d day of October, 1920, plaintiffs demanded of defendant the conveyance of said property and again tendered to defendant the sum of \$3,000 together with the interest due on the unpaid portion of said purchase price from October 1, 1919, to October 1st, 1920, and were ready and willing and offered to the defendant to make and execute the note and mortgage agreed on in said agreement, and to deliver the same to the defendant, and to do and perform all of their agreements under the said agreement upon the like performance by the defendant and have duly performed all the conditions of said agreement on their part."

But, as we have seen, time was made of the essence of the contract, and the payment was to be made not later than October 1st. If any forfeiture occurred, it was complete on that date, and it could not be undone by any act of respondents on a later date.

Besides, it appears from the record that the offer was made on October 2d on the express condition that she would execute a deed to Troughton and the latter to Miss Forgeus before appellant should recover the money. Indeed, it is admitted by respondents that "plaintiffs were able only to pay this money to defendant upon condition that she execute her deed." Such was not the engagement of the parties, and there is no question of their right to make the unconditional payment an essential prerequisite to entitle plaintiffs to demand a deed.

[5] It is true that the law looks with disfavor upon forfeitures and has declared that "a condition involving a forfeiture must be strictly interpreted against the party for whose benefit it is created" (section 1442, Civ. Code), but this does not mean that the courts may make for the parties a different contract from what they have agreed upon or resort to a strained and unnatural construction to defeat or nullify their clearly expressed purpose or intention.

[6] But respondents urge that it "would be manifestly unjust for defendant to be permitted to keep the purchase price paid on the ground of a forfeiture," and appellant rejoins that it would be iniquitous "for plaintiffs to use defendant's land two years, and take the crops therefrom for their own use, without paying a nickel's rental or consideration therefor."

At any rate, the courts are ready upon the slightest equitable consideration to relieve parties, upon such terms as may be just, from the results of a forfeiture. The principle is embodied in section 3275 of the Civil Code as follows:

"Whenever, by the terms of an obligation, a party thereto incurs a forfeiture, or a loss in the nature of a forfeiture, by reason of his failure to comply with its provisions, he may be relieved therefrom, upon making full compensation to the other party, except in case of a grossly negligent, willful, or fraudulent breach of duty."

We see no reason why such relief might not be had in the present case, as it does not fall within the exception. The plaintiffs made an effort to comply with their obligation, but, acting probably without legal advice, their effort was ineffective. Their complaint was framed, as we have seen, upon a different theory, and it would be necessary to have it amended to justify the relief that we have suggested. We perceive no valid objection to such procedure, and, if that course be taken, the court can allow whatever is just and equitable in view of all the circumstances. *McDonald v. Kingsbury*, 16 Cal. App. 244, 116 Pac. 380.

We think the judgment should be reversed, and it is so ordered.

We concur: FINCH, P. J.; HART, J.

58 Cal. App. 105

KING et al. v. GLOBE GRAIN & MILLING CO. (Civ. 3861.)

(District Court of Appeal, Second District, Division 2, California. June 14, 1922. Hearing Denied by Supreme Court Aug. 14, 1922.)

1. Sales $\S$ 1(4)—Contract which failed to state quantity of barley sold held not a complete contract.

A contract which stated that the seller has this day sold and buyer "has this day bought — sacks of good marketable barley, now being grown or located near E.," was not a valid contract, since it described no subject-matter, and the language was uncertain.

2. Frauds, statute of $\S$ 131(1)—Original oral agreement for sale taken out of statute by part payment not changed by subsequent incomplete written agreement, when there was no oral agreement for modification.

Where plaintiff and defendant entered into an oral agreement for the sale of barley

which was taken out of the statute by a part payment, while such contract could be superseded by a writing expressing all the elements of a complete and perfect contract of sale, it could not be changed by an incomplete written contract of sale, where there was no oral agreement for modification.

3. Frauds, statute of $\S$ 95(1)—Contract for sale held taken out of statute by part payment.

A contract of sale in writing, as required by Civ. Code, $\S$ 1624, subd. 4, but void because the agent for the buyer did not have written authority to sign it, as required by section 2309, was taken out of the statute by part payment of the purchase price.

4. Frauds, statute of $\S$ 90(4)—Contract held taken out of statute by buyer's acceptance and receipt of part of the goods.

If a contract of sale in writing, as required by Civ. Code, $\S$ 1624, subd. 4, but void because the buyer's agent did not have written authority to sign it, as required by section 2309, was not taken out of the statute by part payment of the purchase price, because not paid on the day the contract was made, it was taken out of the statute by the buyer's subsequent acceptance and receipt of part of the goods.

5. Sales $\S$ 384(7)—Seller held entitled to recover warehouse charges paid after buyer refused to accept goods.

Where defendant buyer refused to accept the goods after they were delivered to a warehouse by plaintiff seller in accordance with the terms of the contract and the seller was required to pay warehouse charges in order to get possession of the goods so as to resell at the highest market price possible, the seller was entitled to recover the warehouse charges as an element of damage.

Appeal from Superior Court, Orange County; R. Y. Williams, Judge.

Action by D. E. King and another against the Globe Grain & Milling Company. Judgment for plaintiffs, and defendant appeals. Affirmed.

W. G. Van Pelt, of Los Angeles, for appellant.

Scarborough, Forgy & Reinhaus, of Santa Ana, for respondents.

FINLAYSON, P. J. This action was brought to recover damages for an alleged breach by defendant, a corporation, of a contract to purchase barley. Judgment passed for plaintiffs, and defendant appeals.

The contract upon which plaintiffs base their right of action, a copy of which is set forth in the complaint, is as follows:

"Santa Ana, Cal., May 15, 1920.

"The Globe Grain & Milling Co. agree to buy and King & Wassum agree to sell 7,000 to 8,000 sacks barley delivered to the El Toro warehouse at El Toro, Calif., as soon as possible after threshed to be paid as soon as delivered and \$1,000.00 one thousand dollars to be paid imme-

diately and applying on final payment. The price to be \$3.00 per cwt. f. o. b. warehouse. Globe Grain & Milling Co., By C. W. Hutchings." (Italics ours.)

It will be noticed that under the terms of this contract plaintiffs, as sellers, are to deliver the barley "as soon as possible after threshed." Defendant set up in its answer a different writing, which it claims evidences the agreement as finally made. That writing, though dated May 1, 1920, was signed about May 25, 1920, under circumstances presently to be narrated. So far as it is material to our present inquiry, this second instrument is as follows:

"Santa Ana, California, May 1, 1920.

"King and Wassum has this day sold and the Globe Grain & Milling Co. of California has this day bought — sacks of good marketable barley now being grown or located near El Toro, to be sacked in Standard new jute bags at the purchase price of \$3.00 per 100 lbs., said barley to be delivered at El Toro Whse *within 100 days from the date hereof.* * * * Said King and Wassum acknowledges receipt of \$1,000.00 one thousand on account of purchase price of said barley. Said Globe Grain & Milling Co. agrees to pay the balance of said purchase price of said grain upon its delivery. * * * Globe Grain & Milling Co., By C. W. Hutchings, Purchaser. King & Wassum, Seller, per H. A. Wassum." (Italics ours.)

It will be noticed that according to the terms of the last-mentioned writing, the barley was to be delivered "within 100 days from the date hereof," i. e., prior to August 10, 1920. Contemporaneously with the signing of that writing by Wassum and before any barley had been delivered, defendant paid to plaintiffs the \$1,000 which, under the terms of the first agreement, was to be paid immediately by defendant on account of the purchase price. Within 100 days from the date of the second writing plaintiffs delivered to defendant, at the El Toro warehouse, 298,099 pounds of barley, for which defendant paid the sum of \$8,942.97. About October 12, 1920, which was as soon as possible after threshing and therefore within the time contemplated by the first instrument but more than 100 days after the date of the second instrument, plaintiffs offered defendant more barley. Defendant, claiming that all of the barley should have been delivered within the time mentioned in the second instrument, refused acceptance. Hence this suit.

C. W. Hutchings, who signed defendant's name to both writings, was an agent of defendant at Santa Ana. He seems to have had authority to purchase the grain for his principal, but his authority was not in writing.

The circumstances attending the signing of the two instruments were as follows: In May, 1920, plaintiffs were engaged in farming and raising barley near El Toro, in Orange county. About May 15th they orally

agreed with Hutchings to sell to defendant all the barley then being raised by them, which was estimated to be between 7,000 and 8,000 sacks. During the oral negotiations preceding the execution of the first instrument, three points were discussed, namely: The amount to be delivered, the place of delivery and the time of delivery. After some argument it finally was agreed that plaintiffs should deliver between 7,000 and 8,000 sacks, that being the estimated yield of their growing crops; that the barley should be delivered at the El Toro warehouse; and that it should be delivered as soon as possible after threshing. These promises, thus orally agreed to, were incorporated into the first writing, which correctly reflects the oral agreement. The parties never thereafter discussed any change in the terms of their agreement. If the original agreement was ever changed or modified in any respect whatever, it was solely because the plaintiff Wassum, under the circumstances about to be narrated, signed the second writing in ignorance of its contents.

Stating the facts most favorably to plaintiffs, as we must do since the findings are in their favor, the circumstances attending the signing of the second instrument were substantially as follows: About a week or 10 days after the execution of the first instrument, or a day or two prior to May 25, 1920, Wassum, who was a farmer, met Hutchings on the street in Santa Ana and was told by the latter that a check for \$1,000 was waiting for plaintiffs at the office of defendant in Santa Ana. Wassum, on May 25th, went to defendant's office and asked for the check. The person who delivered it to him, an employee of defendant, asked Wassum to sign a paper, whereupon the latter signed a document which he supposed was a receipt for the \$1,000. He did not read the paper. It proved to be the second writing, the substance of which is set forth supra. Though a copy of this instrument was mailed to Wassum, he paid no attention to it, and, without reading it or knowing aught of its contents, put it away among other papers in his desk, where it remained until some time after defendant had refused to accept the barley which was offered in the month of October. Not until then did Wassum know that the paper which he had signed in defendant's office on May 25th was not a receipt for the \$1,000.

Appellant's first point is that the agreement evidenced by the first writing is within the statute of frauds, that it was never taken out of the statute, and that the rights of the parties must be measured by the terms of the second instrument and not by the first. Appellant's argument runs substantially as follows: The agreement for the sale of the barley, an agreement to sell at a price exceeding \$200, was within the statute

of frauds, and therefore was required to be in writing (subdivision 4, § 1624, Civ. Code); an authority to enter into a contract required by law to be in writing can only be given by an instrument in writing (section 2309, Civ. Code); Hutchings had no written authority to sign either of the written agreements; therefore the first writing was insufficient to satisfy the statute of frauds; the sale was, however, taken out of the statute by the payment of the \$1,000 to plaintiffs, but not before; since the second writing was signed contemporaneously with the payment of the \$1,000 to Wassum, that payment must be referred to the contract evidenced by the second writing and not to the contract evidenced by the first writing; and it is therefore the second agreement, and not the first, which was taken out of the statute of frauds by the payment of a part of the purchase price, and therefore the only agreement which can be enforced against defendant is that which required plaintiffs to make delivery of all the barley prior to August 10, 1920.

The trial court found that Wassum signed the second writing through mistake; that he thought it was merely a receipt for \$1,000; that there was no meeting of minds between the parties when Wassum signed the second instrument; that the first agreement was the only one that has been acted upon by the parties; and that it was not superseded by the second so-called agreement.

To maintain its contention that the payment of the \$1,000 which took the agreement out of the statute of frauds was made under the contract evidenced by the second writing and not under that evidenced by the first writing, appellant must establish the validity of the second writing as a complete and perfect contract, notwithstanding the instrument was signed by Wassum in the belief that it was merely a receipt for the \$1,000 paid to plaintiffs on account of the purchase price. Citing *Hawkins v. Hawkins*, 50 Cal. 558, appellant contends that it was the legal duty of Wassum to read the alleged receipt that was handed to him; that he was chargeable with knowledge of the contents of the writing whether he read it or not; and that, being so charged with knowledge of its contents, he assented thereto by his failure to repudiate the instrument on the ground that it did not correctly embody the previous oral agreement.

There is evidence to warrant the inference that defendant misrepresented the nature of the instrument which its employee asked Wassum to sign, and the case therefore seems to be within the doctrine enunciated in *Meyer v. Haas*, 126 Cal. 560, 58 Pac. 1042. In our opinion it would be an extreme case that would warrant a court in holding that a party induced, through misrepresentation as to the purport of a document, to refrain from making examination of its contents, shall,

nevertheless, be deemed to have given his assent to the document before its contents are in fact known to him. All that is required is that the party who is misled into signing an instrument in ignorance of its purport shall have exercised reasonable diligence. Each case must be considered with reference to its own peculiar facts and circumstances. In this case the trial court's findings are tantamount to a finding that reasonable diligence was exercised by Wassum, and we do not think the finding should be disturbed.

[1] But however this may be, there is another reason why it must be held that the original agreement was not superseded by the second writing—the writing which was mistakenly signed by Wassum on the 25th of May under the supposition that he was signing a receipt for the \$1,000. The second writing did not embody a complete contract, and for that reason alone it could not supersede the original agreement nor alter any of its terms. The second writing does not describe the subject-matter of any sale. By its terms plaintiffs do not agree to sell and defendant does not agree to buy any quantity of barley whatever. The language of the second instrument is:

"King and Wassum has this day sold and the Globe Grain & Milling Co. of California has this day bought ——— sacks of good marketable barley now being grown or located near El Toro."

There is nothing in this language which tends to show how many sacks were to be sold by plaintiffs. It might have been but two sacks, and, with just as much probability, it might have been a million sacks. The language is fatally uncertain. It describes no quantity whatever. Nor is there anything within the four corners of the instrument which tends in the slightest degree to indicate that the words "now being grown or located near El Toro" were intended to refer to the 7,000 or 8,000 sacks of barley then being grown by plaintiffs near El Toro. For aught that appears from the face of the instrument, "the ——— sacks of barley now being grown or located near El Toro" might be barley grown or owned by a third party. Without the aid of extrinsic evidence the instrument entirely fails to describe the subject-matter of a contract of sale. But, under the particular facts of this case, extrinsic evidence is not admissible in aid of the instrument, or, at any rate, it is not admissible in aid of the purpose which appellant seeks to accomplish by means of the second instrument.

[2] Under the facts of this case the original oral agreement could be superseded by the instrument which Wassum signed on May 25th only in the event that that writing, in and of itself and by virtue of its own terms, embodied all of the requisites of a complete and perfect contract of sale. The

parties orally agreed, in the first instance, to the sale of 7,000 to 8,000 sacks of barley. They orally agreed to all of the terms of a complete contract of sale. That oral agreement was then reduced to writing, but the agent who signed for defendant did not have any written authority to execute the instrument. The agreement, as to defendant, was thus left as though no writing had ever been signed. Plaintiff never orally agreed to any change in the terms of their oral agreement. Thereafter Wassum signed the second instrument. Since the parties never orally agreed to any change in their original contract, that contract could not be changed by a subsequently executed writing, unless such writing, in and of itself evidenced a complete contract of sale. But, as we have shown, the second writing is not a complete contract. It describes no subject-matter of sale. It follows, therefore, that even if Wassum be chargeable with knowledge of the contents of the second instrument at the time when he signed it, that instrument would not supersede the only contract ever made by the parties, namely, the oral agreement which was negotiated by them immediately prior to the drafting of the first instrument.

It is not material that Hutchings, who drafted the second instrument may have intended to insert therein a description of the same barley that was described in the first instrument. His intention, whatever it may have been, was not communicated to plaintiffs, and therefore the only act which by any possibility can be invoked to sustain appellant's contention that the contract as originally made was altered is the bare fact that Wassum signed the second instrument—an instrument which, for reasons already stated, could not of itself alter the terms of the agreement as originally negotiated.

[3,4] From the foregoing it follows that when the \$1,000 was paid by defendant the only agreement that ever had any existence was the original oral agreement, and that therefore it was that agreement which was taken out of the statute of frauds by the part payment of the purchase price. Or if, because the \$1,000 was not paid at the very time when the oral agreement was entered into, that payment, alone, was insufficient to take the sale out of the statute of frauds, nevertheless defendant's subsequent acceptance and receipt of barley did take the original oral agreement out of the statute, since the only agreement as to which the minds of the parties ever met was the original oral agreement, and that, therefore, is the only agreement under which the barley delivered prior to August 10th could have been accepted and received by defendant.

From the foregoing it follows that respondents were entitled to recover damages for appellant's breach of the agreement sued upon, namely, appellant's agreement to buy

the barley "as soon as possible after threshed."

[5] One other point is made: Respondents, pursuant to their contract, delivered at the El Toro warehouse the barley which appellant refused to accept. In order to regain possession, after defendant's refusal to accept the barley, so as to enable them to resell at the highest market price obtainable at the nearest market, respondents paid the warehouse charges, amounting to \$76.50. The court allowed that item of expense as a part of respondents' damages. Appellant now contends that this was not a proper item of damages. No question is raised as to the reasonableness of the amount of these warehouse charges. The question is purely and simply this: Can such charges, if paid by the vendor, become a proper item of damage in any event in a suit of this character? Nor is any question raised as to the passing of title to the barley which respondents delivered to the warehouse for appellant. Both parties have argued the case upon the theory that the title to the barley on which respondents paid the warehouse charges did not pass to appellant as the vendee, and we therefore shall dispose of the case on the assumption that the title remained in the vendors.

Ordinarily where, as in the instant case, the seller has made a resale, the detriment caused by the breach of the buyer's agreement to accept and pay for the property, the title to which is not vested in him, is deemed to be the excess, if any, of the amount due from the buyer under the contract over the net proceeds of such resale. Section 3311, Civ. Code. That rule can readily be applied with justness and fairness in those cases where there has been no delivery to the buyer. Where, however, as in a case like this, the sellers have agreed to make delivery at a warehouse, the charges whereof are payable by the buyer if he accepts the goods, and where, as here, the buyer has failed to give any notice of his intention not to accept until after the sellers have made delivery to the warehouse pursuant to the requirements of their contract, we conclude that payment of the warehouse charges by the sellers, in order that they might thus regain possession so as to be in a position to make a resale, is not only an element of damage naturally and proximately resulting from the buyer's breach of his contract to accept and pay for the goods, but is such as must have been within the reasonable contemplation of the parties when making the contract. The buyer ought to have known that it would be necessary for the sellers to pay the warehouse charges if the former, without right, should refuse to accept the barley after the sellers had so far completed their contract as to make delivery to the warehouse in accordance with the terms of

their obligation. The object of the remedy given to a seller is to make him whole on account of any loss suffered by the default of the buyer—to compensate him for all detriment proximately caused by the buyer's breach of his contract, or which, in the ordinary course of things, would likely to result therefrom.

Moreover, the fact that warehouse charges, *eo nomine*, were specifically included in the findings as an item of damage, could not increase the total amount recoverable from defendant on a resale by plaintiffs. Defendant is liable for the difference between the amount due under its contract and the net proceeds realized by plaintiffs on the resale. If plaintiffs had not paid the warehouse charges before making the resale, then it would have been necessary for them to resell the barley subject to the warehouse charges. In that event the amount realized on the resale would be less, by at least the amount due for warehouse charges, than would be the case if those charges were paid before the resale, thus increasing, by at least the amount of the unpaid warehouse charges, the difference between the price which defendant agreed to pay for the barley and the net proceeds of the resale.

The judgment is affirmed.

We concur: WORKS, J.; CRAIG, J.

87 Cal. App. 771

PEOPLE v. MARTINEZ. (Cr. 866.)

(District Court of Appeal, Second District, Division 2, California. May 23, 1922.)

1. Criminal law §372(1)—Other offenses may be proved to show inclination.

In prosecutions for illicit intercourse involving consent, evidence of similar offenses committed between the parties, both prior and subsequent to that with which defendant is charged, may be introduced after the prosecution has elected to rely on some particular act for conviction, for the purpose of showing the inclination of the parties toward each other.

2. Criminal law §678(5)—Court must instruct jury as to particular act notwithstanding failure to request election.

In a prosecution for rape of a girl under 14, where the testimony showed several acts, on any one of which the conviction could be based, it was error for the court to fail to instruct the jury that the prosecution must establish a particular act beyond a reasonable doubt before a verdict of guilty could be rendered, notwithstanding defendant's neglect to demand that the district attorney make an election.

3. Criminal law §1173(2)—Failure to instruct as to particular act relied on held not prejudicial.

Where the prosecutrix testified to several acts of intercourse with defendant, all within

a few days of each other, and defendant did not deny any of the acts, the failure to instruct that the jury must find the commission of one particular act before they could convict was not prejudicial to defendant, since all were established by the same evidence, so that it was not possible that some of the jurors might have believed defendant guilty of one and others might have based their vote for conviction on belief of guilt of another act.

4. Criminal law §678(5)—In absence of express election offense first testified to is regarded as that relied on.

In the absence of an express election by the district attorney as to the act on which he would rely for conviction, the law selects the first act testified to by prosecutrix.

5. Indictment and information §176—Variance of two days in proof of date is immaterial.

Variance between an allegation in an indictment that the offense was committed on or about May 11 and proof that it was committed on May 9 was not material.

6. Criminal law §1170½(5)—Restriction of cross-examination as to details of act held not prejudicial.

Where there was no contradiction of the testimony of prosecuting witness concerning the intercourse, the refusal of the trial court on his own motion to permit cross-examination of prosecutrix as to the details of the act was not prejudicial to accused.

7. Criminal law §308—Prosecution must prove every element of offense beyond a reasonable doubt.

Accused is presumed to be innocent until the contrary is proved, and the burden is on the prosecution to prove every element of the crime by evidence sufficient to satisfy the minds of the jurors beyond a reasonable doubt so that a defendant without introducing any evidence to prove his own innocence will be entitled to an acquittal if the people fail to prove his guilt beyond a reasonable doubt.

8. Criminal law §781(6)—Instruction extrajudicial admissions should be received with great caution goes beyond statute.

A requested instruction that extrajudicial admissions of the defendant are to be received and considered with great caution goes beyond the language of Code Civ. Proc. § 2061, subd. 4, providing that on proper occasions evidence of oral admissions of a party ought to be viewed with caution.

9. Criminal law §781(6)—Refusal of instruction as to weight of extrajudicial admissions is not error.

The refusal to give an instruction in a criminal prosecution in the language of Code Civ. Proc. § 2061, subd. 4, that evidence of the oral admissions of a party ought to be viewed with caution is not error.

10. Criminal law §1178—Exceptions to refusal of instructions merely referred to will not be considered.

Exceptions to the refusal to give instructions requested by accused, presented merely

by statement, that the court erred in refusing to give an instruction requested by accused as set forth on a page and line of the transcript, without setting out the language of the instructions in the brief or making any argument in support of the exceptions, will not be considered.

11. Criminal law $\S$ 1170 $\frac{1}{2}$ (5)—Exclusion of cross-examination of prosecutrix as to desire to marry defendant held not error.

The exclusion of a cross-examination of prosecutrix as to whether it was her intention to marry accused after his arrest and at the time of the preliminary examination was not prejudicial to accused, where prosecutrix had already testified on cross-examination that the reason she falsely stated her age at the preliminary examination was because she desired to get married.

12. Witnesses $\S$ 269(2)—Cross-examination regarding age of prosecutrix is not proper where she had not been directly questioned concerning it.

Where the district attorney asked prosecutrix no question as to her age, a cross-examination by accused with reference to her age and to her previous inconsistent statements regarding it was improper.

13. Criminal law $\S$ 977(3)—Imposition of sentence within maximum time, but beyond time permitted without consent, is proper in absence of objection.

Where the sentence was imposed within the maximum time prescribed by Pen. Code, $\S$ 1191, but beyond the time to which the court of its own motion and without the defendant's consent may continue the time for passing sentence, the judgment may, nevertheless, be rightfully pronounced unless defendant makes objection at the time and moves for a new trial.

Appeal from Superior Court, Los Angeles County; Sidney N. Reeve, Judge.

Miguel Martinez was convicted of rape, and he appeals from the judgment. Affirmed.

Theodore Gottsdanker, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and John W. Maltman, Deputy Atty. Gen., for the People.

FINLAYSON, P. J. Defendant was convicted of rape upon the person of a girl 14 years of age. He appeals from the judgment.

The information charges that the offense was committed "on or about the 11th day of May, 1921." The prosecutrix, whose testimony as to acts of sexual intercourse was not contradicted, related from the witness stand the story of her relations with defendant, which, put in narrative form, was substantially as follows:

"I lived with my parents on a ranch at Van Nuys, in the county of Los Angeles. In May, 1921, myself and defendant spent three days and nights together. We first went to a hotel at Zelzah, in Los Angeles county, where we

spent two days and nights. We both occupied the only bed in the room. We had sexual intercourse once each night. The third day we came to the city of Los Angeles and went to a hotel in that city. We occupied the same bed and had sexual intercourse once that night. The next day we went to the courthouse in Los Angeles to get a marriage license. I told the clerk that I was 18 years old."

Though there is no very satisfactory evidence as to the date of the visit to the marriage license bureau, it seems to be conceded that it was May 12, 1921, which would make the last act of sexual intercourse testified to by the prosecutrix fall on May 11, 1921, the date specified in the information.

Defendant's counsel objected to the introduction of any evidence as to the act of sexual intercourse which took place in the city of Los Angeles on the ground that defendant was not charged with that specific act. The objection was overruled. It does not appear that defendant made any demand that the district attorney elect upon which act of illicit intercourse he would rely for a conviction.

The prosecutrix gave no testimony as to her age on her direct examination; the district attorney confining his questions to matters relating solely to the girl's illicit acts of intercourse with the defendant. The prosecution relied upon the parents to furnish the necessary evidence on the subject of their daughter's age. Though not examined as to her age on her direct examination, the prosecutrix, on her cross-examination, in response to questions put to her by defendant's counsel respecting her age, testified that she was 14 years old; that her parents told her to testify that she was 14 years old; that when she was taken to the juvenile home immediately after defendant's arrest she told the authorities there that she was 18 years of age; and that she testified before the committing magistrate that she was of the age of 18 years, or would be in the following February. Upon being asked on cross-examination to explain why she so testified before the committing magistrate, she replied:

"Because I did want to marry before 18, and I didn't have the age to get married. I told them because I wanted to get married, but I didn't have the age to get married."

Defendant's counsel then asked her this question:

"Did you also want to marry this defendant after his arrest and when you testified at the preliminary examination?"

To that question the district attorney objected on the ground that it was immaterial. The objection was sustained. That ruling is now assigned as error.

[1] It was not error for the court to permit evidence of the three separate acts of

intercourse. In cases involving illicit intimacy by consent, such as adultery and statutory rape upon the person of a female under the age of 18 years, evidence of similar offenses committed between the parties, both prior and subsequent to that with which the defendant is charged, if not too remote, may be introduced after the prosecution has selected some particular act of a date certain and has elected to rely on proof of such act for conviction and has introduced evidence tending to support the selection. Such evidence of other acts is admitted for the purpose of showing that the parties are adulterously and lasciviously inclined, and that the barriers of modesty have been broken down with reference to each other. *People v. Koller*, 142 Cal. 621, 76 Pac. 500; *People v. Harlan*, 29 Cal. App. 600, 156 Pac. 980; *People v. Scott*, 24 Cal. App. 440, 141 Pac. 945.

[2] The district attorney did not make the election which the law requires of him. Neither did the court, when the case went to the jury, direct the jurors' minds to any particular act of intercourse with an instruction that it was incumbent upon the prosecution to establish that act by evidence beyond a reasonable doubt before a verdict of guilty could be returned against the defendant. The court's failure so to instruct the jury was error, notwithstanding defendant's neglect to demand that the district attorney make an election. *People v. Castro*, 133 Cal. 11, 65 Pac. 13.

[3] But it so happens that in this particular case the error was not prejudicial. The evidence presented by the prosecution respecting the illicit acts, consisting of the testimony of the girl herself and defendant's confession, was not contradicted. Defendant, who was the sole witness produced by the defense, made no attempt whatever to deny the acts of intercourse testified to by the prosecutrix. If the jury believed that defendant committed one of the acts testified to by the prosecutrix, they must equally have believed that he committed each of the other acts narrated by her, since there is nothing in the case that could possibly make her testimony as to one of these acts more or less probable than her testimony respecting the others. It is not possible, therefore, that some of the jurors were convinced beyond a reasonable doubt of the truth of the charge as to one of the offenses while other jurors voted for a conviction because they believed that it was one of the other acts which was proved beyond a reasonable doubt.

[4] Moreover, in the absence of an express selection by the district attorney of one of the acts of intercourse as the particular offense for which he would ask a conviction, the law selects the act first testified to by the prosecutrix.

"* * * The prosecuting officer, when he commences the trial of a case of this class, where he is at liberty to prove one of several

different offenses under the indictment, should at least as early as the commencement of the trial inform the defense upon proof of what specific offense he intends to rely, and, if he does not, the first evidence which would tend in any degree to prove an offense shall be deemed a selection, and unless that precise offense is proven, the defendant is entitled to an acquittal." *People v. Williams*, 133 Cal. 169, 65 Pac. 323.

See, also, *People v. Harlan*, supra.

[5] The first offense testified to by the prosecutrix was the first act of intercourse at Zelzah. That act occurred on or about May 9, 1921, which was two days prior to the date laid in the information. This variance with respect to the date of the act was not material. *People v. Williams*, supra. Since the testimony of the prosecutrix respecting the act first testified to by her is uncontradicted and has none of the marks of inherent improbability, it follows that appellant was not prejudiced by the prosecutor's failure to make an election or by the court's neglect to instruct the jury that it was incumbent upon the people to establish, by sufficient evidence and to the satisfaction of all the jurors, a particular act of intercourse.

[6] Appellant insists that the court unduly restricted him in his cross-examination of the prosecutrix. This assignment of error calls for no extended discussion. It seems that during his cross-examination of the little girl defendant's counsel asked her if she experienced any pain when defendant inserted his private parts into her private parts. The court, of its own motion, stopped this line of examination. We fail to see how appellant could have been injured by the refusal to permit him to go into the details of the lascivious conduct to which he and this little girl gave themselves. Had there been any conflict in the evidence respecting the acts of coition, there might have been some ground for complaining of the court's refusal to permit counsel to ask the prosecutrix if she felt any pain; for, if she had answered that she felt no pain, it may be that such an answer would have had a tendency to show that there had been no penetration by defendant. But upon the record before us we fail to see how appellant could have been harmed by the court's refusal to permit him to ask the question.

[7] True, a defendant in a criminal action is presumed to be innocent until the contrary is proved, and the burden is upon the prosecution to prove every element of the crime by evidence sufficient to satisfy the minds of the jurors beyond a reasonable doubt; so that a defendant, without introducing any evidence to prove his own innocence, will be entitled to an acquittal if the people fail to prove his guilt beyond a reasonable doubt. And though the defendant in a criminal action, for the purpose of discrediting the tes-

timony of a witness for the prosecution and thus raise a reasonable doubt of guilt, may put to such witness any proper question on cross-examination, still, in view of the record before us, we are unable to see how, if the prosecutrix had said that she suffered no pain during any of the acts of coition testified to by her, the credibility of her testimony would have been materially shaken. The error, if error there be, is so trivial that it must be disregarded in view of section 4½ of article 6 of the Constitution.

[8] Exception is taken to the court's refusal to give the following instruction:

"You are instructed that extrajudicial admissions of the defendant are to be received and considered with *great* caution, and that oral admissions of a party should be viewed with caution." (Italics ours.)

In the first place, this proposed instruction goes beyond the language of subdivision 4 of section 2061 of the Code of Civil Procedure, which simply provides that, upon all proper occasions, the jury is to be instructed that "evidence of the oral admissions of a party [ought to be viewed] with caution," not with "great caution," as is stated in the first part of the proposed instruction. See *People v. Buckley*, 143 Cal. 391, 77 Pac. 169.

[9] But, wholly apart from this criticism, it has been definitely decided in this state that the refusal to give an instruction in the language of subdivision 4 of section 2061 is not error. *People v. Raber*, 168 Cal. 316, 143 Pac. 317; *People v. Ruiz*, 144 Cal. 251, 77 Pac. 907; *People v. Maljan*, 34 Cal. App. 384, 167 Pac. 547.

[10] Exception is taken to the court's refusal to give a number of other proposed instructions, to each of which our attention is called in the following manner:

"The court erred in refusing to give an instruction asked by the defendant beginning at line [the number of the line is here inserted] of page [the number of the page is here inserted] of clerk's transcript and ending on line [number inserted] of page [number inserted] of said transcript."

The language of the requested instructions is not set forth in the brief, no authority is cited, and no argument is made beyond the bald declaration that "the court erred in refusing to give the instruction." We do not feel called upon to consider points so presented. *Moore v. San Vicente L. Co.*, 175 Cal. 213, 165 Pac. 687.

[11, 12] The court did not err in sustaining the objection to the question propounded by defendant's counsel to the prosecutrix on her cross-examination asking her if she intended to marry defendant after his arrest and when she testified at his preliminary examination. This question was put to the prosecutrix on her cross-examination in connection with her explanation of the reason why she had testified at the preliminary ex-

amination that she was 18 years old. That explanation was that she wanted to marry the defendant before she would become 18 years of age. Her answer explaining her testimony before the committing magistrate carried with it the necessary implication that she wished to marry the defendant after his arrest and also at the time of the preliminary examination. Defendant therefore could suffer no prejudice by the court's ruling in sustaining an objection to the question asking the prosecutrix if she desired to marry the defendant after his arrest and when she testified at the preliminary examination. Moreover, the question was not proper cross-examination. It was asked as a part of the cross-examination respecting the age of the prosecutrix—a subject-matter concerning which she had said nothing on her direct examination.

[13] Finally, it is contended that the judgment was not pronounced within the time provided by statute (section 1191 of the Penal Code). The verdict was rendered August 9, 1921. At the time originally set for pronouncing judgment, August 11, 1921, defendant applied for probation. The court therefore continued to August 25, 1921, the time for passing sentence. On the last-mentioned date the court continued to September 22, 1921, the hearing on defendant's application for probation and likewise the time for pronouncing sentence. The matter came on for hearing on September 22d, and the application for probation and the time for passing sentence were continued, at defendant's request, to November 10, 1921, on which date probation was denied and sentence was pronounced. Appellant contends that the record of the proceedings had on September 22d shows that his consent to a continuance to November 10th was given solely because he was induced to believe, from remarks made by the court, that he would be granted probation if the matter were continued at his request. The minute entries show that the time for pronouncing sentence was regularly continued at defendant's request, and that judgment was pronounced within the time limit prescribed by section 1191. Assuming, for the purpose of this decision, that the verity of the minute entries may be impeached by appellant in this manner, nevertheless the fact remains that there is no basis for the contention that appellant's consent to the continuance was given under the influence of a false hope of probation held out to him by the court. At the hearing had on September 22d the court expressly stated that it did not believe this was a case for probation; and yet, in spite of that statement, defendant asked for and the court granted a continuance to November 10th. Moreover, the record does not show that at the time of passing sentence on November 10th the defendant made any objection to the pronouncing of judgment on that date, or that he asked

for a new trial on the ground that the legal time for pronouncing judgment had expired. Where, as here, the judgment is pronounced within the maximum time permitted by section 1191, but beyond the time to which the court, of its own motion and without the defendant's consent, may continue the time for passing sentence, judgment, nevertheless, may be rightfully pronounced unless the defendant make objection at the time and demand that a new trial be granted on the ground that the legal time limit has expired. *People v. Polich*, 25 Cal. App. 464, 143 Pac. 1065; *People v. Okomoto*, 26 Cal. App. 568, 147 Pac. 598.

The judgment is affirmed.

We concur: WORKS, J.; CRAIG, J.

(57 Cal. App. 739)

MARTIN v. BURRIS. (Civ. 2443.)

(District Court of Appeal, Third District, California. May 22, 1922. Hearing Denied by Supreme Court July 20, 1922.)

1. Action —46—Determination of rights of parties may be joined with action for cancellation of joint adventure contract.

A cause of action for the cancellation of a joint adventure contract under Civ. Code, § 3412, may properly be joined with a prayer for determination of the rights and obligations of the parties under the contract, and their interests in the properties acquired prior to its termination.

2. Joint adventures —1—Notice held one for cancellation, and not statutory rescission.

A notice, given by one party to a joint adventure contract to the other that the contract was terminated and the rights of the other thereunder forfeited was not a notice of statutory rescission, but rather a cancellation or termination of the contract.

3. Joint adventures —4(1)—Partnership —21—Breach of contract does not forfeit rights thereunder except as provided by the contract.

A breach of a joint adventure or partnership contract by one of the parties does not work a forfeiture of the rights of that party acquired under the contract prior to the breach, except to the extent provided by the contract.

4. Joint adventures —2—Forfeiture for nonpayment of installments on contract does not apply to nonpayment of advances.

Where a joint adventure contract provided that defendant should pay certain installments on the contracts for property thereafter to be acquired, and should repay to plaintiff a proportion of payments previously made by plaintiff, a provision for the forfeiture of defendant's interest in certain properties to be acquired under the contract on default by him in the payment of his proportion of the purchase

price does not entitle plaintiff to a forfeiture of defendant's interest in the properties for defendant's failure to pay his proportion of payments made by plaintiff, since a condition involving forfeiture must be strictly interpreted against the party for whose benefit it was created under Civ. Code, § 1442.

5. Joint adventures —4(1)—Wrongful acquisition and transfer of conflicting claim does not cause forfeiture.

Where one of the parties to a joint adventure agreement acquired an interest in a mining claim which conflicted with one of the claims covered by the agreement, and thereafter transferred his interest in the claim so acquired to another, including in the transfer the portion of the joint adventure claim covered by the conflict, his act, however wrongful, did not work a forfeiture of his interest in the joint adventure claim.

6. Joint adventures —4(1)—Defaulting party holds rights acquired subject to claims of the other.

Though a party to a joint adventure agreement who defaults in performing his part of the agreement does not thereby forfeit his interests in the property previously acquired under the agreement, he holds such interests subject to the claims of the other party to the contract accruing by reason of the default.

7. Joint adventures —5(1)—In suit for cancellation, court should settle all matters in one accounting.

In a suit for cancellation of a joint adventure agreement, the court should settle all matters between the parties arising out of the agreement by one accounting in the same manner in which partnership affairs are settled on dissolution, and not merely cancel the agreement and leave the settlement of the rights of the parties thereunder to future litigation.

8. Joint adventures —4(1)—Notice of rights to property already acquired held not to estop cancellation.

Where defendant had defaulted in the performance of his joint adventure agreement with plaintiff, a notice given by plaintiff to the purchasers from defendant of a claim which conflicted with one of the joint adventure claims, whereby plaintiff claimed an interest in that claim, did not estop plaintiff from thereafter canceling the joint-adventure contract because of defendant's default, since his claim of interest in property acquired under the agreement was not inconsistent with his right to cancel.

9. Appeal and error —1172(1)—Judgment can be reversed only as to part affected by error.

Where the error affects only the determination of the rights of the parties after the cancellation of the joint adventure agreement, and the judgment canceling the agreement was supported by the evidence, that part of the judgment canceling the agreement can be affirmed, and the judgment reversed in other respects, with directions to adjudicate the rights of the parties.

Appeal from Superior Court, Mono County; Pat R. Parker, Judge.

Action by J. D. Martin against George B. Burris for rescission of contract and for damages. Judgment for plaintiff, and defendant appeals. Affirmed in part, and reversed in part.

Welles Whitmore, of Oakland, for appellant.

John D. Murphey, of Berkeley, for respondent.

FINCH, P. J. The complaint alleges the execution of a contract on November 17, 1916, by the terms of which the parties associated "themselves together for the purpose of acquiring, disposing of and working mining properties in the Masonic Mining District in the county of Mono"; that certain mining properties were acquired pursuant to the agreement; that the plaintiff performed all the terms of the agreement on his part; that the defendant failed to perform any of the terms thereof, and endeavored to prevent performance by plaintiff, to plaintiff's damage in the sum of \$10,000; that on the 29th day of June, 1918, plaintiff rescinded the contract and declared the same to be ended and terminated, and duly notified defendant of such rescission and termination. Plaintiff prayed for judgment for damages in the sum of \$10,000; for the rescission, cancellation, and annulment of the contract; for the forfeiture of defendant's rights thereunder, and of all his rights in and to the properties acquired by plaintiff under the agreement and adjudging plaintiff to be the owner thereof, and for general relief.

[1] The defendant demurred to the complaint on various grounds, and the court overruled his demurrer. The principal grounds urged on appeal against the complaint are that it does not state a cause of action for rescission, and that several causes of action are improperly joined in one count. It may be doubted whether the complaint attempts to state a cause of action for the rescission of the contract in the statutory sense of that term. It clearly states a cause of action, however, for the cancellation of the contract. Civ. Code, § 3412; *Bradley v. Gas Control Co.*, 102 Cal. 627, 36 Pac. 1011. The relief prayed for does not have the effect of making the complaint state independent causes of action. On canceling the contract it is proper for the court to determine the rights and obligations of the parties thereunder and their interests in the properties acquired prior to its termination.

In his answer the defendant denies the alleged failure of performance and wrongful conduct on his part, and alleges failure of performance by plaintiff, and prays for damages and general relief.

The decree, among other things, adjudges that the contract was, on the 29th day of

June, 1918, "fully rescinded, canceled and terminated, and was thereafter of no further force and effect." There was no evidence as to the amount of damages, if any, suffered by either party, and the court declined to make any finding on the question. The court did not adjudge the rights and obligations of the parties relative to the properties acquired under the contract by either party prior to plaintiff's termination thereof on June 29, 1918.

[2] In his brief appellant says:

"The judgment in this case rescinds the contract, at an arbitrary date, but does not determine the rights of the parties. It opens the way for much future litigation, by setting a post around which litigation may revolve."

The notice of June 29, 1918, referred to in the complaint and in the transcript of the evidence as a notice of rescission, is not such in fact. The notice does not contain the word "rescind" or any equivalent term, but provides:

"You are hereby notified that * * * the undersigned hereby declares said contract terminated and all of your rights thereunder forfeited."

By the decree it is adjudged that the contract was by the plaintiff "rescinded, canceled and terminated, and was thereafter of no further force and effect." Construing the word "rescinded" as used in the complaint and in the decree, with reference to the context, it seems clear that the word was not used to indicate a statutory rescission, but rather a cancellation or termination of the contract. *Pfeiffer v. Norman*, 22 N. D. 168, 133 N. W. 97, 38 L. R. A. (N. S.) 891.

[3] On sufficient evidence, the court found that the defendant had broken his agreement in such material respects as to justify the termination thereof by the plaintiff on June 29, 1918. The defendant had failed to repay plaintiff the sums advanced by the latter in the former's behalf, as provided for by the contract. He had failed to pay his proportion of the installments which had become due on certain options. He had refused to convey to plaintiff many mining claims located by defendant. He had entered into an agreement to purchase a one-half interest in the Chemung claim, and refused to convey the same to plaintiff, but had conveyed his interest therein to another. He had, however, rendered valuable services in securing other options and in managing the operation of some of the properties acquired. Whether the joint enterprise constituted a partnership or a joint adventure, the defendant's breach of the agreement justified the plaintiff's termination thereof, but did not work a forfeiture, except as provided by the contract, of his interest in the assets acquired prior to the notice of termination. *Kimball v. Gearhart*, 12 Cal. 28, 48; *Lanpher v. Warshawer*, 28

Cal. App. 457, 152 Pac. 933; *McDonough v. Saunders*, 201 Ala. 321, 78 South. 160, 11 A. L. R. 419; *Parish v. Bainum*, 202 Ill. App. 563; *Iman v. Inkster*, 90 Neb. 704, 134 N. W. 265; *Botsford v. Van Riper*, 33 Nev. 191, 110 Pac. 705; *First National Bank v. Rush* (Tex. Com. App.) 210 S. W. 521; *Kaufman v. Catzen*, 81 W. Va. 1, 94 S. E. 388, L. R. A. 1918B, 672.

[4] The contract provides for the forfeiture of defendant's interest in certain properties on default by him in the payment of his proportion of the purchase price thereof. It is recited therein that options had been taken in the defendant's name for the purchase of a one-half interest in the Red Rock claim, a two-thirds interest in the Lake View, and the entire interest in the Perini claims. There is evidence to the effect that the option on the Perini claims was allowed to lapse by mutual consent, and it need be given no further consideration. The plaintiff advanced the initial payment on the other options, and defendant in the contract agreed to repay plaintiff one-fourth of the sum so advanced within 90 days after the execution of the agreement. The contract further provided that plaintiff should pay three-fourths and the defendant one-fourth of the deferred installments as they became due, their interests in the property to be in the same proportion. Relative to the foregoing options, but not as to other options to be acquired, the contract provided:

"That in the event of either of the parties hereto failing to make any payment upon any option or agreement to purchase at the time and place specified therefor in said agreements or any agreement hereafter to be made in reference thereto, in that event the other party is hereby authorized to make such payment and shall succeed to all the right, title and interest of every kind and character of the delinquent party of, in and to the properties named in any of said options which shall have become delinquent by reason of the nonpayment of any installments thereon."

Manifestly, this provision was not intended to apply to failure of repayment to plaintiff of the sums advanced by him toward the purchase of the claims mentioned prior to the execution of the contract. It is, by its terms, limited to "any payment upon any option or agreement to purchase at the time and place specified therefor in said agreements," and, of course, defendant's obligation to repay plaintiff for such advances is not specified in such options or agreements to purchase. "A condition involving a forfeiture must be strictly interpreted against the party for whose benefit it is created." Civ. Code, § 1442. "A forfeiture can never take place by implication, but must be effected by express, unambiguous language." *Cullen v. Sprigg*, 83 Cal. 56, 64, 23 Pac. 222.

The defendant failed to pay any part of the deferred installments which became due

on the Red Rock option, and the plaintiff paid \$1,000 on the first deferred installment and made a new arrangement with the owners for subsequent payments. The evidence seems to justify the conclusion that by such failure the defendant forfeited his interest in the Red Rock claim.

The evidence does not show that either party made payment of any deferred installment of the purchase price of the Lake View claim. Under such circumstances, the defendant did not forfeit his interest therein.

As to other properties to be acquired, the contract provided:

"That any and all property situate in said Masonic mining district, secured by either the party of the first part or the party of the second part hereto or in the name of any other person whatever through the instrumentality of the parties hereto and for the benefit of either of them, except as hereinbefore provided, shall be the property of the parties hereto and the ownership of the same shall be in the following proportions, to wit: Three-fourths interest in and to all such property shall belong to said party of the first part herein, J. D. Martin, and one-fourth interest in and to all such property shall belong to the party of the second part herein, George B. Burris."

The contract further provided that all options and purchases secured by the defendant should be taken in his name, but that he should transfer them to plaintiff, who should "have the sole and entire management of said properties." The contract provided that the plaintiff would advance the money necessary to pay for such options and "purchases negotiated" by defendant as might meet with the plaintiff's approval, the defendant to repay plaintiff one-fourth thereof, but such repayments to be made "only out of the profits arising or accruing from the properties secured to said parties by reason of this agreement."

In September, 1917, the plaintiff purchased the Atlanta and January claims for the sum of \$600, and took a deed therefor in his own name.

Operating under the contract, and apparently by the efforts of both parties, in December, 1916, an option was secured in the name of plaintiff from Mox Smith for the purchase of the Snowshoe and other mining claims. Plaintiff paid Smith \$250 on the execution of the option. The option contract recited that plaintiff was then the owner of the New York mining location in Masonic district, and provided that as soon as "possible and practicable" the plaintiff was to "commence the operation of said mine for the purpose of developing, surveying, excavating, mining and milling the ore bodies contained therein and will prosecute said work diligently and expeditiously," and that if, "prior to August 1, 1917, ore shall be discovered and exposed or blocked out in said New York mine or mining location, the as-

sayed value of which in the aggregate tonnage shall exceed, after deducting the reasonable cost of mining and milling ores in said Masonic district, the sum of fifteen hundred dollars, * * * then and in that event" plaintiff was to pay Smith \$1,500 on August 1, 1917; and that like payments under similar conditions were to be made every six months up to August 1, 1919, at which time the remainder of the purchase price was to be paid. Plaintiff testified:

"This Mox Smith agreement-contract was made after the contract between me and Mr. Burris and was under the agreement. * * * Part of the consideration for Mox Smith giving the option was that I was to go to work on the New York."

Plaintiff expended about \$12,000 pursuant to the terms of the option contract. The defendant was an experienced miner, while plaintiff was not. The plaintiff testified that he followed the defendant's advice in working the New York claim, and that the defendant worked there "30 or 40 or 50 or 60 days"; that "he went up there some time in December, 1916," and "ceased his superintendency, or ceased work on the New York * * * about March, 1917." There is no evidence that defendant failed to perform any of the terms of the contract applicable to the Mox Smith option. No returns were received from the operation of the New York or from any properties acquired under the contract between the parties hereto.

Mox Smith died, and on the 9th day of December, 1918, the plaintiff entered into an agreement with the administrator of the Smith estate by the terms of which the original option was annulled and canceled, the purchase price reduced, a half-interest in the property recognized to be in a third person, and an option given plaintiff to purchase the other half interest. Relative to this second agreement the court found:

"That the plaintiff had entered into a new and modified contract with the administrator of the estate of Mox Smith, deceased, and that in this respect the plaintiff was working wholly within the terms of the contract of November 17, 1916."

Notwithstanding plaintiff's testimony as to defendant's services in connection with the Mox Smith option, the court found that defendant had failed to perform any of the terms and conditions of the Smith option or of the contract of November 17, 1916, and had forfeited all "right or interest" in the option and the property described therein. The decree adjudges:

"That neither of the parties to this action has any right, title, or interest in and to any property acquired by the other by reason of said contract or agreement since said 29th day of June, 1918."

Construing this provision of the decree in the light of the finding that the plaintiff "en-

tered into a new and modified contract with the administrator of the estate of Mox Smith, deceased," as to the purchase of the property described in the original option and the further finding, or conclusion, that defendant had forfeited all his rights in and to such property, it may be said that defendant's rights in such property are adjudged to be forfeited. It does not appear upon what theory this provision in the decree can be sustained.

[5] It seems that the Chemung location overlaps that of the Snowshoe, and that, after defendant had acquired a half-interest in the former, he caused it to be conveyed to a third person, and included in the conveyance the overlapping strip between the disputed boundary lines. This act, however wrongful, did not, under the authorities cited, work a forfeiture of his interest in the Snowshoe and other claims embraced in the Smith group.

[6] In any case in which a contract of joint adventure is canceled after property has been acquired thereunder, it is eminently proper to adjudicate the rights of the parties in the property so acquired. In this case the pleadings raised the issue of property rights under the contract, and the judgment should determine them, instead of leaving the question open for future litigation. The defendant is not entitled, of course, to a one-fourth interest in the properties acquired, freed from the obligations assumed by him in his contract with the plaintiff, but his interest in the assets of the venture is burdened by such obligations. In the settlement he must be charged with the sums due the plaintiff for advances made and for the value of plaintiff's interest in any properties wrongfully transferred by defendant to persons other than plaintiff.

[7] As said in *Berg v. Mead*, 115 App. Div. 288, 100 N. Y. Supp. 792:

The court should take "a general accounting of all transactions between the parties to the agreement, so that in one proceeding there could be a final accounting and winding up of the affairs of the joint adventure." "A joint adventure * * * is similar to a partnership, and, being of a similar nature, the right to an accounting of profits in accordance with the agreement therefor and the obligations growing out of such agreement between the parties are governed by the same rules of law. * * * Whether the parties were technically partners or not, an accounting was necessary to determine their respective rights." *Butler v. Union Trust Co.*, 178 Cal. 195, 198, 172 Pac. 601, 602.

See, also, *Keyes v. Nims*, 43 Cal. App. 1, 184 Pac. 695; *Jackson v. Hooper*, 76 N. J. Eq. 185, 74 Atl. 130; *Hedges v. Mountjoy*, 164 App. Div. 444, 149 N. Y. Supp. 869; *Saunders v. McDonough*, 191 Ala. 119, 67 South. 591. As in the case of the dissolution of a partnership, if the assets cannot be equitably divided, or if for any other reason it becomes nec-

essary to a proper adjustment of the rights of the parties, the property acquired, prior to the termination of the contract by the plaintiff's notice thereof, should be sold, and the net proceeds distributed in accordance with the interests of the parties.

Since special provision is made in the contract for the forfeiture of the interests of either party in the Red Rock, Lake View, and Perini claims in the event of specified defaults, if it be found that any such default has occurred in relation to any one of such claims, the decree should so adjudge.

[8, 9] October 31, 1917, after the defendant had acquired and transferred to other persons an interest in the Chemung and other claims, a notice was executed by plaintiff and served on defendant and recorded in the office of the county recorder of Mono county, by which notice plaintiff claimed an interest under the contract of November 17, 1916, in the property so acquired and transferred by defendant. It is argued by appellant that, since all of his breaches of the contract had been made prior to October 31, 1917, the plaintiff is estopped by the notice from thereafter terminating the contract. It is not perceived that any element of an estoppel is shown by such notice. If the plaintiff was entitled to an interest in such claims at the time they were acquired by defendant, then, as between the parties, his interest therein still exists, notwithstanding the cancellation of the contract, and the position assumed by the plaintiff in his notice of claim to the property is in no wise inconsistent with that taken at the trial or in the notice of cancellation. The cancellation of the contract did not in any manner affect the rights of either party in the assets theretofore acquired. As to the other grounds urged for a reversal, it is sufficient to say that they are without substantial merit.

"No good reason appears why the new trial that must be had should not be limited to the matters in regard to which error has been shown. * * * It is a plain duty of appellate courts to facilitate to the extent of their capacity as speedy a disposition of litigation as is consistent with the doing of complete justice between the parties." *Collins v. Ramish*, 182 Cal. 360, 368, 188 Pac. 550, 553; *Rudneck v. Southern California Metal & Rubber Co.*, 184 Cal. 274, 193 Pac. 775.

The judgment canceling and terminating the contract between the parties as of the date of June 29, 1918, is not only supported by the evidence, but it does not appear on what evidence the court could have decided otherwise.

That part of the judgment adjudging and decreeing that the agreement of November 17, 1916, was on the 29th day of June, 1918, canceled and terminated is affirmed. In other respects the judgment is reversed, with

directions to the trial court to try the other issues raised by the pleadings and adjudicate the rights of the parties in and to any and all property in which the parties acquired an interest under the agreement of November 17, 1916, prior to June 29, 1918.

We concur: BURNETT, J.; HART, J.

(57 Cal. App. 659)

DOVER et al. v. ARCHAMBAULT.
(Civ. 3886.)

(District Court of Appeal, Second District, Division 1, California. May 12, 1922.)

1. Highways ⇨ 175(1)—Automobilist driving on left side of highway negligent.

Under Vehicle Act, § 20a, providing that on all occasions the driver of any vehicle upon the public highway shall travel on the right side thereof, unless the road ahead on the left-hand side is clear and unobstructed for at least 100 yards, an automobilist, driving on the left side of the highway, resulting in a collision with another automobile, was guilty of negligence in so doing.

2. Pleading ⇨ 364(6)—Granting motion to strike from answer charge of negligence of plaintiff's driver proper when answer denied negligence.

In an action for personal injuries resulting from a collision between automobiles on a highway, the motion of plaintiff to strike from answer the charge of negligence of plaintiff's driver was proper, where in a previous part of the answer defendant had sufficiently denied negligence in the operation of his automobile.

3. Negligence ⇨ 93(1)—Automobile driver's negligence not chargeable to rider without control of vehicle.

An answer alleging that the driver of the automobile in which plaintiff was riding negligently drove it against defendant's car, unaccompanied by any statement of fact showing that plaintiff controlled, or was entitled to control, the operation of the automobile, cannot be construed as a plea of contributory negligence on plaintiff's part.

4. Highways ⇨ 184(2)—Evidence held to show contributory negligence of guest in automobile injured in a collision.

In an action for personal injuries to a guest in an automobile caused by a collision, evidence held not to show her contributory negligence.

5. Trial ⇨ 252(8)—Charge as to last clear chance held properly refused.

In an action for personal injuries caused by the collision of automobiles on a highway, the refusal of defendant's requested charge on the doctrine of last clear chance was properly refused, because it assumed that the injured plaintiff was operating the automobile, whereas there was no such evidence.

6. Negligence ⚡83—Last clear chance doctrine stated.

The doctrine of last clear chance to avoid an injury arises only in favor of the person injured, and for the purpose of sustaining the liability of defendant where notwithstanding plaintiff's negligence the defendant in face of the apparent danger carelessly or recklessly caused the injury.

7. Trial ⚡250—No charge needed on contributory negligence not pleaded or proven.

In an action for personal injuries caused by the collision of automobiles on a highway, where contributory negligence was not pleaded or proven, it was proper to fail to charge thereon.

8. Trial ⚡253(4)—Instruction on imputed negligence held not to exclude issue of contributory negligence.

In an action by one riding in an automobile for injuries by a collision, an instruction that, if the driver was guilty of negligence contributing proximately to the injuries, such negligence cannot be imputed to plaintiff, unless plaintiff exercised control over the operation of the car, held not objectionable as taking from the jury the issue of plaintiff's own negligence.

9. Trial ⚡252(8)—Requested charge as to negligence held properly refused.

In an action for personal injuries caused by the collision of automobiles on a highway, a requested charge by defendant that if the preponderance of evidence establish that plaintiffs ran their automobile into defendant's automobile, that as a matter of law the jury should find for defendant, was properly refused, as assuming that there was evidence tending to prove that plaintiffs owned and operated the car, whereas there was no such evidence.

10. Trial ⚡261—Offered instructions that cannot properly be given without modification sufficient ground for refusal.

Where instructions offered are such that they cannot be properly given without modification, that of itself constitutes a sufficient ground for refusing them.

Appeal from Superior Court, Santa Barbara County; S. E. Crow, Judge.

Action by Margaret Dover and another against Joseph Archambault. From judgment for plaintiffs, defendant appeals. Affirmed.

Richards, Heaney & Price, of Santa Barbara, for appellant.

Wm. G. Griffith, of Santa Barbara, for respondents.

CONREY, P. J. Action to recover damages incurred by reason of negligence of the defendant in the operation of an automobile, whereby the defendant's automobile collided with another automobile in which the plaintiff Margaret Dover was riding, and whereby personal injuries were received by her. The accident occurred May 9, 1920. Judgment

was entered in favor of the plaintiffs, and the defendant appeals therefrom.

At the time of the accident Mrs. Dover was riding in a Ford automobile, owned and driven by one H. A. Palmaymesa. She was riding, with three other persons, as a guest of Palmaymesa, and they were driving in an easterly direction on the state highway between Goleta and Santa Barbara. The plaintiff John Dover was not there. Immediately before the accident, a stage which was driving westerly, ahead of the defendant, stopped to allow a passenger to get off. Another automobile, in front of the defendant, stopped behind the stage. Thereupon the defendant turned his automobile to the left side of the road, and attempted to pass the next automobile and the stage. At the same time the Ford car of Palmaymesa was passing the stage on the south side of the road. According to the testimony, which is amply sufficient to establish the facts, defendant continued to move westerly until the collision occurred. The defendant attempted to prove that he stopped his car, and that the Ford car continued to move forward and ran into the automobile of the defendant. As the evidence is conflicting on this point, we must assume, as the verdict implies, that this testimony on behalf of the defendant is not in accordance with the facts. There is evidence from which the jury was justified in determining that Palmaymesa, as soon as he saw the defendant's car, slowed down to a low rate of speed and turned his car south so that part of it was off the paved highway, and left between his car and the stage a space sufficient to have permitted the defendant to pass. Nevertheless, defendant's automobile struck the front of the Ford car.

[1] There appears to be no doubt that the defendant was guilty of negligence. Section 20(a) of the Vehicle Act provides that—

"On all occasions the driver or operator of any vehicle in or upon any public highway shall travel upon the right half of such highway unless the road ahead on the left-hand side is clear and unobstructed for at least one hundred yards ahead. * * * Stats. 1919, p. 215. "There was no error in the instruction of the court informing the jury that one who operated his vehicle in violation of an express provision of the law was guilty of negligence in so doing. The proposition is thoroughly settled." *Mathes v. Aggeler & Musser Seed Co.*, 179 Cal. 697, 701, 178 Pac. 713, 715.

[2] Appellant contends that the court erred in granting the plaintiffs' motion to strike out from the answer of appellant the following sentence:

"And in that behalf this defendant avers that if the plaintiffs or either of them was injured at the time and place as stated in their complaint that it was by and through the negligence of said H. A. Palmaymesa, who at said time and

place negligently drove his said automobile on to the automobile of this defendant, which was rightfully standing still in said highway and not moving at all in any direction, at the time of said accident."

[3] We think that the order was correct. In a previous part of his answer the defendant had sufficiently denied negligence in the operation of his automobile. The language above quoted added nothing to that denial. It cannot be construed as a plea of contributory negligence on the part of Mrs. Dover, for it is not accompanied by any statement of fact showing that she controlled, or was entitled to control, the conduct of Palmaymesa in the operation of his automobile.

[4] Appellant further contends that the plaintiffs should not recover because the evidence shows that the accident was caused by the contributory negligence of the plaintiff, Mrs. Dover. Assuming that the issue was before the jury, we cannot see that the evidence was such as to require a verdict in favor of the defendant upon that issue. This is true because the evidence is sufficient to sustain a finding that Palmaymesa was not negligent in the premises; and further because, even if he had been negligent, there is no evidence that Mrs. Dover was responsible for his negligence. The circumstances were not such that his negligence could be imputed to her. *Tousley v. Pac. Elec. Ry. Co.*, 166 Cal. 457, 462, 137 Pac. 31. So far as the conduct of Mrs. Dover is concerned, there is no merit in the contention of appellant that it was her duty to have the car stopped so that she might leave it before the collision occurred. She did not see the defendant's car until it was within 50 feet of the car in which she was riding. Only a few seconds could have elapsed until the collision occurred. The jury was well justified in believing that she had no opportunity to save herself from the injury.

[5, 6] It is contended that the court erred in refusing to give the so-called "last clear chance" instruction requested by appellant. This offered instruction was as follows:

"Ninth: One who has the last clear opportunity to avoid injuring another must do so, and if you find from a preponderance of the evidence that the defendant, just before the collision of his car and plaintiff's car on the 9th of May, 1920, stopped his car, and the plaintiffs made their car collide with the defendant's car, and that the injuries to the plaintiffs respectively alleged in the complaint were thereby inflicted, I charge you that your verdict should be for the defendant."

This instruction was properly refused. It omitted any suggestion of negligence on the part of the plaintiffs. It assumed that there was some evidence that the plaintiffs were operating the Ford car, whereas there was no such evidence. Further it may be observed that the occasion for applying the doc-

trine of the rule of discovered opportunity or "last clear chance" to avoid an injury arises only in favor of the person injured, and for the purpose of sustaining the liability of the defendant, where, notwithstanding the plaintiff's negligence, the defendant, in face of the apparent danger, has carelessly or recklessly caused the injury. *Spear v. United Railroads*, 16 Cal. App. 637, 659, 117 Pac. 956.

[7] It is contended that the court erred in giving the fifteenth instruction, which reads as follows:

"15. If you believe from the evidence in this case that the defendant was guilty of negligence in operating and driving his automobile on the occasion alleged in the complaint, and that the alleged accident was proximately caused by such negligence, then I charge you that the plaintiffs are entitled to recover of the defendant such damages as under the evidence would compensate them for the detriment proximately caused thereby, not exceeding in the aggregate the sum of \$10,129.15."

Appellant suggests that this instruction is erroneous because it omits any statement of the condition that, in order to recover, the plaintiffs must have been free from negligence causing the injury. If the defense of contributory negligence had been pleaded by the defendant, or if the evidence presented in support of the plaintiffs' cause of action had been sufficient to sustain a finding of contributory negligence, it would have been appropriate to submit that question to the jury. But where the defense is not pleaded, and where the facts in support of such defense have not been developed by the evidence presented by the plaintiff, it is not error for the court to ignore that defense in presenting the case to the jury. *Kenny v. Kennedy*, 9 Cal. App. 350, 99 Pac. 384; *Hall v. City and County of San Francisco* (Cal. Sup.) 206 Pac. 459.

[8] The court gave the following instruction:

"9. The court instructs you that if you believe from the evidence that H. A. Palmaymesa was guilty of negligence contributing proximately to the injuries of the plaintiff Margaret Dover such negligence cannot be imputed to the plaintiffs in this action, unless you further believe from the evidence that the plaintiff, Margaret Dover, exercised control over the said H. A. Palmaymesa in his operation of the car in which she was riding."

Appellant contends that this instruction is erroneous, in that it took from the jury the issue of the plaintiffs' own negligence. We cannot see that the instruction had that effect, even if such issue had existed.

[9, 10] Appellant contends that the court erred in refusing the eighth instruction requested by the defendant, reading as follows:

"Eighth: If you find from a preponderance of the evidence in this case that the plaintiffs ran their automobile, in which they were riding on the 9th of May, 1920, into the defendant's automobile, as testified to by the witnesses for the defendant, I charge you that as a matter of law your verdict should be for the defendant, and you should so find in your verdict."

The proposed instruction assumed that there was evidence tending to prove that the plaintiffs owned and operated the car, whereas there was no evidence of that kind. Moreover, the proposed instruction omitted the element of negligence in operation of the car. Where instructions offered are such that they cannot properly be given without modification, that of itself constitutes a sufficient ground for refusing them. *Garlick v. Bowers*, 66 Cal. 122, 4 Pac. 1138; *Smith v. Richmond*, 19 Cal. 477, 485.

The court did not err in refusing the seventh instruction requested by appellant. The subject-matter of that instruction was correctly covered by another instruction given. The exceptions to the rulings of the court on matters of evidence need not be discussed. They refer only to two items, each of which is of minor importance.

The judgment is affirmed.

We concur: SHAW, J.; JAMES, J.

(57 Cal. App. 593)

PEOPLE v. SPITZER. (Cr. 867.)

(District Court of Appeal, Second District, Division 1, California. May 4, 1922. Rehearing Denied June 2, 1922. Hearing Denied by Supreme Court July 3, 1922.)

1. Bigamy $\Leftrightarrow$ 1—No conviction where first marriage alleged was void because of previous valid existing marriage.

If the first marriage alleged in an information charging bigamy be shown to have been void because of a previous valid existing marriage, defendant cannot be convicted.

2. Marriage $\Leftrightarrow$ 50(1)—Uncertified license and certificate of marriage performed by alderman in another state held insufficient to prove marriage.

A photographic copy of a record from the health department of New York City purporting to be a marriage license to which was attached a certificate of marriage by an alderman in that city, though received without objection and uncontradicted, was insufficient to establish the marriage, where the license and certificate were not certified, and there was no evidence as to the genuineness of the alderman's signature or of his authority to perform the ceremony.

3. Marriage $\Leftrightarrow$ 50(1)—Testimony as to solemnization by New York City alderman is of no weight in absence of proof of his authority under New York law.

In the absence of proof under Code Civ. Proc. §§ 1900-1902, that under the laws of New York an alderman, who is not vested under Civ. Code, § 70, with authority to solemnize a marriage, has such authority in that state, testimony as to the performance of a marriage ceremony by such an official in New York City is of no weight in establishing such solemnization, as required by section 55; the laws of New York being deemed the same as those of California in the absence of proof to the contrary.

4. Marriage $\Leftrightarrow$ 40(4) — The presumption of lawful marriage from general repute and parties' department is overcome where it is shown that marriage was solemnized by officer not vested with such authority.

Assuming that under Code Civ. Proc. § 1963, subd. 30, it will be presumed from general repute and the fact that a man and woman deport themselves as husband and wife that they have entered into a lawful contract of marriage, under Civ. Code, §§ 55 and 70, such presumption is overcome where the evidence conclusively shows that the marriage was solemnized by a city alderman, who, under section 70, is not vested with authority to act in such capacity.

5. Criminal law $\Leftrightarrow$ 1141(2)—Appellant must affirmatively show error relied on for reversal.

Appellant must affirmatively show the error on which he asserts his claim for reversal.

6. Bigamy $\Leftrightarrow$ 8—Decree annulling previous marriage for reasons not stated held inadmissible in absence of complaint.

In a prosecution for bigamy, a decree annulling the first marriage alleged on the wife's complaint, the allegations of which the court found were true, without further explanations disclosing whether the marriage was void from the beginning for any reasons specified in Civ. Code, §§ 59-61, or merely voidable under section 82, was inadmissible on the question of defendant's guilt or innocence of the crime charged, where the complaint was not offered or introduced in evidence, though the decree declared the marriage void; such declaration relating to the date of the decree only.

7. Criminal law $\Leftrightarrow$ 1171(3)—Argument questioning genuineness of uncertified license and marriage certificate held not prejudicial to defendant in prosecution for bigamy, even if unjustified.

In a prosecution for bigamy, the district attorney's argument questioning the genuineness of an uncertified photographic copy of a marriage license and certificate of defendant's marriage to one whom he claimed was his lawful wife when the first marriage alleged in the information was contracted, and referring to the possibility of preparing a document for the purpose of having it photographed and used as evidence, held not prejudicial to defendant even if the observation were not justified by the

character of such document; the latter being of no value as evidence.

8. Criminal law ⚡806(3)—**Instruction omitting requirement as to reasonable doubt held not erroneous in view of instructions given.**

In a prosecution for bigamy, where the court fully instructed the jury to acquit if they found that defendant was married to one not named in the information when the first marriage therein alleged was contracted, and if they had a reasonable doubt as to his guilt, and fully instructed them as to the meaning of reasonable doubt and the application thereof to the evidence, an instruction to convict if they found defendant was not married to such person, but was married to the person named in the indictment when he contracted the alleged bigamous marriage, was not erroneous as omitting to tell the jury that they should give defendant the benefit of any reasonable doubt; it being unnecessary to repeat the meaning, effect, and application of such term in each instruction, all of which could be considered together.

On Petition for Rehearing.

9. Criminal law ⚡1186(4) — **Conviction of bigamy not set aside for failure of proof of second marriage where no objection was made to proof offered and defense was based on another fact.**

In a prosecution for bigamy, where defendant made no objection to proof of the alleged bigamous marriage, but offered to stipulate as to that fact, and based his defense on the fact that at the time of such marriage he was the lawful husband of one not named in the information to whom he was married prior to the first marriage alleged, the conviction will not be set aside where such prior marriage, which, had it been established, would have constituted a technical defense, was not proven; there being no miscarriage of justice as required by Const. art. 6, § 4½.

10. Criminal law ⚡1139 — **Appellant cannot complain of court's failure to refer to foreign statutes for failure to prove provisions of which reversal was denied.**

One convicted of bigamy cannot complain that his appeal was denied on the technical ground that he failed to establish the fact of a lawful marriage in another state prior to the first marriage alleged in the information, or of the court's failure to refer to the statutes of such state, which were readily obtainable and could have been easily produced had he deemed it necessary; the appellate court having no power to seek from outside sources evidence omitted from the record.

Appeal from Superior Court, Los Angeles County; Sidney N. Reeve, Judge.

Emil Spitzer was convicted of bigamy, and he appeals. Affirmed.

J. M. Marmaduke, John L. Richardson, and T. E. Parke, all of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

SHAW, J. Defendant appeals from a judgment pronounced upon his conviction of the crime of bigamy.

The offense, as alleged in the information, was that he did knowingly and unlawfully marry one Marie Marjorie Sims, at which time he was the lawful husband of Edith C. Spitzer.

His chief defense is that he was never lawfully married to Edith C. Spitzer, as alleged in the information; the reason therefor being that at the time of the admitted marriage ceremony had with her he was the lawful husband of one Mary Truell Spitzer, to whom he had been married in the state of New York on July 26, 1905.

[1] It seems to be the law that, if the first marriage alleged in an information charging the crime of bigamy be shown to have been void because of a previous valid existing marriage, the defendant cannot be convicted thereunder. *Commonwealth v. McGrath*, 140 Mass. 297, 6 N. E. 515; *State v. Sherwood*, 68 Vt. 414, 35 Atl. 352; *People v. Mock Yick Gar*, 14 Cal. App. 334, 111 Pac. 1039. As said in *Lane v. State*, 82 Miss. 555, 34 South. 353:

"The rule is thoroughly settled that one indicted for bigamy must be acquitted on that indictment if he can show that the first marriage alleged in the indictment is void by reason of the existence of a prior lawful marriage, still existing."

We are therefore confronted with the question as to the sufficiency of the evidence to establish the marriage of defendant to Mary Truell in the state of New York, which fact, if established, would, under the authorities cited, have entitled defendant to an acquittal of the offense charged in the information, and the court so instructed the jury.

[2] To establish this fact defendant offered, and there was received in evidence without objection, a photographic copy of a record from the department of health of the city of New York which purported to be that of a marriage license issued to Emil Spitzer and Mary Truell, to which was attached a marriage certificate showing that he and Mary Truell were married in that state by Max S. Grifenhagen, alderman, on July 26, 1905. In addition to this, the testimony of Mary Truell Spitzer and that of Herman Truell, by deposition, was likewise without objection received in evidence, together with the testimony of defendant himself, all of which was to the effect that Emil Spitzer and Mary Truell were married in New York on the date mentioned, on which occasion the marriage ceremony was performed by Max S. Grifenhagen, alderman. While received without objection on the part of the people and uncontradicted, the evidence is insufficient to establish the marriage. The documentary evidence, consisting of the purported copy of the marriage license and certifi-

cate, is not certified; neither is there any evidence whatsoever as to the genuineness of the signature of Grifenhagen attached thereto, nor of his authority to perform the marriage ceremony, without which it possessed no evidentiary value. As said by the Supreme Court in discussing a like question:

"A marriage certificate does not prove itself. Proof of the signature of the person by whom it purports to have been signed and of his authority to perform the marriage ceremony is necessary." "It must be shown that the person who solemnized the marriage was one having authority so to do (26 Cyc. 358), and a paper purporting to be a marriage certificate signed by one purporting to be authorized by the laws to solemnize the marriage is not competent evidence of the marriage unless accompanied by proof that the person making the certificate was in fact authorized to solemnize such marriage." See *People v. Le Doux*, 155 Cal. 548, 102 Pac. 523, and cases therein cited.

[3] While the testimony of defendant himself and that by deposition of Mary Truell and Herman Truell is that the marriage ceremony was performed by Grifenhagen as alderman, there is no evidence whatever that he, by virtue of his official position as alderman, was authorized to solemnize a marriage any more than could a policeman of the city of New York. It may be true that as such official he was, under the laws of New York, vested with authority so to do, but in the absence of proof to the contrary—and there is none—the laws of New York are deemed the same as the laws of California. *O'Sullivan v. Griffith*, 153 Cal. 502, 95 Pac. 873, 96 Pac. 323; *Fox v. Mick*, 20 Cal. App. 599, 129 Pac. 972. Section 55, Civil Code, provides that "consent alone will not constitute marriage; it must be followed by a solemnization authorized by this Code"; and section 70, Civil Code, which designates the officials vested with authority to solemnize a marriage, does not include one occupying the position of alderman, and hence, since he possessed no authority to act in such capacity, the marriage so solemnized must be deemed a nullity. If it be true that under the laws of the state of New York an alderman is vested with authority to officiate at a marriage, then defendant should have established such fact by proof of the existence of such law in the manner provided by sections 1900, 1901, and 1902, Code of Civil Procedure. The testimony was entitled to no weight in support of the claim that defendant was married to Mary Truell.

[4] In her deposition Mary Truell testified that after the solemnization of the marriage between defendant and herself by Grifenhagen, an alderman, they for three years lived and cohabited together and held themselves out to the public as husband and wife. While not argued, this fact, since it is declared by subdivision 30 of section 1963, Code

of Civil Procedure, that "a man and woman deporting themselves as husband and wife" are presumed to "have entered into a lawful contract of marriage," constitutes some evidence tending to show that she and defendant had been legally married as claimed. It was upon this theory, namely, that a marriage might be shown by general repute alone, that the language of the court cited by appellant from *People v. Mock Yick Gar*, 14 Cal. App. 334, 111 Pac. 1039, was used. The presumption, however, is a disputable one. Hence, assuming that under subdivision 30 of section 1963 it will be presumed from general repute and the fact that a man and woman deport themselves as husband and wife that they have entered into a lawful contract of marriage pursuant to the provisions of sections 55 and 70 of the Civil Code, such presumption in the instant case is overcome by the fact that the evidence conclusively shows that the solemnization of the marriage between defendant and Mary Truell and under and pursuant to which they lived together as husband and wife was solemnized by an alderman, who, under the provisions of the law applicable to the case, is not a person or officer vested with authority to act in such capacity.

[5, 6] The information charging defendant with the offense was filed on January 28, 1921. It appears that on October 5, 1921, but prior to defendant's trial, a decree of annulment of the marriage between defendant and Edith C. Spitzer had been rendered in an action therefor brought by the latter. This was offered in evidence by defendant, and an objection thereto sustained. This ruling is assigned as prejudicial error. The decree, giving the title of the case, recites:

"This cause came on to be heard * * * upon the amended complaint and answer thereto, in which said amended complaint plaintiff sought to have the marriage between plaintiff and defendant annulled, and, evidence having been introduced in support of said amended complaint, the court now makes its findings of fact and decision as follows: That the allegations contained in said amended complaint are true, and that a judgment annulling said marriage between plaintiff and defendant should be granted."

Whereupon the court declared the marriage between Edith C. Spitzer and defendant null and void. Since the amended complaint, the allegations of which the court found to be true, was not offered or introduced in evidence, it cannot be said upon what ground the decree of annulment was granted. The decree does not disclose that the marriage by defendant with Edith was void for any reason specified in sections 59, 60, or 61 of the Civil Code, which declare the marriage of the persons therein designated void from the beginning; indeed, for aught that appears to

the contrary, the marriage to Edith was merely voidable at her instance under the provisions of section 82 of the Civil Code, wherein are set forth six causes upon the establishment of any one of which an aggrieved party may avoid the marriage. It devolves upon an appellant who asks for a reversal of a judgment to affirmatively show the error upon which he asserts such claim. While the decree, for reasons not disclosed, declares the marriage void, such declaration has relation to the date of such decree only. It does not purport to be a judicial determination that the marriage was void from its beginning or at the time when defendant is alleged to have committed the offense, and hence evidence of such decree could not affect the question of his guilt or innocence of the crime with which he was charged.

[7] Complaint is made on account of the alleged misconduct of the district attorney when in his argument he referred to the documentary evidence, consisting of the uncertified photographic copy of the license and certificate, and wherein he questioned its genuineness, and referred to the fact that it was possible to prepare a document for the purpose of having it photographed and used as evidence. We cannot say the observation was not justified by the character of the document so introduced. Moreover, since, as stated, it was of no value as evidence, anything said by the district attorney calculated to discredit or destroy its force was futile, and hence it could in no event have been prejudicial to defendant.

[8] Error is also predicated upon an instruction of the court to the effect that, if the jury found that defendant was not married to Mary Truell Spitzer, but was married to Edith C. Spitzer, and that while so married to the latter he married Marjorie G. Spitzer, then they must find the defendant guilty of bigamy as charged in the information. The objection to the instruction is that it omitted telling the jury therein they should give defendant the benefit of any reasonable doubt arising upon the evidence. It elsewhere appears in the instructions that the court fully instructed the jury to the effect that defendant was entitled to be acquitted if they found that he was, as claimed, married to Mary Truell, and that, if upon the evidence they had a reasonable doubt as to his guilt, then it was their duty to acquit defendant. They were fully instructed as to the meaning of a reasonable doubt and as to the application thereof to the evidence in considering their verdict. Instructions should be considered together as a whole, and it was not necessary to repeat in each instruction given the meaning, effect, and application of the term "reasonable doubt."

There is no merit in the errors of law complained of, and, for the reasons given, the evidence was insufficient to establish the ex-

istence of a marriage between defendant and Mary Truell.

The judgment is affirmed.

I concur: CONREY, P. J.

I concur in the judgment: JAMES, J.

On Petition for Rehearing.

PER CURIAM. Aided by other counsel, defendant's attorney has filed a petition herein for a rehearing. Among the grounds urged in support of his contention that the case should be further considered, and the only one we deem necessary to notice, is that of a variance by reason of which the second marriage alleged in the information, and the contracting of which constitutes the offense, was not established, which point, it is conceded, was not presented or argued at the hearing of the appeal.

The information charged that Emil Spitzer, on or about January 1, 1921, did knowingly marry one Marie Marjorie Sims, at which time he was the lawful husband of Edith C. Spitzer. In proof of the marriage to Marie Marjorie Sims, a witness was called who testified that her name was Marjorie Sims; that she knew the defendant, Emil Spitzer, and thereupon she was shown a certified copy of a marriage certificate wherein the name of the groom, as stated therein, was Emanuel Spetzer, and that of the bride was Marjorie Goldie Sims, and wherein it was certified by Henry M. Miller, as justice of the peace of Burbank township, that Emanuel Spetzer and Marjorie Goldie Sims were joined in marriage by him in accordance with the laws of California on January 1, 1921. The witness testified that she was the Marjorie Goldie Sims referred to in the certificate, and upon being asked, "You went to the county clerk's office, did you, to obtain the original marriage license of which this is a certified copy?" replied, "I did." Whereupon counsel for defendant said: "We will stipulate to all that, Mr. Van Cott, if you desire." She further testified that after obtaining the marriage license she was, in the presence of two witnesses, married to defendant by Justice Miller at the city of Glendale, Cal., and thereafter she and defendant lived together as husband and wife. Not only was there no objection to any part of this testimony, but counsel for defendant, in opening his case, stated to the jury that his defense would be based upon the fact that at the time defendant went through the marriage with Marjorie Sims he was then in fact the lawful husband of one Mary Truell Spitzer, to whom, in the city of New York, he was married in 1904, and who was at all times the lawful wife of defendant, and therefore, since at the time of the marriage to Marjorie Sims he had a lawful wife, he could not be guilty of marrying the for-

mer. Not only was this defense the theory upon which the case was tried, but, as shown by the testimony and proceedings from which we have quoted, the second marriage alleged in the information was conceded. As to the identity of Marie Marjorie Sims and Emil Spitzer, mentioned in the information, with Marjorie Goldie Sims and Emanuel Spetzer, who were married, there appears to be no question.

[9] Section 4½ of article 6 of the Constitution provides that—

"No judgment shall be set aside * * * for any error as to any matter of pleading, or for any error as to any matter of procedure, unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice."

It is apparent from an examination of the evidence that no miscarriage of justice resulted from the trial, and while, as held in the main opinion, the New York marriage to Mary Truell, had it been established, would have constituted a technical defense, nevertheless, since it was not proven, defendant must upon this record be deemed guilty as charged.

[10] Counsel for defendant bitterly complain that the appeal of their client for a reversal is denied upon the technical ground that he failed, in accordance with well-recognized rules of evidence, to establish the fact of the New York marriage, and the failure of this court to refer to the New York statutes, readily obtained and which he says were "within a block of the trial court room," and which, had he deemed necessary, he could have easily produced, is severely criticized. This court, as we understand it, has no power on appeal to seek from outside sources evidence omitted from the record. Moreover, since defendant invokes the technical defense that, instead of two wives only, he had three, his complaint that he is the victim of what his counsel is pleased to term a technical rule of law, comes with ill grace.

Rehearing denied.

(58 Cal. App. 154)

PEOPLE v. SPAGNOLI. (Cr. 624.)

(District Court of Appeal, Third District, California. June 19, 1922. Hearing Denied by Supreme Court Aug. 17, 1922.)

1. Criminal law §395—Trial court need not inquire into means by which competent evidence is produced by prosecution.

The prosecution may introduce, where otherwise competent appliances used by defendant in the unlawful manufacture of intoxicating liquor, although claimed by him to have been seized contrary to statute, since the court need

not inquire into the means by which competent evidence is produced.

2. Criminal law §1134(10)—Denial of defendant's motion to return property seized by prosecution not reviewed on appeal.

Denial of defendant's motion for return of property claimed illegally taken from him will not be reviewed on appeal from conviction, though such property was used as evidence on the trial.

3. Criminal law §1173(2)—Refusal to instruct as to defendant's purpose not error, in absence of evidence that liquor was manufactured for use other than as beverage.

Where there was no evidence that liquor was manufactured for use other than as a beverage, it was not error to refuse a charge that it must be found defendant manufactured for beverage purposes before he could be found guilty.

4. Intoxicating liquors §222—Indictment for unlawful manufacture of intoxicating liquor, need not negative purposes of manufacture excepted as lawful.

Where an ordinance prohibits the manufacture of liquor except for certain enumerated purposes, and the exceptions are no part of the definition of the offense, they need not be negated in the information; it being sufficient to follow the general language of the ordinance.

5. Intoxicating liquors §13, 132—Counties may adopt ordinance prohibiting liquor traffic.

It is competent for county supervisors to adopt ordinances prohibiting traffic in intoxicating liquors.

6. Criminal law §329—Burden upon defendant to establish defense peculiarly within his knowledge, notwithstanding burden is upon people to establish guilt.

In a prosecution for unlawful manufacture of intoxicating liquors, burden of proof is upon accused, desiring to excuse the manufacture, to show he had a permit from United States Revenue Department, since this defense of matters peculiarly within defendant's knowledge and the burden of its proof is an exception to the general rule that burden is upon prosecution to establish guilt.

7. Intoxicating liquors §239(2)—Instruction held proper information, charging unlawful manufacture of wine and "Jackass brandy," notwithstanding evidence showed only manufacture of crude brandy.

Where the information charged the unlawful manufacture of "wine and Jackass brandy," the court, over defendant's objection that because Jackass brandy was not a liquor known to law the information charged but the one offense of manufacturing wine properly instructed that proof of manufacture of "any one of the intoxicating liquors described" would support a conviction, as the evidence afforded an inference that the wine was by a continuous process converted into a crude liquor sometimes referred to as "Jackass brandy," and this manufacture, although involving two kinds of liquor, one of which may have been inaccurately described, was a single offense not necessitating two sepa-

rate verdicts, as required by Pen. Code, § 954, where separate offenses are charged.

Appeal from Superior Court, Tuolumne County; G. W. Nicol, Judge.

Giacomo Spagnoli was convicted of manufacturing intoxicating liquors under Tuolumne County Ordinance No. 107, and he appeals. Affirmed.

J. B. Curtin, of Sonora, for appellant.

U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

BURNETT, J. The defendant was convicted of the violation of a county ordinance, commonly known as the "Little Volstead Act," and he appeals from the judgment and the order denying his motion for a new trial. The charging part of the information is as follows:

"The said named defendant did on or about the 8th day of August, 1921, at and in the said county of Tuolumne, state of California, then and there willfully and unlawfully and in violation of Ordinance No. 107 of the county of Tuolumne, being an ordinance prohibiting the sale, manufacture or unlawful possession or transportation of intoxicating liquors and providing penalties for violation thereof, passed by the board of supervisors of Tuolumne county on the 15th day of March, 1921, manufacture certain intoxicating liquor, to wit, wine and Jackass brandy then and there containing one-half of 1 per cent. or more of alcohol by volume, which was then and there fit for use for beverage purposes."

Section 1 of said ordinance provides:

"When used in this ordinance the word 'liquor' or the phrase 'intoxicating liquor' shall be construed to include alcohol, brandy, whisky, rum, gin, beer, ale, porter and wine, and in addition thereto any spirituous, vinous, malt, or fermented liquor, liquids and compounds, whether medicated, proprietary, patented or not and by whatever name called, containing one-half of one per centum or more of alcohol by volume which are fit for use for beverage purposes."

In section 2 we find this provision:

"No person shall manufacture, sell, barter, transport, import, export, deliver, furnish or possess any intoxicating liquor except as authorized in this ordinance, and all the provisions of this ordinance shall be liberally construed to the end that the use of intoxicating liquor as a beverage may be prevented."

[1, 2] A large part of the brief of appellant is devoted to a learned discussion of the action of the trial court in denying his motion to order the return to him of the appliances for the manufacture of liquor and the liquor itself, which were taken from his possession under a search warrant, and in permitting these objects to be introduced in evidence. It is claimed with substantial reason that the proceedings which resulted in the seizure of the property were not in accord-

ance with the requirements of the statute, and a formidable array of authorities is presented to the effect that what is thus obtained should not be received in evidence. We are, however, spared the duty of following the argument, since the question has been unequivocally decided against appellant's contention by the Supreme Court of this state in *People v. Mayen* (Cal. Sup.) 205 Pac. 435. Therein it was squarely held that where competent evidence is produced at a trial the court will not stop to inquire from what source it came or the means by which it was obtained, and that the action of the trial court in denying an application of the defendant for the return of papers or other property claimed to have been illegally taken from him and later used as evidence over his objection will not be reviewed on appeal from a judgment of conviction of a criminal charge.

[3] The next objection of appellant is that the court erred in refusing to give the following proposed instruction:

"The manufacture of intoxicating liquor is not unlawful as the law provides for the manufacture of intoxicating liquor for medicinal and sacramental purposes, and it therefore must be made in order to be sold for either of said purposes. The manufacture of intoxicating liquor for beverage purposes is unlawful, and it is for you to determine from the evidence in this case whether any intoxicating liquor was manufactured by defendant, and you must find from the evidence and believe beyond all reasonable doubt that the defendant manufactured intoxicating liquor for beverage purposes before a verdict of guilty can be found against the defendant."

Appellant claims that—

The refusal of the instruction was error, "unless Ordinance No. 107, under which this action is prosecuted, does make it a crime to manufacture intoxicating liquor. The ordinance so provides, but in so doing we say this ordinance is void."

The declaration of appellant as to the scope of said ordinance is entirely too sweeping. It does not prohibit the manufacture of liquor for *all* purposes. Indeed, certain permissible uses are designated for the manufacture of liquor fit for beverage purposes. And it may be said that, in view of the various sections of the ordinance considering its declaration that its provisions are to be liberally construed "to the end that the use of intoxicating liquor as a beverage may be prevented," it is not an unreasonable construction to hold that the *manufacture* for such purpose is what was intended to be prohibited. If so, the proposed instruction embodied a correct principle of law, and might well have been given. The Attorney General, however, thinks that—

"It was covered by the two instructions which appear on page 25, Transcript."

As to this he is clearly in error. The first of the instructions to which he thus refers simply states in the language of the information the offense charged against the defendant, and the second, the familiar principle that the burden is upon the prosecution to establish beyond a reasonable doubt every material allegation constituting the offense. But these do not cover the point, for the reason that the information does not allege that the liquor was manufactured for *beverage purposes*. However, upon the theory that such was the intention of the board of supervisors and that the proposed instruction, abstractly considered, involves a sound legal principle, the refusal of the court to give it was entirely without prejudice. This follows for the reason that there was no evidence whatever that the liquor was manufactured for any purpose other than for its use as a beverage. All the evidence upon the subject shows that it was used as a beverage, and such use justifies the inference that it was manufactured for that purpose, and no other inference is possible. The instruction therefore was not applicable to any theory supportable by the evidence, and hence it could have been of no assistance to the jury if it had been given.

As to the information, if we concede that it was defective in the respect indicated, appellant suffered no prejudice thereby. Indeed, he urged no such ground at the trial, and the evidence of the use of the liquor was received without objection as though such purpose had been alleged. In this connection it is sufficient to refer to *People v. Johnson* (Cal. App.) 207 Pac. 257, and *People v. Bonfanti*, 40 Cal. App. 614, 181 Pac. 80.

[4] Moreover, it is clear that the ordinance prohibits the manufacture of the liquor except for certain purposes therein enumerated. The exceptions are no part of the definition of the offense, and hence they need not be negatived in the information; it being sufficient to follow the general language of the ordinance condemning the manufacture of said liquor. *Matter of Application of Lieritz*, 166 Cal. 298, 135 Pac. 1129, and cases cited.

[5] That it is competent for the board of supervisors to pass such ordinance is in our opinion settled by the authorities. *People v. Tomasovich* (Cal. App.) 206 Pac. 119.

[6] Complaint is made of the action of the court in directing the jury that the burden of proof was upon the defendant to show that he had a permit from the United States Commissioner of Internal Revenue or from the United States Internal Revenue Department if he desired to excuse the manufacture of said liquor. The general rule is, as contended for by appellant, that the burden of proof is upon the prosecution to establish every element of the crime and to prove guilt beyond a reasonable doubt, but there is a

well-recognized exception in cases of this character where the fact is peculiarly within the knowledge of the defendant. *Greenleaf on Evidence*, vol. 1, § 79; *People v. Boo Doo Hong*, 122 Cal. 606, 55 Pac. 402; *People v. T. Wah Hing* (Cal. App.) 190 Pac. 662.

[7] Appellant complains that the court erred in giving this instruction:

"You are further instructed that it is not necessary that the people prove the manufacture of all of the intoxicating liquors described in the information. It is sufficient if the people prove beyond a reasonable doubt and to a moral certainty and to your entire satisfaction that the defendant did in the manner alleged in the information manufacture any one of the intoxicating liquors described in the said information. And if you believe from the evidence beyond a reasonable doubt and to a moral certainty, that the defendant did as alleged in the information manufacture any one of the items of intoxicating liquors described therein, it is your duty to find the defendant guilty as charged in the information."

It is not disputed that by virtue of section 954 of the Penal Code it was permissible to charge two offenses in the same information, but the principal objection of appellant to the instruction, as we understand his position, is this: The information really charges only one offense, that is, the manufacture of wine, since "Jackass brandy" is not a liquor known to the law, and there was no evidence of the manufacture of any wine. But it is a fair inference from the testimony that the defendant made *wine* from raisins, and afterwards converted by distillation this wine or "raisin mash" into a crude brandy, containing the prohibited percentage of alcohol. It is true that the expert witness testified that there is no such liquor known to the chemical profession or the school of pharmacy as *Jackass* brandy, but he also testified that he believed the term was applied to crude brandy. The Attorney General also claims that the court should take judicial notice of the fact that this expressive term is in general use to designate a particularly vicious brand of liquor, but be that as it may, it is so defined in the information as to bring it within the prohibition of the ordinance, and the significant feature of the information and the evidence is that it was shown to be "brandy" containing a very large percentage of alcohol, and it seems entirely immaterial whether the district attorney was accurate in the use of the other qualifying term.

We may add that there is justification for the view that the information was framed upon the theory—and the evidence supports it—that the manufacture of the liquor was a continuing and uninterrupted process resulting in the production of wine and then of brandy. As thus contemplated, the act of defendant really constituted but one offense, although involving the manufacture of two kinds of liquor. In that aspect the case

is somewhat analogous to *People v. Oppenheimer*, 156 Cal. 733, 106 Pac. 74, and cases cited therein, and *People v. Steelik* (Cal. Sup.) 203 Pac. 78. It would follow that the jury was not in error in finding a verdict of guilty of the offense charged in the information instead of finding two separate verdicts as required by said section 954 where separate offenses are charged. But, at any rate, if the information be regarded as charging two offenses, there was no objection made to the form of the verdict at the time it was rendered, and we would consider the informality as having been waived and without prejudice to the substantial rights of the accused.

We think there is no merit in the claim that the evidence is insufficient to show that the defendant manufactured liquor which contained the prohibited percentage of alcohol.

One Henry Reitz, who was stopping with the defendant, testified positively as an eyewitness to the acts of defendant resulting in the manufacture of brandy. He detailed the process at great length, and we have no reason to say that his testimony is incredible. Several witnesses testified as to the possession by defendant of a "still," and one O. J. Mouron, an expert pharmacist, made an analysis of two samples of the liquor taken from the tent of defendant, and testified that one contained approximately 32½ and the other, 18 per cent. of alcohol.

Indeed, after a consideration of the entire record, we think it may be justly said that the objections of appellant are quite technical, and that he was fairly tried and legally convicted.

The judgment and order are therefore affirmed.

We concur: FINCH, P. J.; HART, J.

57 Cal. App. 623

WARD v. MASSACHUSETTS BONDING & INS. CO. (Civ. 2408.)

(District Court of Appeal, Third District, California. May 5, 1922.)

1. Attachment ⚡349—Complaint held sufficient to state cause of action on attachment bond.

A complaint on an attachment bond, alleging commencement and nature of the action and amount sued for, issuance of attachment, and sheriff's levy thereunder, execution of bond sued on, release of attachment, appropriation of property attached to attachment defendant's own use, and value thereof, recovery of judgment against attachment defendants which was unsatisfied, execution thereon, and refusal to redeliver property attached or pay judgment, such conversion of property to attachment defendants' use as rendered it valueless,

their surrender of all interest therein, return of execution unsatisfied, and defendant's refusal to pay the judgment on plaintiff's demand, *held* to state a cause of action.

2. Attachment ⚡348—Attachment defendant not necessary party to action on bond.

In an action on an attachment bond, reciting the surety's undertaking and promise that, if plaintiff recovered judgment, the attachment defendants would redeliver the attached property to the proper officer to be applied to payment of the judgment or pay the whole value thereof, it was not necessary to join the attachment defendant as a party defendant, though she was the principal in the execution of such undertaking, it appearing plainly from the language thereof that the surety's promise imposed a several as well as a joint liability, in which case the surety may be sued separately, under Code Civ. Proc. § 383.

3. Principal and surety ⚡59—Surety's liability does not extend beyond terms of contract.

The liability of sureties does not extend beyond the terms of their contract.

4. Pleading ⚡214(3) — Allegations of complaint taken as true on demurrer.

Allegations of the complaint, in an action on an attachment bond, as to the value of the property and the amount of the judgment against the attachment defendant, must be taken as true on demurrer.

5. Attachment ⚡349—Surety held liable under bond for amount of judgment, not exceeding value of attached property, though plaintiff demanded only the amount of the judgment.

In an action on an attachment bond, reciting the surety's undertaking and promise that, if plaintiff recovered judgment, attachment defendant would redeliver the attached property, or "will on demand pay to the plaintiff the full value of the property released, not exceeding the amount of such judgment," where the complaint alleged that the value of the property was \$2,000, and the amount of the judgment \$1,287.50, the surety was required to pay any amount recovered, not exceeding \$2,000, though plaintiff demanded of the attachment defendant and the surety only "the amount of said judgment," and it was not necessary for him to allege that the surety or such defendants knew the value of the property, proper practice being for the judgment creditor to demand redelivery of the property or payment of the amount of the judgment requiring the judgment debtor to object to the amount demanded if he believed it to be in excess of the value of the property.

6. Attachment ⚡349—Allegation in complaint on bond as to offer to return attached property held not available as defense in view of allegations showing impossibility of performance.

An allegation of the complaint on an attachment bond that the attachment defendants and the surety served a written notice offering to return the attached property to the sheriff, in compliance with the surety's undertaking, *held* surplusage, and ineffective as a defense,

In view of other allegations that attachment defendants failed to redeliver the property, had converted it to their own use in such manner as to render it valueless, and parted with all interest therein; the context of such complaint revealing such notice as containing an idle and simulated offer to do what was impossible of performance, though the parties may show at the trial that they did have the ability to perform, and that the offer was made in good faith, in which case the surety would be exonerated.

7. Attachment — 345—Offer to return attached property must be made in good faith, and with present ability to perform.

To be effective as a defense to an action on an attachment bond, an offer to return the attached property or pay the judgment must be made in good faith, and with present ability to perform.

8. Attachment — 345—Offer to return or return of part only of attached property is no compliance with undertaking to redeliver or pay value thereof.

An offer by attachment defendants and the surety on their bond to return the attached property, or the return of a part only thereof, is no compliance with the obligation of an undertaking to redeliver the property to the proper officer or pay plaintiff the full value thereof, not exceeding the amount of the judgment.

Appeal from Superior Court, Mariposa County; J. J. Trabucco, Judge.

Action by Charles A. Ward against the Massachusetts Bonding & Insurance Company. Judgment for defendant, and plaintiff appeals. Reversed, with directions.

F. W. Henderson, of Merced, for appellant.

John A. Wall, of Mariposa, for respondent.

BURNETT, J. The appeal is from a judgment of dismissal entered upon an order sustaining a demurrer to the third amended complaint. After an allegation of the corporate capacity of defendant, the complaint proceeds in the second paragraph:

"That on or about the 10th day of March, 1916, Charles Ward, plaintiff herein, commenced an action in the superior court of Mariposa county, state of California, in which he was plaintiff, and Mrs. M. C. McIntyre, whose true name is Nettie C. McIntyre, * * * J. C. Yancey, * * * were defendants; that said action was brought by said plaintiff against said defendants to recover the sum of \$1,154.60 upon an account for labor of men and teams, hay and grain furnished, and freighting done, all at the special instance and request of said defendants, and for interest thereon from the 1st day of November, 1915, at the rate of 7 per cent. per annum, and costs of suit.

"That on or about the 10th day of March, 1916, a writ of attachment was duly issued in said action, and in said month duly levied by the sheriff of Mariposa county upon certain property, to wit, a lot of gold-bearing ore in an ore bin, the property of said defendant. That on

or about the 16th day of March, 1916, the said Nettie C. McIntyre, as principal, and the said Massachusetts Bonding & Insurance Company, a corporation, as surety, executed a written undertaking in words and figures as follows: 'In the Superior Court of the County of Mariposa, State of California. Charles Ward, Plaintiff, v. M. C. McIntyre, J. C. Yancey, and John Doe, Defendants. Whereas, the above-named plaintiff commenced an action in the superior court of the county of Mariposa, state of California, against the above-named defendants, claiming that there was due to said plaintiff from said defendants the sum of \$1,154.60 or thereabouts, and thereupon an attachment issued against the property of said defendants as security for the satisfaction of any judgment that might be recovered therein, and certain property and effects of the said defendants have been attached and seized by the sheriff of the said Mariposa county under and by virtue of said writ; and whereas, the said defendants are desirous of having said property released from said attachment: Now, therefore, the Massachusetts Bonding & Insurance Company, * * * in consideration of the premises, and also in consideration of the release from said attachment of the property attached, as above mentioned, does hereby undertake in the sum of \$2,310, and promise that, in case the plaintiff recovers judgment in the action, defendant will on demand redeliver the attached property so released to the proper officer, to be applied to the payment of the judgment, or will on demand pay to the plaintiff the full value of the property released, not exceeding the amount of such judgment.'"

In the third paragraph it is alleged:

"That, subsequent to the execution and delivery of said bond, as aforesaid, and the release of said attachment, said defendants Nettie C. McIntyre and J. C. Yancey appropriated to their own use all of the property so attached by said sheriff; that the value of the property at the time it was so attached, as aforesaid, and at the time it was released to said defendants upon the filing and approval of said undertaking, was in excess of the sum of \$2,000. That upon the filing of said undertaking and its approval by said sheriff, said sheriff did, upon demand of said Nettie C. McIntyre and J. C. Yancey, defendants in said action, surrender and deliver possession of said property so attached to said defendants last named, and said writ of attachment was discharged by said sheriff."

The fourth paragraph alleges the recovery of a judgment by plaintiff in said action against the defendants therein for the sum of \$1,287.50, that said judgment is in full force and effect, and unsatisfied.

"That execution thereon was issued by the clerk of said superior court and delivered to the sheriff of said Mariposa county. That, upon receipt of said writ of execution, and prior to its return as hereinafter alleged, said sheriff of Mariposa county did demand of defendants Mrs. M. C. McIntyre and J. C. Yancey a redelivery of the property so attached, or pay to plaintiff the amount of said judgment, which

amount was less than the full value of the property so attached and released. That thereafter said defendant and said McIntyre and Yancey did fail and refuse to pay any part of said judgment, and did fail to redeliver any of said property so attached as aforesaid to said sheriff of Mariposa county to be applied to the payment of said judgment. That, after said attached property was released to said Nettie C. McIntyre and J. C. Yancey, as aforesaid, and prior to the making and entering of said final judgment, said defendants Nettie C. McIntyre and J. C. Yancey caused the ore levied upon by said attachment to be crushed and the precious metals taken therefrom and converted the same to their own use. That by such acts said Nettie C. McIntyre and J. C. Yancey rendered said property useless and valueless. That, subsequent to the levy of said writ of attachment, and prior to the issuance of the writ of execution, said Nettie C. McIntyre and J. C. Yancey parted with all of their right, title, and interest in and to the ore bins levied upon by virtue of said writ of attachment. That upon said demand of said sheriff said Nettie C. McIntyre and J. C. Yancey and the Massachusetts Bonding & Insurance Company, defendant herein, served upon said sheriff a notice in writing of which the following is a copy."

Said letter referred to the execution of said undertaking and the recovery of said judgment, and declared that—

"We, and particularly Nettie C. McIntyre and J. C. Yancey, hereby offer and tender to you all of the property attached under said writ, and released upon the filing of said undertaking. Said property, as shown by your return of the writ of attachment is personal property and consists of the following: (Describing it.) Your return further shows that said property was attached by you, 'by taking the same into your custody and putting a keeper in charge,' and we hereby request that you take the same again in your custody and hold the same in like manner as before the filing of said undertaking and the release of said levy. You will please consider this letter a formal offer on the part of the defendants in said action to return to your custody exactly what you had attached prior to the filing of said undertaking. This is to comply with the engagements of the surety upon said undertaking, as above quoted, and we stand ready to put you in precisely the same position with reference to said property as you were before the release of said levy."

The fifth paragraph is as follows:

"That thereafter said writ of execution unsatisfied. That thereafter, to wit, on January 15, 1920, plaintiff demanded of defendant herein that it pay to plaintiff the amount of said judgment, including costs and interest, as aforesaid. That on the 16th day of January, 1920, said defendant notified plaintiff that, having made the offer in writing as hereinbefore set forth, it was under no obligation respecting said bond, and said defendant and said Nettie C. McIntyre and J. C. Yancey have wholly neglected and refused, and still neglect and re-

fuse, to pay the plaintiff herein said judgment or any part thereof, and the whole of said judgment and interest thereon is unpaid."

[1] In the foregoing we discover the omission of no fact material to the statement of a cause of action upon the undertaking. Plaintiff set up all the facts and conditions upon which the liability of appellant depended. As to this we think there is no serious controversy, and we therefore pass to the consideration of the special objections to the complaint.

[2] We are satisfied that it was not necessary for plaintiff to join Nettie C. McIntyre as a party defendant. She was the principal in the execution of said undertaking, but it plainly appears from the language of said instrument that defendant's promise imposed a several as well as a joint liability, and in such case the surety may be sued separately. Section 383, Code Civ. Proc.; *Moreing v. Weber*, 3 Cal. App. 14, 84 Pac. 220; *London, etc., Bank v. Smith*, 101 Cal. 415, 35 Pac. 1027.

In *Farmers' Exchange Bank v. Morse*, 129 Cal. 239, 61 Pac. 1088, cited by respondent, the note upon which the suit was based involved a joint obligation and there was no several liability. The Supreme Court declared that "it clearly appears, on the contrary, that the intention was that the promise should be joint," and, hence, it was held to be a case for the application of the rule requiring all the joint makers to be made parties, citing *Pomeroy's Code Remedies*, § 271, and *Harrison v. McCormick*, 69 Cal. 616, 11 Pac. 456.

[3-5] There seems to be no question as to the sufficiency of the demand for the return of the property, and the only possible criticism relates to the alternative condition, "or pay to plaintiff the amount of said judgment." Instead of using the foregoing language, the bond provided:

"Or will on demand pay to plaintiff the full value of the property released, not exceeding the amount of such judgment."

The rule is, of course, that—

"The liability of sureties is not to be extended beyond the terms of their contract. To the extent and in the manner and under the circumstances pointed out in their obligation they are bound, but no further; and they are entitled to stand on its precise terms." *Pierce v. Whiting*, 63 Cal. 538; *Curtin v. Harvey*, 120 Cal. 621, 52 Pac. 1077.

But it is alleged in the complaint that the value of the property was \$2,000 and the amount of the judgment was \$1,287.50. These allegations must be taken as true, and hence it appears clearly that the "precise terms" of the undertaking required the surety to pay any amount that might be recovered if it did not exceed \$2,000. The judgment was for less than said amount, and it seems difficult to understand why appellant should

be expected to do more than demand what was required to satisfy said judgment. It was not necessary for plaintiff to allege that defendant or McIntyre and Yancey knew the value of the property. Under the circumstances, they would be presumed to know its value, but, whether they knew it or not, the obligation was to pay to the extent of its value. As we understand the situation, the case in effect is the same as though the value of the property had been recited in the undertaking. If the property was actually of less value than the amount of the judgment, it could be shown in defense, but on demurrer the court is bound by said allegation. Indeed, the proper practice in such case would seem to be for the judgment creditor to make a demand for the redelivery of the property or for the payment of the amount of the judgment, requiring the judgment debtor to object to the amount demanded in case he believed it to be in excess of the value of the property.

We may add that the course pursued is approved in *Mullally v. Townsend*, 119 Cal. 47, 50 Pac. 1066. It seems that therein the value of the property was recited in the bond, but we can perceive no special significance in that fact. A similar objection is urged to the demand that was afterward made upon the surety for the payment of the amount of the judgment, but we think it is equally without merit. In view of the allegations of the complaint we are satisfied that no such circumlocution was required in making the demand as appellant would compel.

In *Pierce v. Whiting*, supra, cited by respondent, the complaint did not show any demand at all upon the sureties, and, of course, was radically defective in that respect.

In the *Curtin Case*, supra, the value of the property was found to be \$200 and, manifestly, the sureties were not required to pay the full amount of the judgment, which was for \$400.

[6, 7] The only other question which we deem worthy of any attention is involved in the circumstance of said written offer of performance. The pleading of this fact by plaintiff was rather gratuitous, and was certainly unnecessary, and might well have been omitted. However, it must be considered in connection with the other allegations of the complaint, and, as thus viewed, it presents the aspect of mere surplusage and redundancy. The other allegations show that defendants McIntyre and Yancey had failed and refused to redeliver the property when it was demanded, or to pay the amount of the judgment, and that, prior to the issuance of said writ of execution, they had crushed the ore, extracted the metal therefrom, and converted it to their own use, thus rendering it valueless, and had parted with all their right, title, and interest in and to the ore bins—all before said offer was made. The context there-

fore reveals said written instrument as containing an idle and simulated offer to do what was impossible of performance. To be effective as a defense such offer must be made in good faith, and with present ability to perform. *Langan v. Mariposa, etc., Co.*, 39 Cal. App. 71, 178 Pac. 166; *Doak v. Bruson*, 152 Cal. 17, 91 Pac. 1001. This necessary quality of the act was negatived, and hence no legal significance is to be attached to said offer.

[8] Considering the whole of the complaint, we regard it as though plaintiff had set out said written instrument, and had followed it with the allegation that the offer was not made in good faith, and was impossible of performance because a part of the property had been destroyed, and the residue was beyond the power of the defendants to convey. But, even if it could be said that it does not appear that defendants were unable to secure the conveyance of the bins, it is clear enough that they could not restore the personal property which had been destroyed, and, of course, an offer to return or the return of a part only of the property is no compliance with the obligation of the undertaking. *Metrovich v. Jovovich*, 58 Cal. 341; *Mullally v. Townsend*, supra.

The cases cited in this connection by respondent involved different conditions. For instance, in *Curia v. Packard*, 29 Cal. 194, the question arose after trial as to the sufficiency of the tender of the amount due, and the only controversy was as to whether greenbacks should be taken at their face value. In *Oakland Savings Bank v. Applegarth*, 67 Cal. 86, 7 Pac. 139, 476, there was no question of the good faith of the tender, but it was a few dollars less than the amount due, and the Supreme Court properly held that the payee of the note should have made an objection to the tender on that ground or else he would be deemed to have waived it by virtue of section 2076 of the Code of Civil Procedure. Likewise, in *Bumiller v. Bumiller*, 179 Cal. 119, 175 Pac. 897, the ability to perform was not disputed, and, as stated by the Supreme Court:

"The undisputed evidence shows that the plaintiff tendered to the defendant at the place where he was found, or his duly authorized agent, the full amount due, * * * and that she made such tender good by a deposit of such amount with a proper depository, giving the defendant due notice thereof."

Of course, if the parties did have the ability to perform, and the offer was made in good faith, it can be shown at the trial, and the surety would be exonerated; but, as the matter stands, we think the learned trial judge was in error in sustaining the demurrer.

The judgment is reversed, with directions to the trial court to overrule the demurrer

and permit defendant to answer, if so advised.

We concur: FINCH, P. J.; HART, J.

(57 Cal. App. 580)

MARYLAND CASUALTY CO. v. SHAFER
et al. (Civ. 2439.)

(District Court of Appeal, Third District, California. May 4, 1922. Rehearing Denied June 3, 1922. Hearing Denied by Supreme Court July 3, 1922.)

1. Highways ⇨113(5)—Bond for performance of highway contract does not cover claims protected by statutory materialman's bond.

Where a contractor for the construction of a county highway gave not only a bond for the faithful performance of his contract, but also a separate bond in express compliance with the requirements of St. 1897, p. 201, and acts amendatory thereof, to secure the payment of claims of materialmen and laborers, a materialman cannot claim the benefit of the faithful performance bond as he might have done if that had been the only bond which had been given.

2. Highways ⇨113(5)—Failure to perfect claims under statutory materialman's bond gives no right under contractor's bond for faithful performance.

The fact that a materialman had failed to perfect his claim, so as to lose his rights under the statutory bond given to protect such claims, does not entitle him to protection under the bond for faithful performance given by the contractor to the county.

3. Highways ⇨113(4)—Contractor cannot assign payment reserved for materialmen and sureties.

Where a contract for construction of a county highway provided, as authorized by Pol. Code, § 2643, subd. 11, that the county should retain 25 per cent. of the estimated value of the work, after the acceptance, to pay bills and claims filed in the office of the board of supervisors, the contractor had no authority to assign any portion of the reserved payments to a creditor who had not filed his claim, so that an order for payment to such creditor gave no rights where the claims on file more than exhausted the fund.

4. Appeal and error ⇨877(2)—Party showing no right to fund cannot complain of its distribution.

Appellants, who failed to show that they had any claim upon the funds deposited in court as the balance due on a contract for the construction of a county highway, cannot complain of error in the distribution of that fund among those entitled thereto.

Appeal from Superior Court, Tulare County; T. N. Harvey, Judge.

Action by the Maryland Casualty Company against M. T. Shafer, O. M. Thompson, and others, copartners doing business under the firm name and style of Thompson Bros., and others, to determine the interests of the parties in moneys due under a contract for a

highway construction. From a judgment denying Thompson Bros. any interest in the fund, those defendants appeal. Affirmed.

Hearing denied by Supreme Court; WILBUR, J., dissenting.

See, also, 208 Pac. 194, 197.

Middlecoff, Scott & Ham and Farnsworth, McClure & Burke, all of Visalia, Lewis H. Smith and W. N. Gilliam, both of Fresno, J. A. Chase, of Visalia, Marley Fisher, of Lindsay, Perry F. Backus, of Los Angeles, Russell & Heid, of Tulare, and W. O. Tyler and Scarborough & Bowen, all of Los Angeles, for appellants.

Bicksler, Smith & Parke, of Los Angeles, for respondent.

FINCH, P. J. The county of Tulare and the defendant M. T. Shafer, on the 9th of February, 1918, entered into a contract by the terms of which Shafer agreed to construct a concrete highway for the county. Shafer completed the construction of the highway and the same was accepted by the county January 28, 1919. He failed, however, to pay many persons for labor, material, supplies, team hire, and rental of equipment employed, furnished, and used in the construction of the work. He also made assignments to various persons of sums due or to become due under the contract, and which remain unpaid. The plaintiff, as surety of the contractor, brought this action against the county, the contractor, and all claimants under the contract to secure an adjudication of their respective rights in and to the unpaid installments due from the county and the plaintiff's liability under its contracts of suretyship. The various claimants filed cross-complaints setting up their respective claims to the unpaid installments and their rights of recovery against the plaintiff. The county paid into court the balance due under the contract, \$12,919.81, to be distributed in such manner and to such parties as the court might adjudge, and none of the parties are now claiming anything against the county. From the judgment rendered, three separate appeals are being prosecuted. This appeal is by Thompson Bros. from that part of the judgment denying recovery against the plaintiff and adjudging that other parties have superior rights to payment out of the unpaid installment.

The contract provides "that the contractor shall pay all bills for labor, team hire, material, and supplies contracted for by him on account of the work herein contemplated, when the same becomes due and payable." By the terms of the contract Shafer was required to furnish "a good and sufficient bond and undertaking in the sum of \$16,426.55 conditioned for the faithful performance of this contract by the contractor, according to the terms and provisions herein expressed." Pursuant to this requirement, Shafer and the plaintiff executed a "bond for faithful per-

formance of contract" in the usual form, providing, among other things, that the contractor "shall in all things stand to and abide by and well and truly keep and perform the covenants, conditions, stipulations, contracts, agreements, and obligations in the foregoing contract * * * on his part to be kept or performed at the time and in the manner therein specified, * * * and shall indemnify and save harmless the said county of Tulare."

[1] It is contended that the plaintiff is liable under the faithful performance bond for the claim of Thompson Bros. In support of such contention the following cases are cited: *French v. Farmer*, 178 Cal. 218, 172 Pac. 1102; *Fuller v. Alturas School District*, 28 Cal. App. 609, 153 Pac. 743; *Callan v. Empire State Surety Co.*, 20 Cal. App. 483, 129 Pac. 978, 981. If the faithful performance bond were the only one furnished, appellant's position would seem to be invulnerable, but the contract required and Shafer and the plaintiff executed a separate bond in express compliance with the requirements of the act of 1897 (Stats. 1897, p. 201), and acts amendatory thereof, entitled "An act to secure the payment of the claims of materialmen, mechanics, or laborers, employed by contractors upon state, municipal, or other public work."

Liability under a contract of suretyship, as under other contracts, is dependent upon the intention of the parties thereto. In the discussion of a similar question in *French v. Farmer*, supra, it is said:

"If * * * any effect whatever is to be given to this clause in the condition of the bond, it must be held that it was the intention of the parties to benefit such third persons. * * * The courts of Nebraska, Missouri, Iowa, Indiana, and Michigan * * * seem to hold to the view that, if it can be fairly said from either the contract or the bond, which are to be construed together, that the parties intended to and did agree to pay such third persons, a suit could be brought on such bond by such third person to recover upon the promise so made for his benefit."

Here, in compliance with the contract and the statute, a separate bond was given to secure payment of claims of the character under consideration, and it would be unreasonable to hold that the parties intended the faithful performance bond to secure the same claims.

[2] The statute of 1897, as amended by St. 1911, p. 1422, provides that the claimants "shall, within ninety days from the time such contract is completed, file with the * * * board of supervisors * * * a verified statement of such claims." Concededly appellant failed to file such a claim, and is therefore precluded from recovering on the bond given pursuant to the requirements of that statute. Such failure affords no ground for relief under the faithful performance bond manifestly intended for a different purpose.

[3] Pursuant to the provisions of subdivision 11 of section 2643, Political Code, the contract provides that the county shall retain 25 per cent. of the estimated value of the work for 35 days after the acceptance thereof. The contract further provides that the county "may at its option, retain out of any amounts due the contractor, a sum sufficient to cover and pay any such unpaid bills and claims, provided that sworn statements of said bills and claims have been filed in the office of the board of supervisors on or before the date on which the final payment due the contractor under this contract, shall be made by the first party through its board of supervisors, as hereinafter set forth in article XIV of this contract, and not later than ninety days after the completion and acceptance of the work." As stated, the county retained, under this provision, \$12,919.81 due under the contract, that sum being less than 25 per cent. of the value of the work. The court found that valid claims, duly verified, were filed in due time with the board, aggregating more than the amount retained by the county. Appellant did not so file a verified claim, but filed an order, signed by the contractor, for the amount of such claim. It is now contended that appellant was entitled to payment out of the moneys retained by the county and deposited in court as stated; that Shafer's order operated as an assignment of the sum retained by the county to the amount of the order; and that the plaintiff had no right or equity in the fund reserved in so far as it had been assigned by Shafer. In support of such contention appellant relies on the cases of *Adamson v. Paonessa*, 180 Cal. 157, 179 Pac. 880, and *American Surety Co. v. Empire Securities Co.*, 185 Cal. 586, 197 Pac. 941. The first case relates to a contract for street work under the Improvement Act of 1911 (St. 1911, p. 730), and the latter to similar work under the Vrooman Act (St. 1885, p. 147). In neither case did the contract provide for a reserve fund as in the case at bar. In *Adamson v. Paonessa*, supra, this distinction is clearly pointed out by the court. The provision of the contract for the retention of 25 per cent. of the value of the work until the completion thereof became a part of the contract of suretyship and was as much for the indemnity of the surety as for the county. *Prairie State Bank v. United States*, 164 U. S. 227, 17 Sup. Ct. 442, 41 L. Ed. 412. The further provision for retention by the county of sufficient funds to pay claimants who filed verified claims was equally a part of plaintiff's contract and was for the protection of the surety as much as for that of claimants. To the extent that such provision was observed, the liability of the surety was lessened. The fund retained was beyond the control of Shafer, and no assignment by him could prejudice the rights of the parties for whose benefit the fund was created. To hold otherwise would be to nullify the stipula-

tion of the contract for the retention of the fund and to destroy the security intended for the benefit of claimants bringing themselves within its terms as well as for the protection of the surety. *Wasco County v. New England Equitable Ins. Co.*, 88 Or. 465, 172 Pac. 126, L. R. A. 1918D, 732, Ann. Cas. 1918E, 656; *In re Scofield Co.*, 215 Fed. 45, 131 C. C. A. 353; *Derby v. United States Fidelity & Guaranty Co.*, 87 Or. 34, 169 Pac. 500; *Henningsen v. United States Fidelity & G. Co.*, 208 U. S. 404, 28 Sup. Ct. 389, 52 L. Ed. 547; *Columbia Digger Co. v. Rector (D. C.)* 215 Fed. 618; *Greenville Bank v. Lawrence*, 76 Fed. 545, 22 C. C. A. 646.

[4] The court found that valid claims amounting to \$14,419.50 were duly verified and filed with the board of supervisors, and that such claimants in due time filed cross-complaints in this action and were entitled to judgment against the plaintiff for the respective amounts of their claims, and that the plaintiff is entitled to have the whole of said \$12,919.81 applied to the payment of such claims. The judgment against plaintiff awards such claimants the amounts of their respective claims and directs the clerk to pay them the amount of said fund in the proportion of their claims, and, on payment to the clerk by plaintiff of the remainder of the judgment, to pay the claimants in full upon satisfaction of the judgment by them. The judgment further provides that, upon payment by plaintiff to any of said claimants of the sums awarded them, the clerk shall pay plaintiff such part of the \$12,919.81 as said claimants otherwise would be entitled to receive. Appellant contends that the findings are insufficient to support the judgment. Whatever grounds of objection may be available to other parties defendant, the findings clearly show that appellant, by reason of failure to file a verified statement of claim with the board of supervisors as provided by the contract, is not entitled to participate in the distribution of the fund reserved, and therefore cannot be heard to complain of the disposition made thereof.

That part of the judgment appealed from is affirmed.

We concur: HART, J.; BURNETT, J.

57 Cal. App. 585

MARYLAND CASUALTY CO. v. SHAFER
et al. (Civ. 2440.)

(District Court of Appeal, Third District, California. May 4, 1922. Rehearing Denied June 3, 1922. Hearing Denied by Supreme Court July 3, 1922.)

1. Highways §113(4)—Contractor cannot assign material reserved to satisfy laborers and materialmen.

Where the county by its contract reserved a portion of the funds due on the con-

tract for a specified time to pay the materialmen and laborers who might file claims against the county, whether such reservation was under the authority of Political Code, § 2643, subd. 11, or not, the contractor could not, by assignment of the moneys due him, give his assignee any right to such reserved funds if the claims of the laborers and materialmen properly filed with the supervisors were more than sufficient to exhaust the fund.

2. Highways §113(4)—Contractor's assignee of part of amount due to secure personal loan held not entitled to be paid from reserved funds.

Where there was no showing that moneys loaned to a contractor for which he assigned a portion of the amount due him from the county were used by him in the prosecution of the work, the assignee cannot claim any portion of the funds reserved under the contract to pay materialmen and laborers where the claims of such materialmen and laborers exceeded the amount of the fund.

Appeal from Superior Court, Tulare County; T. N. Harvey, Judge.

Action by the Maryland Casualty Company against M. T. Shafer, the Lindsay National Bank, and others, to determine interests in moneys due under a contract for a highway construction. From a judgment denying the right of the Lindsay National Bank and others to any part of the fund, those defendants appeal. Affirmed.

Hearing denied by Supreme Court; WILBUR, J., dissenting.

Middlecoff, Scott & Ham and Farnsworth, McClure & Burke, all of Visalia, Lewis H. Smith and W. N. Gilliam, both of Fresno, J. A. Chase, of Visalia, Marley Fisher, of Lindsay, Perry F. Backus, of Los Angeles, Russell & Heid, of Tulare, W. O. Tyler and Scarborough & Bowen, all of Los Angeles, Blakeney Hughes, of Fresno, and W. C. Hamilton, for appellants.

Bicksler, Smith & Parke, of Los Angeles, for respondent.

HART, J. This is one of three cases growing out of the same transaction which, for the purpose of consideration on appeal, were consolidated. The other cases are numbered, respectively, 2438 and 2439. All three were submitted upon the same record. There are, however, certain questions presented in this case which do not arise in the others.

The appeal here is by Lindsay National Bank from the judgment, upon the judgment roll alone.

The general facts of the transaction out of which the several cases arise are stated in an opinion filed in this court this day in civil No. 2439, 208 Pac. 192, entitled "Maryland Casualty Company, a Corporation, Plaintiff and Respondent, v. M. T. Shafer et al., Defendants and Respondents, O. M., C. M. and

E. O. Thompson, Copartners, Doing Business under the Firm Name and Style of Thompson Bros., Defendants, Cross-Complainants and Appellants." It is conceived, however, that reference to those facts should be made herein.

The plaintiff was surety of the defendant Shafer on a contract between the latter and the county of Tulare, whereby Shafer agreed to build the Lindsay-Tulare division of a system of public highways in said county for a certain specified consideration. The contract was entered into on the 9th day of February, 1918, and the work of construction completed and the same accepted by the board of supervisors of said county on the 28th day of January, 1919. Under the contract Shafer was to furnish all the labor, materials, supplies, team hire, and equipment essential to the consummation of the terms of said contract or the completion of the work according to the requirements thereof. Besides a bond for the faithful performance of the contract which Shafer was required by the contract to furnish the county, Shafer also executed another and separate bond as required by the contract as well as by the statute (Stats. 1897, pp. 201, 202), the specific purpose of which was to secure the payment of all claims for labor, materials, supplies, etc., bestowed upon and furnished in the construction of the work.

The contract, following the provision of subdivision 11 of section 2643 of the Political Code to the same effect, provides that the county shall retain 25 per cent. of the estimated value of the work for a period of 35 days after the same has been regularly accepted. It is further provided in said contract that the county "may at its option retain out of any amounts due the contractor a sufficient sum to cover and pay any such unpaid bills and claims, provided that sworn statements of said bills and claims have been filed in the office of the board of supervisors on or before the date on which the final payment due the contractor, under this contract, shall be made by the first party through its board of supervisors, as hereinafter set forth in article XIV of this contract and not later than ninety days after the completion and acceptance of the work." In pursuance of said provision, the county retained the sum of \$12,919.81 due under the contract; the said sum being less than 25 per cent. of the cost of the work.

It appears that, upon the completion and after the acceptance of the work, there remained due from the contractor numerous claims in favor of persons performing labor upon and furnishing materials, supplies, etc., for the work. It is also made to appear that the contractor made assignments to various persons of sums due or to become due under the contract and which are still unpaid.

The plaintiff, as surety of the contractor, instituted this action against the county, the

contractor, and all claimants under the contract for the purpose of obtaining an adjudication of their respective rights in and to the balance due from the county to the contractor under the contract and to determine the plaintiff's liability under its contract of suretyship; it being also the surety on the faithful performance bond. The several claimants appeared and filed cross-complaints, setting forth their respective claims to the moneys retained by the county and their right to a recovery against the plaintiff. The balance due under the contract, to wit, the sum of \$12,919.81, which was retained by the county by authority of the contract and subdivision 11 of section 2643 of the Political Code, was paid into court by the county, under a stipulation that the same should be distributed in such manner and to such parties as the court might adjudge, and there is no claim put forth by any of the claimants against the county. The gravamen of the cross-complaint or the facts upon which the appellant relies for a recovery may here be given in the language of said pleading:

"VI. That on December 22, 1918, said contractor, said M. T. Shafer, for a valuable consideration, transferred and assigned to one H. E. French the sum of \$5,000 in lawful money of the United States out of the final payment which became due under and pursuant to said contract referred to in said cross-complaint from said county of Tulare to said M. T. Shafer on March 4, 1919.

"That on December 23, 1918, said H. E. French, for a valuable consideration, assigned and transferred to this cross-defendant Lindsay National Bank all his right to receive from said county of Tulare said sum of \$5,000 which had been so assigned to him by said M. T. Shafer, and ever since December 23, 1918, this cross-defendant, Lindsay National Bank, has been, and now is, the owner and holder of said claim for said sum of \$5,000 to be paid out of said final payment, and no part thereof has ever been paid by said county of Tulare to said Lindsay National Bank."

The said cross-complaint proceeds to allege that the said cross-defendant duly notified the said county of Tulare of its claim and demand for said sum of \$5,000 on the 2d day of January, 1919; that on said day it filed in the office of the clerk of the board of supervisors of said county its verified claim and demand for said sum "in the manner and form required by law"; that on the 2d day of June, 1919, said board of supervisors rejected said claim and demand and has at all times refused and still refuses to pay said cross-defendant said sum. It is further alleged that said demand of said cross-defendant is, and ever since March 4, 1919, has been, payable out of the said sum of \$12,919.81, the balance due the contractor under said contract and retained, as before alleged, and as is admitted, by the county.

The court found the facts with reference to the assignment upon which the bank relies

in substantial accord with the above averments, and that, as against all persons except the plaintiff, Maryland Casualty Company, the said bank by virtue of said assignment is entitled to receive out of said fund of \$12,919.81 so deposited in court the sum of \$5,000 with interest, etc. The court awarded to the several lien claimants appearing in the action by cross-complaint sums aggregating amounts far in excess of the money retained by the county and deposited in court as indicated. The judgment is that "said Lindsay National Bank take nothing herein against said Maryland Casualty Company and no part of \$12,919.81." It was further decreed that the clerk of the court prorate and pay said \$12,919.81 to the parties herein given judgment against said Maryland Casualty Company, "paying to each of said parties such proportion of said \$12,919.81 as his judgment against said Maryland Casualty Company bears to the total amount of all such judgments. * * * And if the said Maryland Casualty Company shall deposit with said clerk a sufficient sum which, in addition to said \$12,919.81, would satisfy said judgment against said company, the clerk shall accept such deposit and therefrom pay the balance of said judgment upon satisfaction thereof by such judgment holders." There is no question raised herein, as in *Maryland Casualty Co. v. M. T. Shafer et al. and Thompson Bros.*, Civil No. 2439, supra, as to the liability of the plaintiff under the "faithful performance bond" executed by it to the county contemporaneously with the execution and giving of the bond under the act of 1897, supra, to secure the payment of the claims of materialmen, mechanics, laborers, etc., employed by contractors upon street, municipal, or other public work. Nor could any such proposition be relevantly raised and urged in this case, inasmuch as the cross-complainant herein, as we shall presently more particularly note, undertakes to secure the satisfaction of its claim out of a specific fund set aside for the purpose of paying the claims of laborers, mechanics, materialmen, etc.

[1] The situation presented here is simply this: That the county in the contract with Shafer expressly reserved to itself the right to retain 25 per cent. of the estimated value of the work for 35 days after the acceptance thereof for the purpose of meeting any unpaid claims which might be regularly authenticated and presented to the board of supervisors for labor bestowed upon and materials furnished for and in the construction of the highway, and that in pursuance of that provision of the contract the board of supervisors did retain the sum of \$12,919.81, due under the contract and which amounted to a sum less than 25 per cent. of the value of said work, etc. The simple question to be determined here, then, is whether an assignment made by the contractor upon the fund

so retained and sequestered for a specific purpose is valid as against those claims which were payable out of said fund and arising out of the construction of the work? A negative answer to the question so propounded must, for obvious reasons, be returned.

Whether the authority for the provision in the contract investing the county with the right to retain 25 per cent. of the value of the work for the purposes stated proceeds from subdivision 11 of section 2643 of the Political Code or from any other statute, is immaterial, since it will not be questioned that the county may, independently of statutory authority and by contract, authorize the retention by it of so much money as may be due on the estimated value of the work as will wholly or in part satisfy claims against the contractor for labor and materials used in the execution of the terms of the contract and which the contractor has not paid. When, therefore, a fund is thus established for the purposes stated, so much of the estimated value of the work done under the contract as is represented by such fund is entirely withdrawn from the control of the contractor. In other words, the contractor has no assignable interest in said fund, unless it should transpire that he had paid all claims for labor and material incurred in the performance of the contract or after all such unpaid claims have been satisfied by the county out of such fund there still remains therein a balance, which is not this case. But this point is discussed and disposed of in accordance with the view thus expressed by this court in the opinion in action No. 2439 this day filed. It is therein said that—

The "provision for retention by the county of sufficient funds to pay claimants who file verified claims was equally a part of plaintiff's contract and was for the protection of the surety as much as for that of claimants. To the extent that such provision was observed, the liability of the surety was lessened. The fund retained was beyond the control of Shafer, and no assignment by him could prejudice the rights of the parties for whose benefit the fund was created. To hold otherwise would be to nullify the stipulation of the contract for the retention of the fund and to destroy the security intended for the benefit of claimants bringing themselves within its terms as well as for the protection of the surety"—citing cases.

The appellant, however, contends that it is supported in its claim to the right to payment out of the moneys retained by the county and deposited in court as indicated by the recent case of *American Surety Co. v. Empire Securities Co.*, 185 Cal. 586, 197 Pac. 941, and also the case of *Adamson v. Paonessa*, 180 Cal. 157.¹ In the opinion in the *Thompson Bros. Case*, Civil No. 2439, supra, this court called attention to the distinction between the cases named and the one at bar, and the reasons for the distinction, and held

¹ 179 Pac. 880.

that they had no application to the instant case. What is said therein with respect to those cases and their inapplicability to the situation presented here is sufficient for the purposes of the decision of the present case.

[2] But there is still another consideration which supports the conclusion that the assignment declared upon by the appellant cannot legally be satisfied out of the fund referred to, said fund not being sufficient to meet and satisfy all the claims for labor and materials which were put into the work and unpaid by the contractor, and it is this: That it is not made to appear by the complaint or the findings that the money received by the contractor upon the assignment was used in satisfying claims against him for labor and materials used in the construction of the highway. For aught that may be known to the contrary from the record before us, the assignment might have been made for the purpose of securing a loan of money from the original assignee, French, to be used by Shafer for private purposes, or for a purpose entirely foreign to the contract. It is plainly manifest, as is above indicated, that the fund in question was subject to no other burdens than those which arose out of claims against the contractor for labor and materials furnished in the construction of the work.

Our conclusion is that the judgment below is correct, and it is accordingly affirmed.

We concur: FINCH, P. J.; BURNETT, J.

57 Cal. App. 573

MARYLAND CASUALTY CO. v. SHAFER
et al. (Civ. 2438.)

(District Court of Appeal, Third District, California. May 4, 1922. Rehearing Denied June 3, 1922. Hearing Denied by Supreme Court July 3, 1922.)

1. Highways — § 113(5)—Cross-complaints in surety's suit against materialmen, contractors, and county to determine interest of parties need not be filed within statutory time for suit to establish liens.

Where the surety on a county highway contractor's bond brought suit against the contractor, the county, and the materialmen and laborers to have the interests of the parties determined, that suit was the beginning of a suit to enforce the claims of materialmen and laborers under the statute requiring such suit within six months from the time the claims were filed, so that such materialmen and laborers could recover against the surety on the bond, though their cross-complaints in that suit were not filed within the six months' period.

2. Highways — § 113(5)—Complaint by surety on highway contractor's bond held to show right of claimants to recover.

Where the complaint of a surety on a county contractor's bond alleged the filing of claims

against the county by materialmen and laborers for materials furnished and work done for the contractor and admitted the execution of the bond by the surety to cover such claims, the complaint was sufficient to authorize recovery by the materialmen and laborers without the necessity of their filing cross-complaints.

Appeal from Superior Court, Tulare County; T. N. Harvey, Judge.

Action by the Maryland Casualty Company against M. T. Shafer, George G. Anderson, and others to determine interests in moneys due under a contract for highway construction. From a judgment determining the interests of George G. Anderson and others, as materialmen and laborers, in the fund in court and against plaintiff as surety on the contractor's bond, George G. Anderson and others appeal. Reversed as to some of the appellants, with directions to render a judgment against the plaintiff, and affirmed as to the other appellants.

Hearing denied by Supreme Court; WILBUR, J., dissenting.

Middlecoff, Scott & Ham and Farnsworth, McClure & Burke, all of Visalia, Lewis H. Smith and W. N. Gilliam, both of Fresno, J. A. Chase, of Visalia, Marley Fisher, of Lindsay, Perry F. Backus, of Los Angeles, Russell & Heid, of Tulare, W. O. Tyler and Scarborough & Bowen, all of Los Angeles, Blakeney Hughes, of Fresno, and W. C. Hamilton, for appellants.

Bicksler, Smith & Parke, of Los Angeles, for respondent.

BURNETT, J. This is a companion case to Nos. 2439 and 2440, 208 Pac. 192, 194, in which the opinions are filed herewith. The appellants herein are laborers and materialmen who claim under the bond executed by plaintiff for their benefit. The bond was given in accordance with the requirement of section 1 of said "act to secure the payment of the claims of materialmen, mechanics, or laborers, employed by contractors upon state, municipal, or other public work," to which act reference is made in the other opinions. St. 1897, p. 201. The trial court found:

"That there is due and unpaid from defendant M. T. Shafer to each of the following persons named in this paragraph, for and account of work and labor performed, rental of teams and equipment, supplies, and materials furnished under and pursuant to the contract set forth in the complaint herein by and between the said M. T. Shafer and said county of Tulare, by each of the following persons together with interest, the following sums."

Then follow the names with some typographical errors of all the appellants herein except Luis Clarin, H. E. French, Blakeney Hughes, Morris & Co., Nick Pazin, and Steve

Pazin, together with the respective amounts due them. However, the court further found:

"That each and every of the following parties to this action who did not file a complaint, answer, or cross-complaint praying judgment against said Maryland Casualty Company on said materialmen's bond within six months from the time he filed a verified statement with the board of supervisors is barred from any relief against said Maryland Casualty Company by the provisions of the statute of 1897 and amendments thereto, providing for the execution of said materialmen's bond."

Then follow the names of all but four of appellants herein. Said finding was based upon said statute, as amended by St. 1915, p. 926, providing:

"At any time within six months after the filing of such claim the person, company or corporation filing the same may commence an action against the surety or sureties on the bond, specified and required in section 1 thereof."

[1] We are entirely satisfied, though, that the trial court made a wrong application of said provision. Upon principle and authority we are convinced that the filing of the complaint by plaintiff suspended the operation of said statute of limitations. Said complaint was filed before the expiration of six months after the verified claims were filed with the board of supervisors, and it set forth the contract and the whole transaction upon which the claims of appellants depend; and their appearance in the action, in response to the invitation of respondent and the command of the court, for the very purpose of having their claims adjudicated, must be regarded as though made at the time the complaint was filed. If the action were brought by the maker of a promissory note against the payee to determine its validity, it would hardly be questioned, we think, that the payee would be allowed to maintain the legal integrity of the note and to establish the obligation of the maker, although in the meantime the statutory period of limitations had expired. In this case the whole issue as to the rights and obligations of the parties is tendered by the complaint, and any defense or counterclaim relating to the instrument which is brought in question is cognizable as of the time when the litigation is instituted.

A similar case to this is *McDougald v. Hulet*, 132 Cal. 154, 64 Pac. 278, wherein the action was brought by a surety, "who had signed a joint and several guaranty of rent payable under a lease, to have it decreed what amount was due and unpaid to the lessor, and that the other surety, and the corporation of which he was president, were principal debtors, and that they be compelled to pay the unpaid rent, and save plaintiff harmless therefrom," and it was held that "the lessor may set up in his answer, by way of counterclaim or cross-complaint, the con-

tract of guaranty and the amount due thereunder, and seek judgment therefor against the plaintiff." It was further held therein that "the filing of the complaint suspended the statute of limitations as to the matters arising out of the transaction pleaded; and where such matter is set forth in the answer, whether called an answer, counterclaim, or cross-complaint, and arose upon contract, and existed at the commencement of the action, the statute of limitations can not run thereupon after the commencement of the action."

In *Perkins v. West Coast Lumber Co.*, 120 Cal. 27, 52 Pac. 118, the action was by an attorney at law to recover against his client upon a special contract for services, and it was held that a counterclaim for damages for bad advice given under the contract alleged and arising out of the transaction set forth in the complaint was not barred by the statute of limitations, "if not so barred at the commencement of the action, notwithstanding the lapse of the period fixed by the statute before the filing of the answer setting forth such counterclaim."

In 24 R. C. L. 837, the rule as to set-offs and counterclaims is stated as follows:

"It is generally held that the object of statutes of set-off was to prevent multiplicity of lawsuits, and not to interfere with or affect the operation of the statute of limitations, and that the statute of limitations applies as well to a demand attempted to be set off as to one upon which an action is brought. A claim which is barred by the statute is not therefore available as a set-off or counterclaim. If, however, a counterclaim or set-off is not barred at the commencement of the action in which it is pleaded, it does not become so afterward, during the pendency of that action."

It seems difficult to conceive of a situation wherein it would be more manifest than herein that the counterclaim or cross-complaint relates to and depends "upon the contract or transaction upon which the action is brought," creating the condition for the application of sections 438 and 442 of the Code of Civil Procedure.

[2] Indeed, it was not necessary for the prevailing appellants herein to file a counterclaim or cross-complaint. The facts upon which their claims are based are disclosed by the allegations of the complaint, and it is a fair inference from these allegations that said defendants were entitled to judgment against the plaintiff for the respective amounts. It is true that plaintiff alleged upon information and belief that said claims were invalid, but this should be disregarded as the mere opinion of the pleader, since no reason is assigned nor legal foundation disclosed for its support.

For confirmation of this view we may direct specific attention to its material allegations as they relate to the claim of these ap-

pellants. In paragraph 2 it appears that on February 9, 1918, the contract was executed for the construction of the highway, and the various provisions of said contract are set out, including the requirement that the contractor should furnish said bond for the payment of laborers and materialmen, and that he should pay all such claims.

Paragraph 3 alleges that on February 15 the contractor made a written application to plaintiff for a bond or undertaking in the sum of \$32,853.10 to secure said payment, a copy of said application being exhibited in said paragraph.

In paragraph 4 it is alleged:

"This plaintiff, to secure the payment of work and labor performed and material used in the construction of said division of said system of highways and roads as aforesaid, did, on or about the 28th day of February, 1918, make, execute and deliver to said county of Tulare its bond in the sum of \$32,853.10, which said bond was duly acknowledged and was filed with said board of supervisors of said county of Tulare, as provided by law."

In paragraph 5 this bond is set out in full and it appears unobjectionable in form.

In paragraph 10 we find this allegation:

"That labor, team hire, materials, and supplies furnished and used in and upon said division of said system of public roads and highways did on and after July 1, 1918, become and were due and payable, remained unpaid, and are now unpaid and payable," etc.

In paragraph 11 it appears that said contract was completed by Shafer and accepted by said county of Tulare as completed on January 28, 1919.

In paragraph 12 it is alleged that—

"The time for filing verified claims as against said bond of this plaintiff expired on or about April 28, 1919."

Paragraph 17 alleges:

"That the persons, partnerships and corporations hereinafter named, defendants herein, claim to have some right, title, interest or claim either as against the bond executed by plaintiff, as herein set forth, or as against said county of Tulare or the funds now due and payable under the terms of said contract of February 9, 1918, and have filed with the board of the county of Tulare a bill, or statement of account, or an order signed by M. T. Shafer directing said county of Tulare and said board of supervisors to pay such alleged claim, or a certificate of said M. T. Shafer certifying that such alleged claim is due and payable on account of labor performed or material furnished in connection with said contract of February 9, 1918, or a notice to withhold payment of money (as provided by section 1184 of the Code of Civil Procedure of the state of California), or a statement of claim, acknowledged, verified, or otherwise; that the names of said persons, partnerships or corporations so having filed bills, statements of accounts, orders, certificates, withhold notices, or statements of claim as aforesaid, the nature of said claims

and the amounts claimed thereunder, are respectively as follows."

In the list therein set out appear all of appellants except Blakeney Hughes.

To recapitulate: The complaint alleges the execution of the contract between the county and Shafer for the construction of the highway; the execution of the bond by plaintiff for the benefit of the laborers and materialmen; the performance of labor and the furnishing of material by said appellants for which they have not been paid; the completion of the contract and its acceptance as completed by the county; and the filing of the verified claims of appellants with the board of supervisors. It is true that it is not specifically designated to which class of claimants appellants belong, but the uncertainty, if any, in that respect would be resolved against the pleader in view of the fact that it was a matter of record. There was an omission also to allege the date of the filing of the respective verified claims, but it is clearly implied that the filing was within the statutory period.

The complaint also specifically prayed "that a full and final determination and adjudication be had in this action of any and all rights, claims and demands of each and all of the parties herein," etc., and for general relief.

It is apparent that, if said appellants had begun the action against respondent on the bond, they would have been required to allege only the same facts as appear in said complaint, although, as careful pleaders, they would have been more specific as to one or two of the incidents of the case.

Such being the situation, it seems plain that they cannot be barred from relief simply because their actual appearance in the case was delayed until said period of six months had expired, and they then filed what they called a cross-complaint containing no additional facts to those alleged in the original complaint, but simply making more definite the date when the verified claims were filed with the board of supervisors.

It appears, then, that the complaint would have justified a judgment in favor of all the appellants except Blakeney Hughes. The number is diminished, however, by the findings. It appears from the finding as to the filing of the claims that M. G. Dunlap filed his too late and R. Carmona filed none at all. The court also found specifically that there was nothing due to George Norwood, H. E. French, Lindsay Plumbing Company, W. S. Cairns, and Morris & Co. There seems to have been no specific finding as to the amount due Luis Clarin, Nick Pazin, and Steve Pazin, but there was really no issue as to the validity of their claims; respondent's only contention as to them being that they were barred by the statute of limitations.

We may add that it is not disputed that said bond is enforceable for the benefit of said laborers and materialmen and falls within the doctrine of *Callan v. Empire State Surety Co.*, 20 Cal. App. 483, 129 Pac. 978, 981; *Fuller v. Alturas School District*, 28 Cal. App. 609, 153 Pac. 743; *French v. Farmer*, 178 Cal. 218, 172 Pac. 1102.

The judgment is reversed, and the court below directed to render a judgment upon the findings against the Maryland Casualty Company for the respective amounts of their claims in favor of these defendants: George G. Anderson, Mike Antich, Luis Claudio, Luis Clarin, Nick Durkl, E. Espino, Juan Garcia, T. Garcia, V. Hurtado, Mariano Lucas, Dan Aley, Jose Rodrigues, Jas. K. Johnston, A. J. Philips, Rufus Estes, L. G. Garnsey, Nick Pazin, Steve Pazin, and J. W. Stephens.

As to the other appellants the judgment is affirmed.

We concur: FINCH, P. J.; HART, J.

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PEOPLE'S BANK v. PORTER. (Civ. 2404.)

(District Court of Appeal, Third District, California. May 31, 1922. Hearing Denied by Supreme Court July 27, 1922.)

1. Bills and notes ⇨343—Negotiability not destroyed in hands of indorsee in due course who takes with knowledge that note is part of purchase price of a chattel by which title is retained until payment of note.

The negotiability of a note is not destroyed in the hands of an indorsee in due course who takes with knowledge that the note is given as part of the purchase price of a chattel, title to which is retained until the note is paid, under Negotiable Instruments Law (St. 1917, p. 1533, § 3084), providing an unqualified order or promise to pay is unconditional, though coupled with the statement of the transaction; and this is true even assuming that the actual consideration for the note was the transfer of title to the chattel at maturity, not the mere promise to do so.

2. Bills and notes ⇨144—Negotiability determined at time note is given.

The negotiability of a note is determined at the time it is given, as, under Negotiable Instruments Law (St. 1917, p. 1539, § 3128), an instrument negotiable in origin continues to be negotiable until it has been restrictively indorsed or discharged, by payment or otherwise.

3. Bills and notes ⇨168—Rule that note secured by mortgage not negotiable inapplicable to note given in part payment for chattel, title to which is retained until note is paid; "chattel mortgage."

The rule that, where a note is secured by a mortgage, the note, though negotiable in form, is not negotiable in law, does not apply to a note given as part of the purchase price of a

chattel, title to which is to be retained until the note is paid, since such note is not a chattel mortgage within Civ. Code, § 2956 et seq.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Chattel Mortgage.]

4. Bills and notes ⇨165—Making note on face subject to another instrument is warning that promise is conditional.

Where a note upon its face is made subject to the terms of another instrument, such provision is an intentional warning given by the maker to any prospective indorsee that the promise to pay is conditional upon, or subject to, the performance of the collateral agreement referred to.

5. Bills and notes ⇨164—Note nonnegotiable in hands of indorsee when all instruments constituting transaction and note to him make promise conditional.

A note is not negotiable in the hands of an indorsee when all the contemporaneous instruments constituting the transaction and note to the indorsee make it clear that the promise to pay is conditional upon the performance of certain acts by the payee.

6. Bills and notes ⇨155—Note payable whenever payee deems himself insecure nonnegotiable.

Where a note (or some collateral agreement known to the indorsee) makes the note payable whenever the payee deems himself insecure, the due date is usually held uncertain, so as to render the note nonnegotiable.

7. Bills and notes ⇨168—Negotiability not affected by fact that payee may, on default in payment, retake chattel in payment for which note was given.

A note given as part of the purchase price of a chattel, title to which is retained until the note is paid, is not rendered nonnegotiable by the fact that the payee could retake the chattel in the event of failure of payment, since that circumstance does not affect the absolute promise to pay, but merely gives the payee a choice of remedies when the note is due, especially under Negotiable Instruments Law (St. 1917, p. 1533, § 3086), providing that negotiability is not affected by giving the holder an election to require something to be done in lieu of payment of money.

Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

Action by the People's Bank against C. W. Porter. From a judgment for plaintiff, defendant appeals. Affirmed.

Ralph H. Lewis, of Sacramento, for appellant.

White, Miller, Needham & Harber, of Sacramento, for respondent.

BURNETT, J. Plaintiff brought an action on March 3, 1921, as indorsee and assignee of two certain promissory notes, dated August 21, 1920, appellant being the maker and the Eckley-Reynolds Company, a copartnership,

engaged in the tractor business, the payee thereof. Each note is for the sum of \$393, and is in the same form, except that one is made payable 6 months after date and the other 12 months after date. It will be sufficient to set out the former, as follows:

\$393. Sacramento, Calif., August 21, 1920.

"Six months after date without grace I promise to pay to the order of Eckley-Reynolds Co. at 531 Jay street, Sacramento, Calif., three hundred ninety-three dollars in gold coin of the United States of America, of the present standard value, with interest thereon in like gold coin at the rate of 8 per cent. per annum from date until paid, for value received, interest to be paid semiannually and if not so paid the whole sum of both principal and interest to become immediately due and collectible, at the option of the holder of the note, and in case suit or action is instituted to collect this note, or any portion thereof, I promise and agree to pay in addition to the costs and disbursements provided by statute, such additional sum in like gold coin, as the court may adjudge reasonable for attorney's fees to be allowed in said suit or action."

It was not claimed that any part of either of said notes was paid nor was it denied that plaintiff was an indorsee for value in good faith before maturity, but it was urged in defense that there was a breach of warranty of a tractor for which the notes were given, and that this defense could be maintained against plaintiff by reason of the fact that the notes were nonnegotiable.

The trial court found:

"That at the time of the sale, delivery, and indorsement of said promissory notes, and each of them, plaintiff had knowledge that said promissory notes were, and each of them was, given as part of the purchase price of said tractor, and had notice and knowledge that at the time of the execution and delivery of said promissory notes, and each of them, a contract had been entered into by defendant and said copartnership in the words and figures set forth as Exhibit A to plaintiff's answer to defendant's cross-complaint; that plaintiff, at the time of indorsement and delivery to it by said copartnership of said promissory notes, and each of them, had no notice or knowledge of any defect, if any there were, in the personal property for the purchase price of which said notes were given, and had no notice or knowledge of any total or partial failure of consideration for said promissory notes, or either of them; that plaintiff, at the time of said purchase, delivery, and indorsement to it of said promissory notes, and each of them, * * * had no notice or knowledge of any warranty or guaranty that had been given at any time by said copartnership to defendant, nor did it have notice or knowledge of any facts that put it upon inquiry as to any failure of consideration for said promissory notes, or either of them, or as to any warranty or guaranty made by said copartnership to defendant."

The sufficiency of the evidence to sustain the foregoing finding is not controverted, but its ordinary legal effect is deemed by appel-

lant to be nullified by the consideration that the contract of sale of said tractor provided that the title to the machine should remain in the vendor until the whole consideration was paid by the vendee.

[1] The question to be determined, then, may be stated in the language of respondent:

"Is the negotiability of a promissory note, having all the characteristics of a negotiable instrument, destroyed in the hands of an indorsee in due course who takes with knowledge that the note is given as part of the purchase price of a chattel, title to which is retained until the note is paid?"

The situation is the same as though there had been written into each of said notes the following clause:

"This note is given as part of the purchase price of a Kordell tractor this day delivered to the maker of this note, title to which tractor shall remain in the payee until this note, with all costs, expenses and attorney's fees for the collection thereof, has been fully paid when same shall become vested in the buyer."

As to the negotiability of such note, a conflict of authority exists, although the weight and number of authorities decidedly preponderate in favor of respondent's contention, as pointed out in its brief. From the citations therein we may quote from Daniels on Negotiable Instruments (6th Ed.) § 52, and 3 R. C. L. p. 917. From the former:

"Where in a note the obligation to pay is not limited or contingent, but is absolute and unequivocal, the character of the note as a negotiable instrument is not affected by a recital therein that it was given for an amount due by the makers for goods furnished by the payee, upon a reservation of title as upon a conditional sale."

The latter declares:

"It seems to be a settled rule that the negotiability of a note is not destroyed merely because, in addition to the promise to pay, it contains a statement that the title to the property for which the note is given is not to pass until the note is paid."

Respondent claims—and we think with reason—that the framers of the Uniform Negotiable Instruments Law, which has been adopted in this state (Stats. 1917, p. 1531), had in view this conflict of authority and sought to render the negotiability of such notes unquestionable by providing (section 3084, Civ. Code) that—

"An unqualified order or promise to pay is unconditional within the meaning of this act, though coupled with— * * *

"2. A statement of the transaction which gives rise to the instrument."

Indeed, in Brannon's Negotiable Instrument Law (3d Ed.) p. 477, it is said:

"The real purpose of this clause, as we learn from Mr. Crawford, who drafted the act, and from Judge Brewster, is to cover the case of

a note which contains a statement that it is given for a chattel, which is to be the property of the owner of the note until the note is paid. Such notes are usually regarded as negotiable. Several states, however, have taken the opposite view, holding that such notes are nonnegotiable, and it was to bring the latter states into accord with the more general view and unify the law on this point that this clause was inserted."

But whether such was the purpose is, of course, of little interest here, since we have no direct adjudication in this state upon the subject. Our courts are certainly at liberty without any embarrassment from the conflicting decisions of other jurisdictions to give a reasonable construction to said provision, so as to effectuate the intention of the parties to be gathered from a consideration of the whole transaction. For, after all, such intention is the vital question, and the only reason for considering at all the circumstance that the payee retained the title is that thereby the promise to pay may be rendered conditional. The notes, as we have seen, do not refer to said contract of sale, but contain an unconditional and absolute promise to pay at a certain time. But, considering together all the instruments as constituting one transaction, we do not discover an intention to make the payment dependent upon any contingency. Assuredly, there is no express language to the effect that the maker was to pay upon condition that the payee could and would transfer title at the time of the maturity of the notes. If such had been the intention of the parties it should have been, and we must assume it would have been, so written. If any such condition is to be imposed upon the payment of the notes, it must be the result of a reasonable implication of the said reservation. But such implication is strongly rebutted by the circumstance that one of the notes was to be paid six months before the absolute title was to pass. As to this note there can be no pretense that its payment was dependent upon any future contingency as to the title or otherwise. And as to both notes it should be said that the absolute promise made therein in simple, unequivocal language is not to be reduced or cut down to a conditional or contingent obligation by reason of a doubtful construction of an uncertain term in another part of the instrument.

But, assuming that the actual consideration for the notes was the transfer of the title to the machine at the time of their maturity, and not the promise to do so, it would not destroy their negotiability. A written promise to pay a certain sum of money at a day certain for a consideration thereafter to be rendered is a good promissory note.

"The most that can be said of a recital in a note itself, of the consideration on which it rests, is that the indorsee, taking it before

maturity, is chargeable with notice of the recital. But a recital that it is given for some future thing to be done by the payee is not enough to advise an indorsee before maturity that there will be a failure of consideration." *Siegel et al. v. Chicago Trust & Sav. Bank*, 131 Ill. 569, 23 N. E. 417, 7 L. R. A. 537, 19 Am. St. Rep. 51.

So in *Splivallo v. Patten*, 38 Cal. 138, 99 Am. Dec. 358, it was held that a note given for the rental of property is negotiable, and that an indorsee of the note, though he takes it with knowledge of the consideration, is not subject to the defense that the original payee failed to give possession of the property for the rental of which the note was given. Appellant's position really amounts to an assault upon the consideration for the payment of the notes. It is virtually the claim that the obligation to pay the notes may not mature by reason of the failure or inability of the vendor to convey title. But there can be no doubt that such possible failure of the consideration cannot defeat the right of an indorsee in good faith and for value to recover.

[2] Manifestly the question must relate to the situation at the time the notes were given. What may happen later will not affect their negotiability. *Pitman v. Walker* (Cal. Sup.) 203 Pac. 739.

"An instrument negotiable in its origin continues to be negotiable until it has been restrictively indorsed or discharged by payment or otherwise." *Stats.* 1917, p. 1539, § 3128.

We think it clear that the parties intended no qualification of the promise to pay, but said provision that the title should be withheld was for the protection of the vendor to secure the payment of said notes. The only question, as we view the case, is whether this amounted to a mortgage in the sense of the statute requiring foreclosure to secure the payment of the indebtedness. Section 726, Code Civ. Proc.

[3] The rule in this state is that, where a note is secured by a mortgage, the note, although negotiable in form, is not negotiable in law where the purchaser takes it with knowledge of the existence of the mortgage. *National Hardware Co. v. Sherwood*, 165 Cal. 1, 130 Pac. 881. But this undoubtedly refers to a mortgage executed in compliance with the requirements of the Civil Code. We have no such mortgage herein. It is true that in some of the decisions a similar situation is characterized as involving a mortgage, and it does possess, of course, the common feature of security. For instance, while in *Chicago Railway Co. v. Merchants' Bank*, 136 U. S. 268, 10 Sup. Ct. 999, 34 L. Ed. 349, after stating that the negotiability of the note was not affected by the fact that the title to the cars for which it was given remained in the vendor until all the notes of the same series were fully paid, the Supreme Court of the United States declared that the

agreement for the retention of the title constituted a short form of chattel mortgage, it is entirely plain that it was not technically a chattel mortgage within the contemplation of the law of this state. Section 2956 et seq., Civ. Code. Indeed, it is not claimed by appellant that a foreclosure would be required to enforce the obligation, and no such issue was raised by the pleadings, appellant admitting that:

"In the event the vendor at any time should desire to retake the possession of the tractor, such vendor could do so, and, in the event he did take possession and allowed the installments to fall due under the contract, the delivery of the possession of the tractor and the payment of the balance due under the contract would be mutual and concurrent conditions, and the vendor could not recover the balance due under the contract until the possession of the said tractor had been either tendered or delivered to the vendee"—citing *Liver v. Mills*, 155 Cal. 462, 101 Pac. 299, and *Muncy v. Brain*, 158 Cal. 307, 110 Pac. 945.

It may be stated finally as to this branch of the case that the rule making a note secured by a mortgage nonnegotiable is peculiar to this state, and is based upon the theory that the note amounts to a promise to pay the balance of the indebtedness that may remain after the net proceeds of the sale under foreclosure have been applied to the payments thereof. The amount of such balance being, of course, uncertain at the time of the execution of the note, it cannot be said that the promise is to pay a certain and definite sum of money. In such case an essential element of a negotiable instrument is therefore lacking. *Meyer v. Weber*, 133 Cal. 681, 65 Pac. 1110.

Respondent very aptly declares that the cases cited by appellant fall naturally into three classes, and illustrate certain definite principles of law as follows:

[4] (1) Where the note upon its face is made subject to the terms of another instrument such provision is an intentional warning given by the maker to any prospective indorsee that the promise to pay is conditional upon or subject to the performance of the collateral agreement referred to. Among the cases of this character cited by appellant, *Klots Throwing Co. v. Mfrs'. Co.* 179 Fed. 813, 103 C. C. A. 305, 30 L. R. A. (N. S.) 40, and *Fleming v. Sherwood*, 24 N. D. 144, 139 N. W. 101, 43 L. R. A. (N. S.) 945, may be taken as examples. In the former, the note specifically recited that it was "subject to terms of contract between maker and payee of October 25, 1905." Therein the court said:

"It is not too much to hold that when a promise is expressly limited by a provision in the note itself, assignees should take it subject to such limitation. In our opinion, the special stipulation in the present note limits and qualifies the obligation to pay so that it is not ab-

solute, but is a prima facie obligation subject to be defeated by the maker's defenses."

In the latter the note recited:

"Payee's ownership of goods account of which this note is given, the account thereof and contract condition of original sale are not affected by accepting this note until receipt of the full amount due thereon."

It is to be observed also that in the decision the court makes a distinction between "title" and "ownership," stating that, while there is a conflict of authorities as to whether the reservation of title makes the note negotiable, there is no authority holding a note negotiable where it recites that "ownership"—that is, title and possession—was reserved. We may add that in the case at bar it is not disputed that possession of the tractor was delivered to the maker of the note.

[5] 2. When all the contemporaneous instruments constituting the transaction and known to the indorsee make it clear that the promise to pay is conditional upon the performance of certain acts by the payee. Of this line of cases we may refer to *Robertson v. Kochtitzky* (Mo. App.) 217 S. W. 543, and *Dyer v. International* (C. C. A.) 262 Fed. 296. In the former the court declared:

"The note involved here does not fall within the Negotiable Instrument Law (Laws 1905, p. 243). As it reads, it is a promissory note with conditions attached that take away from it its negotiability in that it expressly refers to and covers a contract outside of the note itself and made part of it."

It may be added, however, that therein the action was between "the original parties to the note," so that the rights of a purchaser in good faith for value were not involved.

In the *Dyer* Case, supra, the contract between the original parties provided that the money for which the note was given should not be paid until a certain transfer of property should be made and the evidence showed that said note and contract constituted one transaction of which the indorsee had notice. It was properly held that the note was nonnegotiable.

[6] 3. Whenever the note (or some collateral agreement known to the indorsee) makes the note payable whenever the payee deems himself insecure the due date is usually held to be uncertain, and the note nonnegotiable. For instance, in *Reynolds v. Vint*, 73 Or. 528, 144 Pac. 526, the Supreme Court of Oregon declared:

"A note providing, as the note in suit does, that whenever Reynolds or his agents deem the note insecure they shall have the power to declare it due, even before maturity, is nonnegotiable."

The same court followed the same rule in *Western, etc., Co. v. Burnett*, 82 Or. 174, 161 Pac. 384, wherein the note provided that the payee or assigns "are hereby fully authorized

and empowered to declare this note due any time they may feel insecure."

[7] We can see no merit in the suggestion that the notes were rendered nonnegotiable by the fact that the payee could retake the tractor in the event of failure of payment. That circumstance does not affect the absolute promise to pay. It simply gave the payee a choice of remedies when the notes became due, either to reclaim the chattel or to sue for the money. Indeed, section 3086 of the Civil Code (Stat. 1917, p. 1533) provides that the negotiable character of an instrument otherwise negotiable is not affected by a provision which "gives the holder an election to require something to be done in lieu of payment of money." So long as the maker's promise to pay is unconditional, and absolute it makes no difference that the payee may not require payment, but may resort to another remedy.

It is undoubtedly true, in the language of respondent, that—

"Out of the necessities of trade and credit has grown the rule that an unconditional written promise to pay a sum certain at a fixed date for practical purposes shall be regarded as money itself, so that, until nonpayment at maturity has raised some question as to the validity of the promise to pay, the note may pass from hand to hand free from defenses against original parties, its value determined only by the financial responsibility of the maker, and by the rate of interest to be paid. If, however, the note itself, or some other written or oral understanding between the original parties of which the indorsee has notice, makes the time or amount of payment, or payment itself, uncertain or conditional, the instrument loses its character as mere future cash—that is, loses its negotiability—and the purchaser takes the instrument subject to all defenses existing between the original parties."

Within the contemplation of the foregoing principles we think the judgment should be affirmed; and it is so ordered.

We concur: FINCH, P. J.; HART, J.

(57 Cal. App. 721)

PEOPLE v. ANDERSON. (Cr. 857.)

(District Court of Appeal, Second District, Division 2, California. May 20, 1922.)

1. Homicide $\S$ 244(1)—Facts showed that defendant did not shoot deceased under fear of being killed or suffering injury at deceased's hands.

In a murder prosecution, evidence held such that the jury was fully warranted in its conclusion that the circumstances were not sufficient to excite the fears of a reasonable person, and that defendant did not shoot deceased under fear of being killed or of suffering great bodily injury at his hands.

2. Homicide $\S$ 110—Simple assault does not justify homicide.

A simple assault does not justify homicide.

3. Homicide $\S$ 276—Whether killing was in self-defense for jury.

Where the evidence in a murder prosecution showed that defendant stated, shortly before the killing, that he would "kill me a Wop to-night," the jury might have inferred that defendant shot deceased with a predetermined design to kill, and waited until deceased's hostility might create apparent necessity for taking life, and the question of self-defense was for the jury.

4. Homicide $\S$ 174(7)—Evidence of all circumstances of flight, including shooting bystander, held admissible.

In a murder prosecution, permitting the state to show all the circumstances attending the flight of defendant from the scene of the homicide, including the shooting of a bystander, who jumped on the running board of defendant's car as the latter was about to drive away, was not error.

5. Criminal law $\S$ 351(3)—Evidence of flight admissible as tending in some degree to prove consciousness of guilt.

Flight of an accused raises no presumption in law of guilt, but is admissible as tending in some degree to prove consciousness of guilt, and is received, not as part of the res gestae, but as indicative of a guilty mind.

6. Criminal law $\S$ 361(3)—Accused may show flight consistent with innocence.

Where evidence of flight of the accused had been admitted, the accused could explain it and show that it was consistent with his innocence, and the state may show the circumstances connected with the flight which would strengthen its probative value as showing guilt.

7. Homicide $\S$ 171(3)—Evidence of offenses other than for which defendant on trial inadmissible.

Evidence of offenses other than the one for which defendant is on trial is not admissible, but where the case is such that proof of one crime tends to prove any fact material in the trial of a person accused of another crime, such proof is admissible, and the fact that it may tend to prejudice defendant in the minds of the jury is no ground for its exclusion.

8. Criminal law $\S$ 351(4)—Willful resistance to authorized arrest a crime.

Willful resistance to arrest by an authorized officer, who is discharging or attempting to discharge his duty, is a crime under Pen. Code, $\S$ 148, if made by one who is placed on trial for the particular crime for which the officer sought to make the arrest, and may be shown in evidence against the accused, as tending to show his consciousness of guilt.

9. Criminal law $\S$ 686(1)—Permitting state to reopen its case in chief and introduce evidence of autopsy not error.

In a murder prosecution, permitting the state to reopen its case in chief and to introduce testimony as to the course of the bullet

through the body of deceased, which had been exhumed, after the commencement of the trial, was not error.

10. Criminal law §686(1)—Defendant, having been given opportunity to examine exhumed body of deceased, could not complain as to court's action in reopening of case to show course of bullet.

In a murder prosecution, where the state was permitted to reopen its case in chief and introduce testimony as to the course of the bullet in deceased's body, defendant, having declined the offer of the court to take such measurements on the exhumed body as he might desire, could not complain that he was prejudiced by the court's action.

11. Criminal law §829(5) — Where law of self-defense fully covered by instruction given, refusal of instruction on self-defense not error.

In a murder prosecution, where the court's instruction fully covered the right of self-defense, the refusal of defendant's instruction on self-defense was not error.

12. Homicide §109—Killing in self-defense not unlawful.

Under Pen. Code, § 187, murder is the unlawful killing of a human being, and under section 192 manslaughter also is the unlawful killing of a human being, but if one kills in self-defense, the killing is not unlawful.

13. Criminal law §829(5)—Instruction held tantamount to instruction that state must prove defendant did not shoot in self-defense.

Where defendant relied on self-defense, an instruction that the jurors should acquit unless they believed that the prosecution had proved defendant's guilt beyond a reasonable doubt as charged was tantamount to an instruction that the jury must acquit unless the prosecution satisfied the jurors beyond all reasonable doubt that the killing was unlawful, that is, without justification, which was equivalent to saying that the prosecution must prove beyond a reasonable doubt that defendant did not shoot in self-defense.

14. Homicide §300(3) — Where survivor claimed self-defense, refusal of instruction as to who was aggressor and as to communicated and uncommunicated threats not error.

Where defendant claimed self-defense, the refusal of an instruction that, where one is killed in a deadly encounter and the survivor claims self-defense, the question as to who was the aggressor is of vital importance, and all acts of hostility or threats communicated or uncommunicated are proper to be considered by the jury, was not error.

Appeal from Superior Court, Los Angeles County; Frederick W. Houser, Judge.

Charles W. Anderson was convicted of manslaughter, and he appeals. Affirmed.

Fred H. Thompson, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Arthur Keetch, Deputy Atty Gen., for the People.

FINLAYSON, P. J. Defendant, who was charged with murder and convicted of manslaughter, appeals from the judgment, and likewise from an order denying him a new trial.

The homicide consisted in the killing of one G. B. Armanda on July 17, 1921, shortly after midnight, at the Montebello oil fields in Los Angeles county, and after defendant, the deceased, and three other workmen had left their work upon a well which they were drilling for the Union Oil Company. The killing, which was done by shooting Armanda as the latter stood facing defendant, who was seated in his automobile, was admitted; but it was claimed that it was done in necessary self-defense.

As is usual in such cases, there was a sharp conflict in the evidence. The version of the tragedy and of the events leading up to it, as given by witnesses for the prosecution—whose testimony, in view of the verdict of conviction, must be deemed to have been accepted by the jury as true—is substantially as follows: Defendant was the foreman of a crew of oil drillers at work on an oil rig of the Union Oil Company near Montebello. He had under him a crew of about four men, one of whom was the decedent. Work on the well was done by crews working in shifts. Defendant and the four men under him had the night shift, working eight hours, from 4 o'clock in the afternoon until 12 o'clock at night. On the evening of July 15, 1921, the men under defendant's charge were talking among themselves in a joking manner about matters pertaining to the marriage relation. In the course of the conversation the deceased jokingly said something which defendant interpreted as a reflection upon the legitimacy of his birth. Taking umbrage at the remark, defendant struck deceased a blow in the face while the latter was seated at a work table. Though mutual explanations followed, and defendant apologized for his hasty act, it is evident that the event left feelings of resentment ranging in the breast of each. The next day the deceased, whose fellow workmen had nicknamed him the "Wop" told defendant not to call him "Wop" any more, but to address him by his given name. Later in the evening defendant, apparently speaking to himself, was heard to say: "I see where I am going to kill me a Wop to-night." At midnight of that day, July 16, 1921, defendant, the deceased, and the three other men who constituted the night shift ceased their work on the well and went into the "dog house," where they changed their clothes preparatory to leaving the oil rig and going to their respective homes in automobiles which were parked near by. After they had changed their clothes the five men went out the back door together; defendant, preceding

the others, bidding them "good night." About this time the deceased, who had come out of the "dog house" with the others, spoke up, saying to defendant:

"You are going to kill you a Wop to-night? I guess I am the Wop. Now if you want to have this out, fight it out like a man."

Still addressing defendant, who now had his hand on his hip pocket, the deceased said:

"If you want to fight it out like a man, take your hand off that knife, and we will fight it out like a man—settle the argument."

Defendant made no reply, but, still keeping his hand on his hip pocket, walked backward up the slope of a hill toward where his automobile was parked, followed, for a short distance, by the deceased. Defendant continued to back up the hill until he found that he was not going in the right direction, when he turned and walked to his car, stepped into it, and seated himself at the steering wheel. Decedent stopped and stood still while defendant thus walked to his car. Meanwhile one V. E. Gardner, a fellow workman in whose automobile the deceased had intended returning to his home, started the motor of his car. As Gardner started his engine, the deceased turned and walked toward Gardner's car, which, while being driven down the hill toward Montebello, was slowed down so as to permit the decedent to get in. In the meantime defendant, who had started his car, stopped it directly in front of and across the path of Gardner's car, blocking the latter's passage and causing him to come to a stop about five feet from defendant's car. As Gardner's car thus came to a stop, the deceased, with his foot on the running board of Gardner's car, put his lunchpail in his friend's machine, and was standing on the running board preparatory to stepping into the car, when defendant, from his car four or five feet away, called out to the deceased, saying:

"You are a son of a bitch; you are a God damned son of a bitch."

He repeated this three or four times. Deceased replied in kind, saying:

"You are not a son of a bitch; your mother was a cow."

The deceased then took his foot from the running board of Gardner's car and started toward defendant, who was still sitting in his car. Standing some four or five feet from defendant's car and shaking his finger at defendant, but making no other hostile gesture or demonstration, the deceased, addressing defendant, said:

"Now look here, we have got to be at work to-morrow, and we have got to work together; God damn it, we are going to get along, and I just want you to understand that."

The deceased repeated this statement several times. Defendant said something in reply, when the deceased, stooping down, picked up a clod of dirt and said to defendant, "Don't you pull that knife on me or I will crown you," or, "If you draw a knife I will brain you." According to the witnesses for the prosecution, the deceased, though he told defendant that he would "crown" him if the latter "pulled" his knife, made no threatening gesture when he spoke; he did not lift his arm as though to strike defendant or to hit him with the clod of dirt that he had picked up, but kept both hands at his side. As the deceased thus stood four or five feet from where defendant was seated in his car, and while telling defendant not to "pull" a knife on him or he, the deceased, would "crown" him, there came a flash from defendant's pistol, and Armanda fell, mortally wounded. Gardner immediately sprang from his car and started to Armanda's assistance, but, noticing a spot of blood on the latter's shirt just over the heart, he jumped on the running board of defendant's car and tried to stop defendant, who, starting his car forward immediately after shooting Armanda, was leaving the scene of the tragedy. As Gardner jumped on the running board of defendant's car, he said to the latter: "Anderson, you have killed him; you better stop." Gardner had barely finished his admonition to defendant to stop when another shot rang out, and Gardner fell, shot through the shoulder with a bullet from defendant's pistol. Defendant then drove away in his machine toward his home in Montebello, where later he was arrested. The testimony respecting the shooting of Gardner went in over defendant's objection that it was not a part of the res gestæ, and was incompetent and irrelevant.

Appellant contends: (1) That the verdict is contrary to law and the evidence; (2) that the court erred in permitting the prosecution to introduce evidence of the shooting of Gardner; (3) that the court erred in permitting the prosecution to reopen its case and introduce certain testimony as to the course taken by the bullet through Armanda's body, which was exhumed after the introduction of the people's case in chief; and (4) that the court erred in refusing certain instructions requested by defendant.

[1-3] There is no merit in the claim that the verdict is against law and the evidence. Because he was seated in his automobile when he fired the fatal shot, appellant says that he had all the rights of a person in his castle, and that he was under no obligation to retreat, but could stand his ground and repel force with force. Without doubt, appellant had the right to stand his ground and to kill Armanda if, to a reasonable person, circumstanced as defendant was, that seemed necessary in order to save his own

life or to save him from great bodily harm. But it was never claimed by the prosecution that appellant should retreat. Nor was it ever claimed that he would not be justified in shooting Armanda from where he sat in his car if the circumstances, as they appeared to him, were sufficient to excite the fear of a reasonable person that the deceased meant to kill him or to do him great bodily harm, and if he acted under the influence of such fear alone. What the prosecution contended was that the circumstances confronting appellant were not such as to excite the apprehension of a reasonable person. According to the witnesses for the prosecution, the deceased did not threaten to injure appellant at the time when the latter fired the fatal shot. The details of the tragedy, as recounted by the people's witnesses, were such that the jury was fully warranted in its conclusion that the circumstances were not sufficient to excite the fears of a reasonable person, circumstanced as defendant was, and that appellant did not shoot Armanda under the influence of any fear of being killed or of suffering great bodily injury at the hands of Armanda. It is true, deceased had picked up a clod of dirt, but he held it at his side, saying no more to appellant than that he would "crown" him if he drew a knife, or words to that effect. The fact that the deceased had a clod of dirt in his hand, which he held at his side and threatened to use only in the event that appellant should draw a knife, did not necessarily justify appellant in taking Armanda's life in defense of his own. A simple assault does not justify homicide. *People v. Webster*, 13 Cal. App. 349, 109 Pac. 637. Whether the killing was done in self-defense was a question for the jury, who, from appellant's remark that he would "kill me a Wop to-night," might well have inferred that he shot Armanda with a predetermined design to kill, and that he but bided his time until decedent's hostile feelings might create the semblance of a necessity for taking life. All the circumstances and their full significance were for the jurors to determine and weigh; and their verdict, having substantial evidence to support it, cannot be disturbed unless it be vitiated by some erroneous ruling of the court.

[4-6] The court did not err in permitting the prosecution to show all the circumstances attending the flight of appellant from the scene of the homicide, including the shooting of Gardner, who, it will be recalled, jumped on the running board of appellant's car as the latter was about to drive away from the scene, and said to him, "Anderson, you have killed him; you better stop." While the flight of an accused raises no presumption in law that he is guilty, it is admissible in evidence as a circumstance to be weighed by the jury as tending in some degree to prove consciousness of guilt, and is

entitled to more or less weight according to the circumstances of the particular case. Evidence of flight is received, "not as a part of the *res gestæ* of the criminal act itself, but as indicative of a guilty mind." *Roscoe*, Cr. Ev. 18. See, also, *People v. Giancoli*, 74 Cal. 644, 16 Pac. 510. For the same purpose the events and circumstances connected with the flight of the accused are equally admissible as a part of the *res gestæ* of the flight. The accused may explain his flight and may show that it was entirely consistent with his innocence; and in a like manner the people may introduce evidence of the circumstances connected with the flight which will strengthen its probative value as tending to show the guilt of the accused. *Ford v. State*, 129 Ala. 16, 30 South. 27; *Johnson v. State*, 120 Ga. 135, 47 S. E. 510. One conscious of his innocence is less liable to use a lethal weapon to avoid detention or to facilitate his escape from the scene of a tragedy than is one who fears the consequences of his guilty act.

[7, 8] It is, of course the general rule that evidence of offenses other than the one for which the defendant is on trial is not admissible. But where the case is such that proof of one crime tends to prove any fact material in the trial of a person accused of another crime, such proof is admissible, and the fact that it may tend to prejudice the defendant in the minds of the jury is no ground for its exclusion. Appellant's conduct, when he was informed by Gardner that he had killed Armanda and was counseled to stop, was a circumstance proper to be brought to the knowledge of the jury, not for the purpose of showing that defendant was guilty of the additional crime of assault with intent to commit murder, but for the purpose of determining whether such conduct was or was not an indication of guilt of the crime charged; and it matters not that the evidence tended to show that the defendant was guilty of another and distinct offense. Willful resistance to arrest by a public officer who is authorized to make the arrest and who is discharging or attempting to discharge a duty of his office is a crime (Pen. Code, § 148); and yet such resistance, if it be made by one who is placed on trial for the particular crime for which the officer sought to make the arrest, may be shown in evidence against the accused as tending to show his consciousness of guilt. *State v. Lambert*, 104 Me. 394, 71 Atl. 1092, 15 Ann. Cas. 1055; 16 C. J. p. 553.

[9, 10] It was not error to permit the prosecution to reopen its case in chief and to introduce the testimony of the county autopsy surgeon and others as to the course taken by the bullet through the body of the deceased, which had been exhumed after the commencement of the trial. It was within the discretion of the court to allow the dis-

trict attorney to reopen the case for further testimony. And since no abuse of discretion appears, there was no error. In granting the prosecution leave to reopen its case the trial judge expressly stated that, in the interest of justice, defendant would be given the opportunity to make such measurements on the exhumed body as he might desire. Appellant's counsel saw fit to decline this offer, and he cannot now be heard to say that his case was prejudiced by the court's action.

[11] Complaint is made that the court erred in refusing to give certain instructions proposed by defendant bearing upon the question of self-defense. The law upon that subject was fully and fairly presented to the jury by the instructions which were given. All the necessary, fundamental, and essential legal propositions relating to the situation were clearly and fully presented in the court's instructions, including the nature of the charge against defendant, the definition of the various offenses contained therein, the necessity of the prosecution proving beyond all reasonable doubt every material element of any crime contained within the information before the jury would be warranted in finding a verdict of guilty, the presumption of innocence attending the defendant at all stages of the case, the right of the jury to determine the credibility of the witnesses and the weight of evidence, the definition of reasonable doubt, the right of self-defense, including the doctrine of appearances—in fact, everything which the situation seemed to demand. The instructions upon the law of self-defense, which were requested by defendant and refused by the court, if given, could not have thrown any more light upon that question than was furnished by the instructions allowed and read to the jury. Their rejection, therefore, was not error.

[12, 13] It seems to be appellant's contention that the court should have instructed the jury, in so many words, that the burden of proof was upon the prosecution to show that defendant did not kill Armanda in self-defense. Appellant cannot claim that the instructions given by the court placed upon him the burden of proving justification by showing a case of self-defense. Nowhere in its charge did the court say anything which, by any stretch of the imagination, might be construed as an intimation that the burden was upon defendant to justify the homicide by showing self-defense. On the

contrary, the jury was instructed, in effect, that the burden was upon the prosecution to show that the killing was not done in self-defense. In its charge to the jurors the court specifically instructed them that it was their duty to acquit the defendant unless the prosecution proved his guilt "beyond a reasonable doubt * * * *in the manner and form as charged.*" The information charged that defendant did "unlawfully" kill one G. B. Armanda. Murder is the "unlawful" killing of a human being. Pen. Code, § 187. So, also, is manslaughter the "unlawful" killing of a human being. Pen. Code, § 192. If one kills in self-defense the killing is not "unlawful." From this it follows that the instruction to the effect that it was the duty of the jurors to acquit unless they believed that the prosecution had proved defendant's guilt beyond a reasonable doubt, "in the manner and form as charged," is tantamount to an instruction that the jury must acquit unless the prosecution, by proof satisfying the minds of the jurors beyond all reasonable doubt, shall prove the killing to have been "unlawful," that is, without justification, which is equivalent to saying that the prosecution must prove beyond a reasonable doubt that the defendant did not shoot in self-defense.

[14] Defendant requested an instruction to the effect that where one is killed in a deadly encounter and the survivor claims that the killing was in self-defense, the question as to who was the aggressor is of vital importance, and all acts of hostility or threats "communicated or uncommunicated" are proper to be considered by the jury. In refusing to give this instruction the court did not err. While it is true that there is some evidence to the effect that prior to the day of the homicide the deceased had complained to his fellow workers of defendant's domineering conduct and spoke of him in disrespectful terms, there is no evidence that he ever made any threat to kill defendant or to do him bodily harm. For this reason we need not discuss the question whether the requested instruction involved a strictly accurate abstract statement of the law, for it is clear that it is not applicable to the evidence, and doubtless for that reason was rejected by the court.

The judgment and the order denying a new trial are affirmed.

We concur: WORKS, J.; CRAIG, J.

apply on the tonnage removed during the month in which such payment is made, *held* a sale for \$7,500 of the fertilizer in bulk, rather than by the ton; the \$1 per ton provision being merely to prevent removal of the fertilizer more rapidly than paid for.

In Bank.

Appeal from Superior Court, Los Angeles County; J. P. Wood, Judge.

Action by B. Farrell against E. A. Parkford. Judgment for plaintiff, and defendant appeals. Affirmed.

A. L. Abrahams and P. B. D'Orr, both of Los Angeles, for appellant.

Fred L. Dreher, of San Francisco, and James, Pace & Smith, of Los Angeles, for respondent.

RICHARDS, Justice pro tem. This appeal is from a judgment in the plaintiff's favor in an action brought to recover the sum of \$4,500 with interest alleged to be the balance due plaintiff upon a certain contract in writing for the purchase by the defendant from the assignor of plaintiff of certain manure and fertilizer, upon a certain portion of a ranch in Nevada known as the "Marker Field." The defendant in his answer admits the making of said contract, but denies that the plaintiff's assignor performed the conditions and covenants therein contained to be by her kept and performed; and denies that any sum whatever remains or is due thereon. As a special defense the defendant alleges the making of certain representations by the manager of said ranch who was the agent and representative of the plaintiff's assignor during the negotiations leading up to said contract as to the amount of manure and fertilizer upon said portion of said ranch covered by said contract, upon which representations said defendant alleges that he relied in entering into the same, and which proved to be false and untrue. The defendant also, and as a further and separate defense, alleged that said contract was entered into under a mutual mistake of fact on the part of the parties thereto as to the amount in tonnage in manure and fertilizer upon said premises, and that to the extent of that mistake the consideration of said contract had failed. The cause proceeded to trial upon the issues as thus framed, at the conclusion of which the trial court made its findings of fact and conclusions of law, wherein the court found that the parties had entered into the contract as alleged and admitted in their respective pleadings, and that plaintiff's assignor had fully performed the covenants and conditions thereof to be by her performed; that the plaintiff's assignor or her agents or representatives had made no false or fraudulent representations as to the subject-matter of said

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FARRELL v. PARKFORD. (L. A. 7076.)

(Supreme Court of California. Sept. 15, 1922.)

Sales 71(3)—Contract for sale of fertilizer construed to constitute sale in bulk.

A contract for the sale of all the fertilizer on a certain farm, to be removed within a year, for \$7,500, providing for the payment of \$1,000 at execution of contract and \$500 each month thereafter, \$1 to be paid for each ton of fertilizer removed, and the \$500 payments to

contract as alleged in the said defendant's separate answer and defense, nor had the said defendant relied upon any such representation in entering into said contract; that said contract was not entered into under any mutual belief or mistake of the parties as to the amount of material forming the subject-matter of said contract, and that no such belief or mistake was the moving cause of the execution of the same; and that there was no failure of consideration on the part of plaintiff's assignor for the same. The court further found that the defendant by the terms of said contract purchased from the plaintiff's assignor in bulk all of the manure and fertilizer on the premises named in the contract for the total sum of \$7,500, upon which purchase price thereof the sum of \$3,000 had been paid according to the terms and at the times specified in said contract, but that no further payments had been made thereon, and that there remained and was due and payable thereon the sum of \$4,500, with interest, which principal and interest amounted in the aggregate to the sum of \$5,077.84, for which sum judgment was accordingly ordered and entered. It is from such judgment that the defendant has taken and prosecutes this appeal.

The first contention of the appellant is that under the terms of the contract in question, as properly construed, the purchase price of the said manure and fertilizer to be purchased by him was to be calculated at the rate of \$1 per ton thereof upon said premises, and removed by him therefrom up to the amount of 7,500 tons, and that in fact there proved to be but about 2,500 tons of said material thereon, of which said defendant had removed but 2,280 tons, and for which plaintiff's assignor had been fully paid, and in fact overpaid; and that the deposit of said material having been exhausted he was not liable to pay the plaintiff any more money upon said contract. This contention requires examination of the terms of said contract with a view to its proper interpretation. The first clause in said contract provides:

"That in consideration of the money to be paid at the time and in the manner hereinafter mentioned, the said party of the first part hereby sells, assigns, and transfers to the party of the second part, all manure and fertilizer on that part of the Rodgers or Reservation ranch in section 23, and known as the 'Marker Field'; and hereby agrees to allow the party of the second part a period of one (1) year from the first day of November, nineteen hundred and eighteen, and up to the first day of November, nineteen hundred and nineteen, in which to remove the said manure and fertilizer from the said land."

It then proceeds to provide that—

"The party of the second part agrees and covenants with the party of the first part as follows:

First: To pay the party of the first part as the purchase price for all of said manure and fertilizer on the land described, the sum of seven thousand five hundred (\$7,500.00) dollars at the times and in the manner following, that is to say:

"One thousand (\$1,000.00) dollars to be paid on the signing of this contract, and at least five hundred (\$500.00) dollars on the first day of January, 1919, and a like sum of five hundred (\$500.00) dollars on the first day of February, 1919, and on the first day of each succeeding month. The said payments of five hundred (\$500.00) dollars being minimum payments on this contract, and shall apply upon the payment of the purchase price which shall be made as follows:

"The party of the second part shall pay or cause to be paid to the party of the first part, one (\$1.00) dollar for each ton of manure removed from the said ranch until the whole of said purchase price has been paid. Provided, however, that in making settlement, the five hundred (\$500.00) dollar payments shall apply on the tonnage removed during the month in which said five hundred (\$500.00) dollar payment is made."

It seems to us clear that the interpretation of the foregoing provisions of said contract which the trial court placed upon them must be upheld. The plaintiff's assignor agreed to sell, and the defendant agreed to buy, all of the manure and fertilizer upon the designated premises, and agreed to remove the same within a period of one year from November 1, 1918. For this bulk amount of said material the defendant agreed to pay the sum of \$7,500. He was to make this payment at the times and in the manner following: \$1,000 upon the date of the execution of the contract; \$500 on January 1, 1919; and a like sum on the first day of each succeeding month until the whole purchase price of said material had been paid. These monthly installment payments were, however, to be minimum payments, since the defendant was to pay for said material as he removed the same, at the rate of \$1 for each ton of said material removed from the said ranch, until the whole of said purchase price had been paid; thereafter whatever remained of said material upon said premises belonged to said defendant without further payment, subject to the necessity of the removal of the same by him within the period of one year from November 1, 1918. Such was the plain intentment of this contract. The requirement therein that \$1 per ton was to be paid upon the removal of the manure was not inserted therein for the purpose of fixing a tonnage valuation thereon, but was evidently inserted for the protection of the seller against the removal of any large portion of said material without payment therefor within the month of such removal. The amount of said material so contracted for in bulk upon said premises was possible and entirely susceptible of

estimation as to its probable tonnage by the parties to the contract. If that tonnage did not measure up to the defendant's estimate and anticipation, that, in the absence of any fraud or misrepresentation on the part of the other contracting party, was entirely the defendant's concern. In this aspect of the case it differs in no respect from the purchase of any other specific article of personal property for a fixed price for the whole; as of a herd of ranch cattle (*Cole v. Smith*, 26 Colo. 506, 58 Pac. 1086); or an entire lot of goods in a certain warehouse (*Brawley v. U. S.*, 96 U. S. 168, 24 L. Ed. 622); or of all the lumber of the seller than on hand in a certain mill (*Inman Bros. v. Dudley, etc.*, *Lumber Co.*, 146 Fed. 449, 76 C. C. A. 659); or all of the coal in place in a certain ledge (*Timlin v. Brown*, 158 Pa. 606, 28 Atl. 236). In every such case the contract is held to be only for the sale of the specific article or articles in bulk for a gross price, and the fact that upon delivery the thing sold proves less in number or weight or measurement than was the estimate of the parties at the time of the purchase, furnishes no defense against the payment of the entire purchase price, in the absence of fraud or misrepresentation upon the part of the seller. The foregoing authorities fully sustain this doctrine, and in fact go so far as to give it application in cases where the quantity is estimated with the qualification of "about," or "more or less," the cases holding that the contract applies to the specific goods, and the naming of the quantity is not regarded in the nature of a warranty, but only as an estimate of the probable amount in reference to which good faith is all that is required of the party making it. *Benjamin on Sales* (7th Ed.) p. 713. The cases relied upon by the appellant do not militate in any degree against this doctrine; the case of *Mineral Park Land Co. v. Howard*, 172 Cal. 289, 156 Pac. 458, L. R. A. 1916F, 1, upon which the appellant chiefly relies, is easily distinguishable from the case at bar. In that case the contract was one by which the plaintiff granted to the defendants the right to haul gravel and earth from plaintiff's land, the defendants agreeing to take therefrom all that was necessary in the construction of a certain fill and cement work on a proposed bridge, estimated at approximately 114,000 cubic yards, and for which they agreed to pay 5 cents per cubic yard. After extracting a little less than one-half of the specified amount of said material, the defendants ceased the work of extraction, and refused to pay for more than the amount actually taken. The trial court found that the deposit of said material on the plaintiff's land was far in excess of the amount taken, but that the same could not be practically removed, and hence that it was not in the contemplation of the parties that the defend-

ants should take and pay for something the removal of which was not practicable. The distinction between the cases is obvious, since in the case cited there was no contract to pay a lump sum for a specified article, but only an agreement to pay so much per ton for material the removal of which was practicable. The court in that case referred to certain mining cases upon which the appellant herein also relies; but these, upon examination, are cases where the parties contracting to mine the ore agreed to pay royalties of so much per ton upon the ore actually extracted, the courts in such cases holding that the exhaustion of the deposit puts an end to the liability. These cases have no application to the facts of the case at bar.

The case of *Williams v. Miller*, 68 Cal. 291, 9 Pac. 166, which the appellant also relies upon, comes within the last-named class of cases, and is thus of no aid to the appellant herein.

We do not pass upon the technical objections urged by the respondent against the consideration of the questions presented upon this appeal, deeming it to be a case which should be considered and decided upon the merits.

The judgment is affirmed.

We concur: LENNON, J.; WASTE, J.; WILBUR, J.; LAWLOR, J.; MYERS, Justice pro tem.

189 Cal. 350

MADERA SUGAR PINE CO. v. INDUSTRIAL ACC. COMMISSION OF CALIFORNIA et al. (S. F. 10158.)

(Supreme Court of California. July 31, 1922.)

Master and servant ☞405(5)—Evidence held to show child's dependency within Compensation Act irrespective of statutory presumption.

In a proceeding by a 5 year old child for compensation for the death of his father, a widower, evidence of contributions for the child's support held sufficient to show that claimant was wholly dependent upon his father, irrespective of the conclusive presumption declared by Workmen's Compensation Act, § 14, as amended by St. 1919, p. 917, § 5.

In Bank.

Certiorari by the Madera Sugar Pine Company, a corporation, against the Industrial Accident Commission of the State of California and Lilburn Milton Mankin, a minor,

by Kate Manley, his guardian ad litem and trustee, to review an award of the Industrial Accident Commission. Award affirmed.

Fee & Ring, of Madera, for petitioner.

A. E. Graupner, of San Francisco (Warren H. Pillsbury, of San Francisco, of counsel), for respondents.

WASTE, J. This is a proceeding on a writ of review. Lilburn Mankin, while employed by the petitioner as a laborer, sustained injuries occurring in the course of and arising out of his employment, which resulted in his death. After proceedings duly had, the Industrial Accident Commission found that the deceased employee left surviving, alone, and wholly dependent upon him Lilburn Mankin, his son, aged 5 years, and awarded said minor child a death benefit in the sum of \$4,900, payable weekly at a specified rate. The sole question presented upon the application is the correctness of an award predicated upon total dependency of the claimant. The respondent justifies its action upon two grounds: First, that it is supported by evidence of the existing facts; and, second, that it is warranted by the conclusive presumption as to the dependency of a minor, laid down in section 14 of the Workmen's Compensation, Insurance and Safety Laws, as amended (Stats. 1919, p. 917, § 5). Both of these positions are challenged by the petitioner.

From the testimony adduced before the Commission it appears that, at the time of and for three years prior to the death of Mankin, the employee, his minor child, the claimant was not living with him, but resided with Mrs. Kate Manley, mother of Mankin's deceased wife, and maternal grandmother of the boy. The circumstances which brought about this arrangement were as follows: The mother of the little boy died in November, 1918, when the child was but two years of age. Mankin, taking the boy with him, thereupon resided for a short period with Mrs. Manley, paying her \$8 a week for a time, and later \$10 a week, for himself and child. When he went away, apparently to return to his employment, he left the child with Mrs. Manley, and made an arrangement with her to pay her \$15 a month for the support of the boy, and to supply necessary clothes for him as needed. This arrangement Mankin faithfully kept until his death. The arrangement was satisfactory to Mrs. Manley, and the amounts paid by the father were declared by her to be sufficient to cover all the expenses of board and clothing for the child. The boy was never sick, was too young to attend school,

and needed but few clothes, which the father supplied, amounting to about \$30 a year.

Mrs. Manley lived separate and apart from her husband. Her 18 year old son, who lived with her, and who worked as a ranch hand, earning \$18 a week when so employed; contributed to the household expenses. Mrs. Manley herself did washing as a means of support. Whatever her son contributed, her own earnings, and the amount paid to her by her son-in-law, for board and clothing for his child, went into a common fund, from which Mrs. Manley paid all the expenses. From this fact the petitioner would have it appear that both Mrs. Manley and her son contributed to the support of the boy, and he was therefore not wholly dependent upon his father for support. There is nothing in the point. In view of the uncontradicted evidence, cited above, particularly in the light of the testimony of Mrs. Manley that the amount paid her by the boy's father covered the cost of the boy's keep and clothing, the contention is scarcely worth the consideration here given to it. The record under review clearly establishes, as a fact in the proceeding before the commission, that the claimant there was wholly dependent upon the injured employee for support, and the award based upon that finding may not be disturbed.

Passing to the second phase of the proceeding here under review, respondent takes the position that the claimant for an award, being a child under the age of 18 years, physically incapacitated from earning a living because of tender age, is conclusively presumed to have been wholly dependent for support upon Mankin, the deceased parent, at the time of the injury. In making such contention respondent relies upon the provisions of section 14, subd. (a), paragraph (2), of the Workmen's Compensation Act as amended (Stats. 1919, p. 917), which in substance so declares. Whether that be so or not, and whether or not that provision of the act is unconstitutional, in that the application in this case would deprive petitioner of a proper opportunity to submit all the facts bearing upon the issue, these questions are immaterial in the face of the testimony contained in the record before us. Irrespective of the "conclusive presumption" declared by the statute, it otherwise satisfactorily appears that the claimant before the Industrial Accident Commission was wholly dependent upon the deceased employee of the petitioner for his support.

The award is affirmed.

We concur: SHAW, C. J.; SLOANE, J.; LENNON, J.; LAWLOR, J.; MYERS, Justice pro tem.

189 Cal. 392

In re ROLLINS' ESTATE.

SMITH v. ROLLINS.

(L. A. 7055.)

(Supreme Court of California. Aug. 3, 1922.)

1. Executors and administrators $\S$ 20(7) — Competency of applicants for appointment presumed, in absence of contest and averments to the contrary.

When an original application for letters of administration is presented and no question of incompetency is raised by contest and appropriate averments, competency will be presumed.

2. Executors and administrators $\S$ 20(7)—Evidence that proposed administratrix wrongfully claimed decedent's property competent to aid court to discretionary appointment.

Where two children of decedent separately petitioned for appointment to administer the estate, evidence that one of them asserted doubtful claims to decedent's property was competent to aid the court in its discretionary choice under Code Civ. Proc. $\S$ 1367.

In Bank.

Appeal from Superior Court, Los Angeles County; John M. York, Judge.

Proceedings for the appointment of an administrator of the estate of Henry S. Rollins, deceased. From an order appointing Warren K. Rollins, Florence Rollins Smith appeals. Affirmed.

Clyde R. Burr, of Los Angeles, for appellant.

James S. Bennett, of Los Angeles, for respondent.

SLOANE, J. This is an appeal from an order appointing respondent, Warren K. Rollins, administrator of the estate of Henry S. Rollins, deceased.

Henry S. Rollins died on the 18th of April, 1921. On the 19th of April the appellant, Florence Rollins Smith, a daughter of decedent, filed a petition for appointment as administratrix of her father's estate. On May 3d following respondent, Warren K. Rollins, a son of decedent, and brother of appellant, petitioned for the issuance of letters of administration to himself. Both petitions were set for hearing and heard on the same day. No contest was made on the ground of incompetency of either applicant, but each petition was made and noticed as an original application, as provided in section 1374 of the Code of Civil Procedure. The two petitioners, as children and heirs of the decedent, were equally entitled under the provisions of section 1365 of the Code of Civil Procedure to appointment as administrator of the estate.

[1] When an original application for letters of administration is presented and no

question of incompetency is raised by contest and appropriate averments, competency will be presumed, and no issue on that point is presented. Estate of Eliza Gordon, 142 Cal. 131, 75 Pac. 672; Estate of McCausland, 170 Cal. 136, 148 Pac. 924.

Between two applicants equally entitled to letters, and in the absence of such contest, the choice lies in the discretion of the court. Code Civ. Proc. $\S$ 1367.

[2] The appellant here concedes this discretionary power to the probate court, but complains that in this case the court permitted over appellant's objections the introduction of improper and incompetent evidence in aid of its discretion. The evidence received by the court was testimony tending to show that the appellant was claiming property transferred to her by the decedent under circumstances which made it apparent that an action would in all probability have to be maintained against her in behalf of the estate to determine the ownership of such property. While this circumstance did not disqualify her to serve as administratrix, it was a matter properly to be taken into account by the probate court in determining its choice between the applicants.

We know of no reason why the court was not justified in taking such testimony in aiding it in the exercise of the discretion given under section 1367 above cited in deciding which of the applicants to appoint.

The order appealed from is affirmed.

We concur: SHAW, C. J.; WASTE, J.; LAWLOR, J.; RICHARDS, Justice pro tem.; WILBUR, J.

189 Cal. 373

MAPEL et al. v. CANADY. (L. A. 6776.)

(Supreme Court of California. Aug. 1, 1922.)

1. Records $\S$ 9(10 $\frac{1}{2}$)—Judgment in Torrens proceeding held not to purport to extend force of restrictive clause in prior deed.

The judgment in proceedings by H., the owner of a lot, to have it registered under the Torrens Act, adjudging H. the owner of an estate in fee simple therein, subject, however, to "conditions, restrictions, and reservations in favor of A. * * * contained in" prior deed of the lot from A. to another, does not purport to extend the force of the restrictive building clause in A.'s deed, so as to make it a covenant running with land, but merely establishes the existence of such clause and subjects the title to whatever operative force it may have.

2. Covenants $\S$ 69(2)—Building restriction not covenant running with land.

Clause in a deed "subject to the following restrictions" to the effect that only a residence of a certain value and a certain distance from the street can be erected on the lot does not create a covenant running with the land or a privity with grantees of adjoining lots.

In Bank.

Appeal from Superior Court, Los Angeles County; John M. York, Judge.

Action by E. B. Mapel and others against Martha Canady. Judgment for defendant, and plaintiffs appeal. Affirmed.

Muhleman & Crump, of Los Angeles, for appellants.

Earle M. Daniels and John F. Keogh, both of Los Angeles, for respondent.

SLOANE, J. The object of this action was to subject certain real property owned by defendant, Martha Canady, and consisting of a city lot in a residence section of Los Angeles known as Forest Glen Heights tract, to certain building restrictions.

The tract of which the lot in question was a part had previously been owned by one E. L. Allen, who subdivided the same with a view to making it a strictly residential section. After such subdivision, Allen, by a deed of grant, bargain, and sale, conveyed title in fee to the lot in question, being lot 19 of said tract, to one Jennie A. Mannington. This deed, after the granting clause and description, contained the following clause:

"Subject to the following restrictions, no stores, offices, lodging houses, flats, or business buildings of any description to be erected, kept, or maintained upon said premises, but a residence, same when erected to cost not less than \$4,000.00, same to be placed at a uniform distance of 50 feet from Forest avenue property line."

No other words of condition, agreement, reservation, or covenant relating to the limitation upon improvements to be maintained on the lot were contained in the deed.

Plaintiffs do not demand relief in this action by virtue of the terms of the deed itself. The purported cause of action is based upon proceedings taken by a subsequent owner of the lot, one William Bonine Hubbard, in registering his title under the so-called Torrens Land Act (St. 1897, p. 138).

In his petition in such proceeding Hubbard alleged his ownership in fee of the lot in question as subject to the restrictive clause as provided in the deed heretofore referred to, and in the decree in such proceeding it was adjudged that Hubbard was the owner of an estate in fee simple in said lot, subject, however, to "conditions, restrictions, and reservations in favor of E. L. Allen, whose post office address is 333 Grand avenue, Los Angeles, Cal., contained in deed recorded in Book 2329, page 244, of Deeds," in the office of the recorder of Los Angeles county, this reference being to the deed first referred to from Allen to Mannington. Subsequent conveyances under the Torrens Act vested title to the lot in Martha Canady, the respondent, with the same conditions and restrictions, designated by reference to the same deed.

The plaintiffs in this action allege no facts connecting them with any rights in the premises other than that they hold an assignment of all the rights and interest of Allen, the original grantor, in and to and under the reservations attempted to be made under said original deed, and that they are owners of other lots in the same tract and contiguous to lot 19.

[1] It is the contention of appellants that in some way the judgment in the Torrens proceeding impressed upon this real property a continuing covenant running with the land that no "stores, lodging houses, flats, or business buildings should be erected thereon."

If the judgment purported to do this, it might be necessary to consider to what extent jurisdiction under the Torrens Law extended in the matter, but such is not the judgment. It does not renew, extend, or enlarge the application of the limitation declared in the deed, but merely subjects the title under consideration to whatever burdens the deed may have imposed. It merely makes the present title subject to the conditions of the deed, but it does not and cannot add anything to the force or effect thereof.

Just as if the title in fee had been registered in Hubbard subject to the lien of a certain designated mortgage such decree would determine the existence and due execution of the instrument referred to, but would impose no further or greater lien than the mortgage itself created, and the mortgagor would in no wise be estopped from attacking any infirmities of the mortgage itself.

So in the present case the Torrens judgment establishes the existence of the restrictive clause of this deed and subjects the title to whatever operative force it may have, but the terms of the deed itself continue to be the measure of the rights conferred and the liabilities incurred.

[2] An examination of the deed in this case shows that it was not made or accepted on any condition; that the grantee did not enter into any covenant or agreement restricting his rights in the premises, that no reference is made in the deed to any other lots in the tract, or that such restrictions ran with or were for the benefit of such other lots, or that a general plan or scheme of restrictions was contemplated as to such tract; and there is nothing to indicate that such restrictions were intended to run with the land, or to create a privity of contract or estate with any grantees of the adjoining lots of the tract.

In fact, appellant concedes that the deed in question did not create any covenant running with the land, and can only sustain the action here as supplemented by the judgment in the Torrens Land Act proceeding referred to.

It is held in *Werner v. Graham*, 181 Cal. 175, 183 Pac. 949, that the instrument in which such reservation is made must contain all the conditions that make the contract binding, and the opinion in that case is epitomized in the statement of the court that—

"This whole discussion * * * may be summed up in the simple statement that if the parties desire to create mutual rights in real property of the character of those claimed here they must say so, and must say it in the only place where it can be given legal effect, namely, in the written instruments exchanged between them which constitute the final expression of their understanding."

The most that can be said for the restrictions of this deed is that they created a mere personal right of action in favor of the grantor, which was in no wise extended or enlarged in the subsequent judgment in the *Torrens* proceeding by registering the title as subject to the provisions contained in this prior deed.

We are of the opinion that the facts stated did not constitute a cause of action.

The judgment is affirmed.

We concur: SHAW, C. J.; WASTE, J.; LAWLOR, J.; LENNON, J.; RICHARDS, Justice pro tem.

189 Cal. 377

In re BOWDITCH'S ESTATE.
(L. A. 7190.)

(Supreme Court of California. Aug. 1, 1922.)

Taxation §883—Exercise of power of appointment under will of nonresident of property located in that state held not taxable.

The exercise of a power of a testamentary disposition by legatee under her father's will covering property in another state, title to which was in trustees, residents of such state, is not subject to the transfer tax imposed by St. 1917, p. 882, § 2, subd. 6, providing that the exercise of a power of appointment derived from any disposition of property shall be deemed a taxable transfer in the same manner as though the property had belonged absolutely to the donee and had been bequeathed or devised by the donee.

In Bank.

Appeal from Superior Court, Santa Barbara County; S. E. Crow, Judge.

In the matter of the estate of Charlotte Bowditch, deceased. From an order directing the payment of inheritance tax on transfer of certain personal property, the administratrix and certain legatees appeal. Order vacated.

Richards, Heaney & Price, of Santa Barbara (Frank M. Angellotti, of San Francisco, of counsel), for appellants.

Erwin P. Werner and Karl R. Levy, both of Los Angeles (Ralph W. Smith of Sacramento, of counsel), for respondents.

LENNON, J. The administratrix with the will annexed of the estate of Charlotte Bowditch, deceased, and certain legatees and devisees under said will, appeal from an order decreeing, among other things, that an inheritance or succession tax be paid on account of the purported transfer under said will of certain personal property valued at \$299,260.66. The uncontradicted material facts pertinent to the point presented on the appeal are these:

J. Ingersoll Bowditch, who died in the year 1889, was a resident of the state of Massachusetts, where his will was admitted to probate and his estate distributed. By his will the property here involved was bequeathed to certain trustees in trust, to pay the net income derived therefrom to Charlotte Bowditch during her life, and, upon her death, to convey the corpus and remainder of said property "to such person or persons and in such way or manner as such child [Charlotte Bowditch] shall direct in and by * * * her last will, if any." In accordance with this testamentary direction, the trustees under the will of J. Ingersoll Bowditch paid the income from the property to Charlotte Bowditch during her lifetime, and, upon her death, transferred the property to certain persons named in her will, accepting the latter instrument as a proper exercise of the power of appointment created in her favor by the will of J. Ingersoll Bowditch. At all times herein mentioned all of said trustees were residents of the state of Massachusetts and it is stipulated that the property itself always remained physically within that state. Charlotte Bowditch, however, was a resident of the county of Santa Barbara, state of California, continuously from the date of the execution of her will, August 7, 1912, to the day of her death, September 3, 1919.

The order from which the present appeal is taken decrees that the transfers of the said trust property to the persons named in the will of Charlotte Bowditch are taxable under subdivision 6 of section 2 of the California Inheritance Act of 1917 (Stats. 1917, p. 880), which provides, in part, that—

"Whenever any person, trustee or corporation shall exercise a power of appointment derived from any disposition of property made either before or after the passage of this act, such appointment, when made, shall be deemed a transfer taxable under the provisions of this act, in the same manner as though the property to which such appointment relates belonged absolutely to the donee of such power, and had been bequeathed or devised by such donee by will."

It is appellants' contention that the transfers in question are not taxable by the state of California.

Of prime importance in all cases concerning the determination of the jurisdiction to impose an inheritance tax is the fundamental proposition that a tax of that character is a tax upon the right or privilege of succeeding to property.

"The so-called right of inheritance, and also the right of testamentary disposition, are not inherent rights of the individual, nor are they safeguarded or secured in futuro by any provision of our constitution. They are both subject to legislative control, and are creatures of legislative will. Consequently the Legislature has the power to take away both rights, and to make the state the successor to all property upon the death of the owner. The right and power to impose a succession tax rests on this principle." *Estate of Potter* (Cal.) 204 Pac. 826.

In other words, the tax is imposed and is sustainable upon the theory that a state which confers the privilege of succeeding to property may attach thereto the condition that a portion of the property shall be contributed to that state. In *re Wilmerding*, 117 Cal. 281, 284, 49 Pac. 181. Necessarily, then, and concededly, a succession to property effected entirely independently of the authority of a particular state is not taxable by that state and is not within the purview of our inheritance tax acts.

Applying this jurisdictional test to the present case, we are confronted with the fact that, by the will of a resident of Massachusetts, probated in Massachusetts, trustees, also residents of Massachusetts, were authorized to convey certain personal property situated in Massachusetts as directed by the will of Charlotte Bowditch, who died a resident of California. The ultimate question, therefore, is whether the will of Charlotte Bowditch, in so far as the exercise of this power of appointment is concerned, is governed by the laws of California.

The law in this respect is stated in *Estate of Clark*, 148 Cal. 108, 112, 82 Pac. 760, 761 (1 L. R. A. [N. S.] 996, 113 Am. St. Rep. 197, 7 Ann. Cas. 306), as follows:

"Every state has plenary power with respect to the administration and disposition of the estates of deceased persons as to all property of such persons found within its jurisdiction. Thus the courts of a state may and do grant original probate upon wills of deceased non-residents who leave property within that state. In California this is expressly provided for by section 1294, supra, and the rule as to other states is the same. * * * But the limitations of the operation of this principle would also be recognized, namely that this exercise of original jurisdiction over the estates of nonresidents affects, and can affect, only the property within the state. The judgment admitting the will to probate is valid in all other states only as to the property within the ju-

risdiction of the court pronouncing the judgment. It has no extraterritorial force, establishes nothing beyond that, and does not dispense with nor abrogate the formalities and proofs which may be exacted by other jurisdictions in which the deceased also left property subject to their laws of administration."

It is obvious that the exercise of the power of appointment in the will of Charlotte Bowditch is governed by and dependent upon the laws of California only in the event that the personal property which is the subject of the said power is within the jurisdiction of this state. As previously stated, the personal property here involved is not actually within the state of California. Neither is it constructively within this state, under the doctrine of *mobilia sequuntur personam*.

"That maxim [*mobilia sequuntur personam*], universally applied in the jurisdiction of all civilized nations, is that the personal estate of a decedent, wherever it may in fact be located, is, for the purposes of succession and distribution, deemed to have no other locality than the domicile of the decedent." *Estate of Hodges*, 170 Cal. 492, 150 Pac. 344, L. R. A. 1916A, 837.

But personal property which is the subject of a power of appointment does not acquire a constructive situs in the state of the domicile of the donee of the said power under this theory, for such property is no part of the estate of the donee.

"When a donor gives to another power of appointment over property, the donee of the power does not thereby become the owner of the property. The donee has no title whatever to the property. The power is simply a delegation to the donee of authority to act for the donor in the disposition of the latter's property." *Shattuck v. Burrage*, 229 Mass. 448, 118 N. E. 889; *United States v. Field*, 255 U. S. 257, 41 Sup. Ct. 256, 65 L. Ed. 617; *Walker v. Treasurer*, 221 Mass. 600, 109 N. E. 647.

Therefore, for the purpose of testamentary succession and distribution, the property here involved has acquired no situs in this state, either actual or constructive, and the laws of Massachusetts alone control the transfer thereof under the will of Charlotte Bowditch.

Even if the will were accepted in Massachusetts as a valid exercise of the power of appointment because executed in accordance with the laws of California, that result would follow solely because of and under the laws of Massachusetts. It would be entirely competent for the state of Massachusetts to authorize a transfer of the property in accordance with an appointment in a will invalid under the laws of California. *Sewall v. Wilmer*, 132 Mass. 131.

The precise question presented in this case has not frequently arisen, and the cases which have decided the point are some-

what in conflict. However, the view above expressed is apparently in accord with the weight of authority. A case almost identical with the present case in its facts, and arising under an inheritance tax law in every material respect the same as ours, is *Walker v. Treasurer*, supra. In that case a resident of Maryland left personal property to trustees in Maryland by a will probated in that state. The will directed the trustees to pay the income to the wife of the testator during her life, and, upon her death, to pay the principal to persons designated by her will. The donee of the power, who was domiciled in the state of Massachusetts at the time of her death, exercised the power of appointment in a will admitted to probate in Massachusetts. The Supreme Judicial Court of Massachusetts held that the transfer was not subject to an inheritance tax imposed by the state of Massachusetts, for the reason that both the physical and constructive situs of the property was in the state of Maryland and no necessary incident of the transfer depended for its efficacy upon the laws of Massachusetts.

For similar reasons we hold that the transfer of the property under the power of appointment exercised by Charlotte Bowditch in her will is not subject to an inheritance tax in this state.

The order appealed from is vacated, with instructions to the court below to enter an order in accordance with the foregoing opinion.

We concur: SHAW, C. J.; WASTE, J.; SLOANE, J.; LAWLOR, J.; MYERS, Justice pro tem.; RICHARDS, Justice pro tem.

189 Cal. 124

VETERANS' WELFARE BOARD et al. v. JORDAN, Secretary of State.
(S. F. 10240.)

(Supreme Court of California. June 13, 1922.
Rehearing Denied July 13, 1922.)

1. States ☞115—Veterans' Welfare Bond Act held to create "indebtedness against state" within constitutional limitation.

The Veterans' Welfare Bond Act of 1921, providing for a bond issue to carry out the provisions of the Veterans' Welfare Act and the Veterans' Farm and Home Purchase Act, held to provide for the creation of indebtedness against the state within Const. art. 16, § 1, limiting the amount of indebtedness which may be created against the state, though the act makes an appropriation for the payment of the issued bonds and interest.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Indebted—Indebtedness.]

2. States ☞119—Any scheme which in substance gives or loans the state's credit prohibited regardless of the particular form.

Const. art. 4, § 31, prohibiting a gift or a loan to the credit of the state, prohibits any plan or scheme by which in substance and effect the credit of the state is given or loaned, regardless of the particular form which the transaction takes.

3. States ☞119—Veterans' Welfare Bond Act. In so far as it authorizes use of funds to purchase land to be sold, held violative of prohibition against giving or loaning state's credit.

The Veterans' Welfare Bond Act of 1921 held violative of Const. art. 4, § 31, prohibiting the making of a gift or a loan of the credit of the state in so far as it authorizes the use of the funds derived from bond issue to carry out the provisions of the Veterans' Farm and Home Purchase Act, providing for the purchase by the state of land to be sold to the veterans on credit.

4. States ☞119—Statute to achieve public purpose not unconstitutional merely because, as incident to its main purpose, state's credit is used to effectuate such purpose.

Where a separate and distinct public purpose is achieved and such public purpose is one within the constitutional powers of the Legislature to bring about, the law will not be held unconstitutional under Const. art. 4, § 31, prohibiting a gift or a loan of the credit of the state, merely because as an incident to its main purpose the credit of the state is used to effectuate that purpose.

5. Constitutional law ☞48—Doubts resolved in favor of constitutionality of statute.

Doubts are to be resolved in favor of the constitutionality of a statute.

6. States ☞119—Veterans' Welfare Bond Act, in so far as it provides for acquiring and improving land, acquiring water rights, and selling land at cost to veterans, not violative of prohibition against giving or loaning state's credit, but violative thereof in respect to loans to purchase personal property.

The Veterans' Welfare Bond Act of 1921 held not violative of Const. art. 4, § 31, prohibiting a gift or a loan of the credit of the state in so far as it provides for the use of the proceeds of bonds to acquire, subdivide, improve, and acquire water rights for land, and to sell the land so improved to veterans at cost, such statute being devoted to a public purpose, but the act is violative thereof in so far as it provides for the loaning of money from such proceeds to enable them to purchase personal property to carry on their farming operations.

7. Statutes ☞64(8)—Invalidity of one portion of Veterans' Welfare Bond Act held not to affect validity of other portion.

The unconstitutionality of the Veterans' Bond Act of 1921, in so far as it authorizes the use of the proceeds to purchase land to be sold to the veterans on credit under the Veterans' Farm and Home Purchase Act, because viola-

tive of Const. art. 4, § 31, prohibiting a gift or loan of the credit of the state, does not affect the statute in so far as it authorizes use of proceeds for the purchase and improvement of land to be sold to veterans at cost under the Veterans' Welfare Act, since it cannot be said that the Legislature would not have passed the act if it had known of the unconstitutionality of such portion.

8. States ☞ 113—Statute held not violative of constitutional provision requiring the creation of a debt to be for a single object.

Veterans' Welfare Bond Act of 1921, providing for a bond issue to carry out the provisions of the Veterans' Welfare Act and the Veterans' Farm and Home Purchase Act, *held* not violative of Const. art. 16, § 1, prohibiting the creation of a debt except for "some single object," in so far as it relates to the purchase and improvement of land to be sold to the veterans at cost under the Veterans' Welfare Act, since, in so far as it provides for the use of the proceeds to further the provisions of the Veterans' Farm and Home Purchase Act, the statute is void.

9. Statutes ☞ 107(7) — Statute providing for bond issue held not violative of constitutional provision as to bill making appropriation of money containing more than one item.

Veterans' Welfare Bond Act of 1921, providing for a bond issue to carry out the provisions of the Veterans' Welfare Act and the Veterans' Farm and Home Purchase Act, *held* not violative of Const. art. 4, § 34, providing that no bill making an appropriation of money, except the general appropriation bill, shall contain more than one item of appropriation, which must be for a single purpose, since, if such constitutional provision is applicable to bond issues authorized by voters on submission of question under article 16, § 1, the appropriations therein made are for a single object.

10. States ☞ 152—Statute providing for bond issue held not violative of constitutional provision requiring such statute to provide ways and means for repayment of loan.

The Veterans' Welfare Bond Act of 1921, providing for a bond issue, *held* not unconstitutional as against contention that it does not provide ways and means for the repayment of the loan, as required by Const. art. 16, § 1, in view of section 5 of the statute, providing that the bonds shall be paid from a fund to be raised in part by taxation in the same manner as moneys raised for general purposes of the state.

In Bank.

Mandamus by the Veterans' Welfare Board and others against Frank C. Jordan, as Secretary of the State of California. Writ granted.

John U. Calkins, Jr., of Oakland, Milton D. Sapiro and George J. Hatfield, both of San Francisco, and Frederick B. Wood, for petitioners.

Gregory & Goodell, of San Francisco, for respondent.

WILBUR, J. The petitioner, Veterans' Welfare Board, prays for a writ of mandamus to compel the respondent to publish an act of the Legislature known as the Veterans' Welfare Bond Act of 1921 (Stats. 1921, p. 959), as required by section 17 of that act (Stats. 1921, pp. 959, 966), as notice to the voters who are to vote on said bond issue. The respondent has refused to publish this statute on the ground that the same is unconstitutional and void. The act is entitled:

"An act to authorize the creation of a debt or debts, liability or liabilities, through the issuance and sale of state bonds, for the single object of creating a fund to carry on the operations of the Veterans' Welfare Board; * * * to provide ways and means, exclusive of loans, for the payment of the interest of such debt or debts, liability or liabilities, as such interest falls due, and also for the payment and discharge of the principal of such debt or debts, liability or liabilities, as such principal matures. * * *" (Italics ours.)

Section 1 of the act provides:

"For the purpose of creating a fund to carry on the operations of the Veterans' Welfare Board * * * the veterans' welfare finance committee created by this act shall be and it hereby is authorized and empowered to create a debt or debts, liability or liabilities, of the state of California, in the manner and to the extent hereinafter provided, but not otherwise, nor in excess thereof." (Italics ours.)

Section 2 of the act provides for the issuance and sale of state bonds of the denomination of \$1,000 each and not exceeding in the aggregate \$10,000,000, if authorized by a majority of the voters of the state. Provision is made for the submission to the people of the act in question by printing on the ballot "For the Veterans' Welfare Bond Act of 1921" and "Against the Veterans' Welfare Bond Act of 1921," with this explanation:

"This act provides for a bond issue of ten million dollars to be used by the Veterans' Welfare Board in assisting California war veterans to acquire farms or homes." Section 15.

It is contended by respondent that the act in question violates article 4, § 31, of the Constitution, in that it authorizes the gift or loan of the credit of the state. The money raised by the issuance of bonds under the statute is to be used to carry out the provisions of the Veterans' Welfare Act (Stats. 1921, p. 969) and the Veterans' Farm and Home Purchase Act (Stats. 1921, p. 815), the provisions of which were recently before this court in the case of *Veterans' Welfare Board v. Riley*, 206 Pac. 631. In our opinion we cited with approval the decision of the New York Court of Appeals in *People v. Westchester County National Bank*, 231 N. Y. 465, 132 N. E. 241, 15 A. L. R. 1344, with relation to the proposed bond issue in that state

of \$45,000,000, for the payment of a bonus to the world war veterans of that state. That court held that by the issuance of state bonds and the payment of the money derived from a sale thereof as a bonus to the veterans, there was a giving of the credit of the state to such individuals as received money from the proceeds of the sale of bonds in violation of the constitutional provisions of the Constitution of that state prohibiting the giving of the credit of the state to individuals. We pointed out in our decision that article 4, § 31, of our Constitution, was not violated by the terms of the two acts under consideration because the effect of the act was to loan the money, and not the credit, of the state, while article 4, § 31, prohibited the giving or loaning of the credit of the state and did not prohibit the loaning of the money of the state. It was clearly intimated in that decision that where the state was required to obtain the money so loaned by a bond issue, and the proceeds of the bonds were used for the purpose of purchasing land to be sold on credit, it was, in effect, loaning the credit of the state to the purchaser of the land from the state.

The petitioners meet this difficulty by a very ingenious argument based upon the case of *People v. Pacheco*, 27 Cal. 175. It is argued that, inasmuch as the Veterans' Bond Act of 1921 makes an appropriation in section 5 for the payment of the issued bonds and interest, no debt whatever is created by the issuance of the bonds. This argument would lead to the conclusion that an indebtedness, if authorized according to section 1, art. 16, of the Constitution, created no indebtedness, for that article, under the head of "State Indebtedness," provides that—

The Legislature "shall not, in any manner, create any debt or debts, liability or liabilities, * * * unless the same shall be authorized by law, * * * which law shall provide ways and means, exclusive of loans, for the payment of the interest of such debt or liability as it falls due, and also to pay and discharge the principal of such debt or liability within seventy-five years of the time of the contracting thereof, and shall be irrevocable until the principal and interest thereon shall be paid and discharged and such law may make provision for a sinking fund to pay the principal of such debt or liability to commence at a time after the incurring of such debt or liability of not more than a period of one-fourth of the time of maturity of such debt or liability, * * * and all moneys raised by authority of such law shall be applied only to the specific object therein stated or to the payment of the debt thereby created. * * * The Legislature may, at any time after the approval of such law by the people, if no debt shall have been contracted in pursuance thereof, repeal the same." (Italics ours.)

Under this constitutional provision, such law creating an indebtedness must not only be ratified by a vote of the people, but must also make provision for repayment of the

indebtedness. If it is true that no debt against the state is created within the meaning of the Constitution where ways and means are provided at the time of the creation of the debt for its payment, this section of the Constitution, in effect, would read: The Legislature shall not create any debt, where such indebtedness is in excess of \$300,000, except by a law which does not create a debt and except where the people have approved such indebtedness. It is certainly a startling proposition that the issuance of \$10,000,000 in interest-bearing bonds by the state does not create an indebtedness. It is obvious that the Legislature did not take this view of the situation or it would not have made provision for the submission of the bond issue to the people and would not have provided in the title of the act, and in the first subdivision thereof, for the creation of an indebtedness. It must be conceded, however, that the decision in *People v. Pacheco*, supra, relied upon by the petitioners, tends to support their contention that where the Legislature by statute authorizes the indebtedness, and provides and appropriates the revenue for payment of such indebtedness as it accrues, such statute does not create a debt within the meaning of article 4, § 31, and article 12, § 13, and article 16, § 1, of the Constitution. The Legislature of California, on April 4, 1864 (Stats. 1863-64, p. 344), passed a law authorizing the Central Pacific Railroad Company of California to issue bonds in the sum of \$1,000 each, not exceeding \$12,000,000 in all, bearing interest at a rate not exceeding 7 per cent. per annum and provided that the interest coupons of the first million and a half dollars of such bonds should be payable at the state treasury. It provided for the annual levy and collection of a tax of 8 cents on each \$100 of taxable property in the state to be paid into a fund from which said interest coupons should be paid as they fell due, and appropriated such money in such fund for the payment of said interest coupons. It was claimed that this law violated article 8 of the Constitution of 1849, which is substantially identical with the provisions of article 16, § 1, of the present Constitution. The Constitution of 1849, article 11, § 10, is also substantially identical with the provision of article 12, § 13, of the present Constitution:

"The credit of the state shall not in any manner be given or loaned to or in aid of any individual, association, or corporation; nor shall the state, directly or indirectly, become a stockholder in any association or corporation."

It was held in *People v. Pacheco*, supra, that the credit of the state was not loaned to the Central Pacific Railroad Company for the reason that the Legislature in the act authorizing the aid to the railroad company also made an appropriation to pay said in-

terest coupons from taxes already levied. The court in that case, after quoting extensively from *State v. Medbery*, 7 Ohio St. 526, advanced the following proposition:

"The theory is, that if the Legislature provides a million of dollars revenue, by taxation or otherwise, for any given year, or other period of time within the constitutional limit, and appropriates a million of dollars to be paid out of it, the one balances the other, and the debt or liability of the state is not increased thereby. * * *

"In our Constitution, as we have seen, there is no restriction upon the power of taxation, or upon the objects, or the time for which appropriations may be made, except, that 'no appropriation for a standing army shall be for a longer time than two years.' As to all other objects, so far as any constitutional restriction is concerned, it may as well be for twenty as for two years. * * *

"It follows, from these views, that the act under consideration does not create, or authorize to be created, a debt, or liability, within the meaning of the limiting clause of the eighth article of the Constitution. * * *

The reasoning of this opinion would lead to the conclusion that where the Legislature by an act creating an obligation or indebtedness also levied a tax to pay the indebtedness and appropriated the proceeds of the tax levy to the payment of such indebtedness, that the appropriation balanced the indebtedness, and that there was therefore no debt created by the act within the meaning of the clause limiting the power of the state Legislature to create indebtedness, and as was held in that case, as there was no debt there was no loan of credit to the corporation. This reasoning would perhaps justify the conclusion in this case that the bond issue did not create a debt within the meaning of the section authorizing the creation of an indebtedness, and therefore that there was no loaning of credit contemplated by the law within the meaning of article 4, § 31, of the Constitution. There are, however, several points of difference between the situation presented here and that presented in the case of *People v. Pacheco*, supra. In that case there were no bonds issued by the state, and no proposal to submit the issuance of bonds to the voters of the state. The Legislature provided for an appropriation to pay the interest coupons upon the bonds of a private corporation secured by a mortgage upon its property. The interest accrued annually and was to be met annually by an annual tax levy in an amount fixed by the statute, authorizing the payment of the interest coupons. The court in *People v. Pacheco*, supra, cited *State v. McCauley*, 15 Cal. 455, *McCauley v. Brooks*, 16 Cal. 11, 24, and *Koppikus v. State Capitol Commissioners*, 16 Cal. 248, as controlling authority for the proposition advanced; the court stating:

"The questions to be determined, are:

"Firstly—Does the appropriation made by the act for the payment by the state semiannually during the next twenty years of the interest on the first fifteen hundred bonds create a debt, or liability, within the meaning of these terms, as used in article VIII of the Constitution. * * *

"The first question appears to us to have been determined in the negative by our predecessors in the cases of the *State of California v. McCauley*, 15 Cal. 455, *McCauley v. Brooks*, 16 Cal. 24, and *Koppikus v. State Capitol Commissioners*, 16 Cal. 249. * * * Page 207.

"But if the reasons for maintaining the decisions already cited upon this question were less cogent than they are, we should now hesitate long before overruling them. The last of them was rendered in 1860. The construction put upon the clause under consideration thenceforth became a judicially recognized part of the Constitution. Since that time two Legislatures have proposed, and the people have adopted, numerous amendments to other sections of the Constitution; but this provision was left unchanged. It must be presumed, therefore, that they were satisfied to have the provision under consideration stand with the interpretation thus put upon it by the courts." Pages 220-221. (Italics ours.)

In considering the effect of these decisions upon the proper interpretation of the Constitution of 1879, other decisions of the Supreme Court under that Constitution must also be considered. In the case of *People v. Johnson*, 6 Cal. 499, an act to provide for the survey and construction of a wagon road through the Sierra Nevada Mountains at a price not exceeding \$300,000 was held invalid because at the time the act was passed there was an aggregate indebtedness of the state over and above the sum sought to be appropriated of a million dollars, and the indebtedness thereby created had not been submitted to the voters of the state. In commenting upon the provisions of article 8 of the Constitution of 1849, the court stated:

"The language of the article already quoted is too clear and explicit to admit of but one interpretation. In fact, it would defy the ingenuity of the most subtle intellect to invent a consistent interpretation, other than that which naturally suggests itself from the words of the article. It is without ambiguity, and expressly forbids the Legislature from creating a debt of more than \$300,000, in any way, unless the same is left to the vote of the people. So plain is the meaning of the language, that it is scarcely worth while to invoke rules of construction, and in cases where the language of an act is plain and unambiguous, courts are not permitted to resort to rules of construction to alter such meaning; but if it were otherwise, the doubt could be easily resolved by a reference to the intention of the framers of the Constitution, as appears in the reports of the Debates of the Convention, p. 165." 6 Cal. 500, 501.

"That the article was not intended simply as a limitation on the power to borrow money, is evident from its language; the words are, 'shall not in any manner create any debt or debts, liability or liabilities, which singly, or

in the aggregate,' etc. A debt or liability may be created, in other ways than by the borrowing of money; it may be created by appropriation, where there is no money to meet it; it may be created by drawing on a fund where there is no cash in the treasury, or incoming revenue, to satisfy such drafts; it may be done in various ways; yet the stern letter of the Constitution imperatively forbids the Legislature from creating, in any manner, except in the mode pointed out, such debts or liabilities. * * * 6 Cal. 503.

Article 8 of the Constitution was again considered in *Nougues v. Douglass*, 7 Cal. 65, where the act of April 18, 1856 (Stats. 1856, p. 110), providing for the erection of a state capitol at a cost not to exceed \$300,000, to be paid for by bonds of the state, was held to be unconstitutional although the act, section 16, provided for the payment of said bonds, principal and interest, from funds derived from the sales or leases of lands donated to the state of California by the United States government for the purpose of erecting public buildings and authorizing the state treasurer to set aside money in the general fund to pay any additional amount necessary to pay said bonds as they accrued. Another act passed by the Legislature in 1856 (Stats. 1856, p. 48), providing for the leasing of the state prison grounds and property together with the convict labor of the state for a period of five years at a price not to exceed \$15,000 per month, was held constitutional in *State v. McCauley*, 15 Cal. 429. The law was attacked on the ground that it in effect created a debt of \$600,000, the board of prison directors having contracted at the rate of \$10,000 a month for five years. The court said:

"The contract provides for the payment of \$10,000 a month, and the act appropriates this sum per month. The appropriations are to take effect, and the services are to be rendered in future. Until the services are rendered, there can be no debt on the part of the state. The lessee could not have claimed, at any time after the making of the contract, the aggregate of all the monthly installments—because the state never owed him that amount. The state only became indebted as the services were each month performed."

This holding, it will be observed, is in line with the subsequent cases of this court in regard to municipal indebtedness. *McBean v. Fresno*, 112 Cal. 159, 44 Pac. 358, 31 L. R. A. 794, 53 Am. St. Rep. 191; *Higgins v. San Diego*, 118 Cal. 524, 45 Pac. 824, 50 Pac. 670. This view was adhered to in the case of *McCauley v. Brooks*, 16 Cal. 11. In the case of *Koppikus v. State Capitol Commissioners*, 16 Cal. 248, an act providing for the construction of a state capitol in the city of Sacramento (Stats. 1860, p. 128) was held not to violate article 8 of the Constitution of 1849, limiting the indebtedness of the state to \$300,000, notwithstanding the fact that it au-

thorized the construction of a capitol valued at \$500,000, for the reason that the commissioners were only authorized to contract to the extent of \$100,000 and the act appropriated \$100,000 out of money in the treasury not otherwise appropriated to carry the act into effect. The court in that regard stated as follows:

"The commissioners are only authorized to contract to the extent of \$100,000; though a plan be adopted by them which may require, in its execution, the half million designated. For the liabilities which may be thus incurred, the act makes provision; it appropriates, for that purpose, the requisite sum, thus anticipating their existence, and discharging them as they arise. See *State v. McCauley* and *Tevis*, 15 Cal. 429. Before any greater liabilities can be created, further legislation must be had.

"It will be thus seen that there is no analogy between this case and the case of *Nougues v. Douglass et al.*, 7 Cal. 65, cited by the plaintiff in error. The Act of 1856, considered in the latter case, authorized a contract for the construction of a capitol for a sum not exceeding \$300,000, and provided that the payments should be made in bonds of the state, redeemable in 30 years; and at the time of its passage the state was indebted to the amount limited by the Constitution without a vote of the people."

It is these three cases that were relied upon by the court in *People v. Pacheco*, supra, to support the proposition that no indebtedness was created by the act there in question. These cases do not purport to overrule the cases of *People v. Johnson*, supra, or *Nougues v. Douglass*, supra, but, on the contrary, distinguish such cases. It will be observed that all these cases dealt with statutes providing for annual payments to be met by annual tax levies. The decisions do not, therefore, apply to a single indebtedness, exceeding \$300,000, evidenced by bonds of the state. Such an indebtedness, when created by the Legislature without the vote of the people, was held to be invalid under the provisions of article 8 of the Constitution of 1849 in the case of *Nougues v. Douglass*, supra, notwithstanding the act in question made provision for payment of the bonds as they accrued. So far as we know, it has never been held by this court that a bond issue submitted to the people did not create an indebtedness.

The proposition advanced in *People v. Pacheco*, supra, has been generally accepted throughout the United States as far as it applies to the application of appropriations to current indebtedness created during the period intervening between two sessions of the Legislature. *Rowley v. Clarke*, 162 Iowa, 732, 144 N. W. 908; *State v. Medbury*, 7 Ohio St. 529; *State v. Parkinson*, 5 Nev. 15; *In re State Debts*, 19 R. I. 610, 37 Atl. 14. But see, also, *Flechten v. Lamberton*, 69 Minn. 187, 72 N. W. 65. But the decision has not been accepted as authority outside of California for the proposition that bonds do

not create an indebtedness where the law authorizing the bond issue provides ways and means for the payment of the bonds. *State ex rel. v. Candland et al.*, 36 Utah, 406, 104 Pac. 285, 24 L. R. A. (N. S.) 1260, 140 Am. St. Rep. 834; *Rowley v. Clarke*, supra; *State v. McMillan*, 12 N. D. 280, 96 N. W. 310. As early as December, 1868, Judge Deady of the United States Circuit Court, in deciding the case of *Coulson v. City of Portland*, Fed. Cas. No. 3275, Deady's Reports, 481, 499, said:

"I have never been able to bring my mind to assent to the reasoning by which the court [in *People v. Pacheco*, supra] arrived at the conclusion that the act in question did not create a debt. By means of such artificial reasoning and unlooked for construction of popular and plain terms and phrases, constitutions may be purged of every prohibition upon the legislative power of taxation and creating indebtedness, which the wisdom or fears of the people may place in them."

The distinction between the legislative power of taxaton and the appropriation of money and the creation of debt during the period between the two sessions of the Legislature and the creation of obligations extending beyond the two-year period is pointed out by the Supreme Court of Iowa in the case of *Rowley v. Clarke*, supra. That court after calling attention to the fact that *State v. McCauley*, supra, *McCauley v. Brooks*, supra, and *Koppikus v. State Capitol Commissioners*, supra, did not sustain the decision of this court in *People v. Pacheco*, supra, said:

"For the reasons already stated, we are not inclined to follow the California decisions. To do so would defeat the manifest design of the people in adopting the section of the Constitution in limiting indebtedness the General Assembly may create. The salutary purpose was to prevent mortgaging the revenues of the state in the future, beyond a specified amount, and, if this is to be rendered effective, it is quite as essential to denounce a scheme to incur a debt for the payment of which provision is made by a scheme of taxation as a debt to the payment of which no thought has been given. In either event, the funds to meet the obligation must be raised by taxation, and, in either, it is certain to be paid."

[1] It is true that the mere fact that the decision in *People v. Pacheco*, supra, may seem to us to be incorrect and illogical so far as it applies to a period in excess of the two-year period between sessions of the Legislature, would not alone justify us in departing from the rule therein laid down in the interpretation of the similar constitutional provisions in the Constitution of 1879, adopted in the light of that decision, but the decisions in *People v. Johnson*, supra, and *Nougues v. Douglass*, supra, and the cases relied upon in *People v. Pacheco*, supra, are also a part of the constitutional history of the state, and, in the light of these earlier

cases, we do not think it can be said that either under the Constitution of 1849 or the Constitution of 1879 a bonded indebtedness authorized by vote of the people would not create a debt or liability within the meaning of the Constitution prohibiting an indebtedness of over \$300,000, merely because the law authorizing the indebtedness and calling for a vote of the people also provided, as the Constitution required it must, ways and means for the payment of the bonds (article 16, § 1).

It is clear, then, that the bond issue of \$10,000,000 proposed to be submitted to the people will, if authorized by vote of the people, create an indebtedness against the state when such bonds are issued.

If the money derived from the sale of the bond issue is to be given or loaned directly to the veterans, we would have exactly the question presented to the Court of Appeals of the state of New York in the case of *People v. Westchester County National Bank*, supra, and which was by that court held to be a violation of the constitutional provision against the giving or loaning of the credit of the state. In one sense the loaning of money derived from the sale of bonds by the state is no more a loaning of the credit of the state than loans made by a bank of money deposited in such bank is a loan of the credit of the bank. But constitutional provisions of the character under consideration by which the people seek to limit the power of the Legislature should not receive a technical construction, but should be construed in the light of the evils to be remedied and the purpose to be achieved. There is no essential difference in the effect upon the state finances between selling a bond for \$100 and giving the proceeds to an individual, and giving the bond directly to the individual. The Supreme Court of the state of Minnesota, in *William Deering & Co. v. Peterson*, 75 Minn. 118, 77 N. W. 568, a case involving loans to farmers for the purchase of seed wheat, said:

"If the state cannot loan its credit, it cannot borrow the money on its own bonds, and then loan the money. It cannot do indirectly what it cannot do directly."

The same view was expressed by the Supreme Court of the state of North Carolina in the case of *Galloway v. Jenkins*, 63 N. C. 147. The Legislature of North Carolina in 1868 had passed an act authorizing the treasurer of the state to deliver \$2,000,000 in coupon bonds of the state to the Chatham Railroad Company in exchange for an equal amount of its stock. It was held that this was a giving or a lending of the credit of the state within the meaning of the Constitution prohibition, notwithstanding the fact that the state received stock of the railroad corporation of an equivalent amount in exchange for its bonds. In *Webb v. Lafayette*

County, 67 Mo. 353, the Supreme Court of Missouri had under consideration the validity of a statute which authorized counties and townships to issue bonds in aid of railroads and which also provided that a portion of the state taxes derived from the counties and townships extending such aid should be applied by such counties and townships to the payment of such bonds without being remitted to the state treasury. This law was held unconstitutional as a giving or loaning of the credit of the state. In that connection the court stated as follows:

"To the extent that section 5 withdraws the state tax on such roads and applies it to the payment of a township subscription, every citizen of the state, in effect, and in fact, is required to pay a part of such subscription, when section 13 of the Constitution declares, 'that the credit of the state shall not be given or loaned in aid of any person, association or corporation.' It is no answer to this to say that this is not giving or loaning the credit of the state. We agree that it is not done directly, but that it is done indirectly is clear; for what is the difference between giving this tax directly to the railroad corporation, and giving it to a township to pay a debt contracted to such a corporation? Can that be done indirectly which is forbidden to be done directly? If so, constitutional inhibitions accomplish nothing, and organic laws may be set at naught by the merest evasion. We admit the power of the General Assembly to control and dispose of the funds and revenues of the state, in its fullest and broadest sense, but when it is limited and restricted by the Constitution, it is to be exercised only in conformity thereto, and not simply according to legislative will."

[2] So far as our research reveals, the decisions are unanimous upon the proposition that this provision of the Constitution prohibiting the giving or loaning of credit should be construed liberally to effect its purpose. Such construction would, therefore, prohibit any plan or scheme by which in substance and effect the credit of the state is given or loaned, regardless of the particular form which the transaction takes. In two recent decisions upholding the issuance of bonds to be devoted to the raising of money to pay veterans a bonus, provisions of the state Constitutions involved prohibiting the giving or loaning of the credit of the state were not considered. This was pointed out in *People v. Westchester County National Bank*, supra:

"In Minnesota the money necessary to pay a bonus was to be borrowed. It was held that the purpose of the loan was public and the act constitutional. A clause like ours was in the Constitution (section 10, art. 9), but this phase of the matter seems not to have been argued. Certainly it was not referred to in the opinion. *Gustafson v. Rhinow*, 175 N. W. Rep. 903 [144 Minn. 415]. Again in Washington a bonus was to be financed by an issue of bonds. Again, too, a similar clause in the Constitution (section 5, art. 8) was not referred to. But in dis-

cussing whether the purpose of the act was public, the court did say that moral obligation to make a compensation rested on the state. *State ex rel. Hart v. Clausen*, 194 Pac. Rep. 793."

In *State v. Johnson*, 170 Wis. 218, 175 N. W. 589, 7 A. L. R. 1617, one of the points raised was:

"The act violates the provisions of section 3 of art. 8 of the Constitution, which inhibits the giving or loaning of the credit of the state in aid of any individual."

The question thus raised is not discussed in the opinion for the reason evidently that the scheme there under consideration was one by which the state levied a tax for a number of years and authorized its expenditure, and therefore did not create a debt because there was no assumption of any obligation and the arrangement was to give money to the veterans when obtained from year to year by taxation.

[3] The plan contemplated by the Veterans' Farm and Home Purchase Act to which a portion of the money raised by the bond issue is to be devoted is substantially this: The veteran selects the farm or the home which he desires to purchase and calls the attention of the Veterans' Welfare Board to his desire to purchase this particular piece of property. If they approve of the application, they purchase the land with the money of the state derived from this bond issue and sell to the veteran for the same price plus interest and a due proportion of the expense of the administration of the law, upon terms of payment by which the repayment to the state may be extended over 40 years. There is no essential or substantial difference between this procedure and the procedure which would be involved in loaning the purchase price of the land directly to the veteran and taking a mortgage back upon the property he purchased with the money so loaned. It is impossible to escape the conclusion that this is in substance and effect a loaning of the credit of the state to the veteran purchasing the farm or home. No advantage is gained by the state by reason of these loans except the fundamental and underlying advantage which is supposed to accrue from all statutes making provisions for veterans; that is, a stimulation of patriotism on the part of others who may be called upon to engage in future wars and the promotion of the general welfare by giving due recognition and reward to those who in their service for their country have jeopardized their lives and accepted the hazards of war for the purpose of perpetuating the institutions under which they live. While these considerations may well justify the classification of citizens so that such veterans receive special consideration in the making of such loans, it cannot deprive the trans-

action of its essential characteristics of a gift or loan of the credit of the state.

[4, 5] The Veterans' Bond Act of 1921 also provides for the use of the proceeds of the bonds by the Veterans' Board in connection with the purchase, improvement, subdivision and sale of large tracts of land contemplated by and provided for in the Veterans' Welfare Act. It is pointed out that another bond issue is pending for this same general purpose, but authorizing the purchase of the land so purchased, improved, and subdivided by settlers other than veterans. Two such settlements have already been provided for by direct appropriation of money for that purpose (Stats. 1917, p. 1566). In this scheme of subdivision in the Veterans' Welfare Act as well as in the provisions of the Veterans' Farm and Home Purchase Act for the direct purchase of individual farms or residences for the benefit of the veteran, the state pays the purchase price of the land and sells to the veteran on long terms of credit. There is, however, a very essential difference between the two schemes. In the one, no benefit accrued to the state other than the indirect one involved in the reward of the veteran; in the other, there is carried out a policy of land settlement. In the case of the land settlement provision an object is achieved other than the mere extending of credit to veterans. In the case of Veterans' Welfare Board v. Riley, 206 Pac. 631, we called attention to the fact that the decisions were not uniform with relation to the question as to whether or not a plan of purchase and subdivision of land was a public purpose for which public money might be appropriated and used, and in that case we placed our decision as to the constitutionality of the act upon the ground that the statute authorized expenditures in aid of veterans, which is conceded to be a public purpose, and gave aid in such a way as not to violate the constitutional provisions under consideration with regard to giving of the money and credit of the state. If the purpose achieved by the purchase and subdivision and settlement of the land is a public purpose and justifies the expenditure of public money, and if the scheme provided by the Veterans' Bond Act and the Veterans' Welfare Act for the purchase and subdivision of such land accomplishes this public purpose, it may well be that we would not be justified in declaring such a law unconstitutional because of the fact that incidental to the main purpose there was an advantage to the purchaser of the land ultimately derived from the credit of the state. If we look at the form of the transaction, it is not a giving or a loaning of the credit of the state; it is a purchase of land by the state, a sale of that land, and an extension of credit for the purchase price. If we look at the substance of the transaction as we

have said with reference to the Farm and Home Purchase Act, it is a loan unless there is some other factor also entering in the substance of the transaction which changes its character. Where a separate and distinct public purpose is achieved and such public purpose is one within the constitutional powers of the Legislature to bring about, we do not feel that we would be justified in declaring that the law is unconstitutional because of the fact that as an incident to its main purpose the credit of the state is used to effectuate that purpose. As has frequently been said, doubts are to be resolved in favor of the constitutionality of a statute. And if the injection into this scheme of the separate and distinct public purpose involved in land settlements raises such a doubt, the law should be upheld as constitutional.

We therefore turn to the question of whether or not the purpose sought to be achieved by the law for the settlement of large tracts of land after their improvement by the state is a public purpose. The question is a federal as well as a state question, for the taking of money by taxation for private instead of public purposes is a violation of the federal as well as of the state Constitution. For that reason the decision of the Supreme Court of the United States in *Green et al. v. Frazier, Governor, et al.*, 253 U. S. 233, 40 Sup. Ct. 499, 64 L. Ed. 878, in passing upon certain statutes of North Dakota, is of great, if not controlling, importance. Among other acts of the Legislature of the state of North Dakota was one with reference to home building, as follows:

"The Home Building Act declares the purpose of the state to engage in the enterprise of providing homes for its residents and to that end to establish a business system operated by it under the name of 'The Home Building Association of North Dakota'; and defines its duties and the extent of its powers. [Laws 1919, c. 150.] The Industrial Commission is placed in control of 'The Home Building Association,' and is given the power of eminent domain, and the right to purchase and lease the requisite property. Provision is made for the formation of home building unions. The price of town homes is placed at \$5,000, and of farm homes at \$10,000. A bond issue of \$2,000,000, known as 'Bonds of North Dakota Home Building Series,' is provided for."

In considering that matter the court upheld the state statute and laid down the following general principles and disposed of the matter as follows:

"What is a public purpose has given rise to no little judicial consideration. Courts, as a rule, have attempted no judicial definition of a 'public' as distinguished from a 'private' purpose, but have left each case to be determined by its own peculiar circumstances. *Gray, Limitations of Taxing Power*, § 176. 'Necessity alone is not the test by which the limits of state authority in this direction are to be de-

fined, but a wise statesmanship must look beyond the expenditures which are absolutely needful to the continued existence of organized government, and embrace others which may tend to make that government subserve the general well-being of society, and advance the present and prospective happiness and prosperity of the people.' Cooley, Justice, in *People v. Salem*, 20 Michigan, 452. Questions of policy are not submitted to judicial determination, and the courts have no general authority of supervision over the exercise of discretion which under our system is reposed in the people or other departments of government. *Chicago, Burlington & Quincy R. R. Co. v. McGuire*, 219 U. S. 549, 569; *German Alliance Insurance Co. v. Lewis*, 233 U. S. 389.

"With the wisdom of such legislation, and the soundness of the economic policy involved we are not concerned. Whether it will result in ultimate good or harm it is not within our province to inquire.

"We come now to examine the grounds upon which the Supreme Court of North Dakota held this legislation not to amount to a taking of property without due process of law. * * *

"As to the Home Building Act, that was sustained because of the promotion of the general welfare in providing homes for the people, a large proportion of whom were tenants moving from place to place. It was believed and affirmed by the Supreme Court of North Dakota that the opportunity to secure and maintain homes would promote the general welfare, and that the provisions of the statutes to enable this feature of the system to become effective would redound to the general benefit. * * *

"This is not a case of undertaking to aid private institutions by public taxation as was the fact in *Citizens' Savings & Loan Association v. Topeka*, 20 Wall. 655, 665. In many instances states and municipalities have in late years seen fit to enter upon projects to promote the public welfare which in the past have been considered entirely within the domain of private enterprise."

It is true that in this decision the Supreme Court of the United States announced its purpose to be controlled somewhat in its determination of the broad general question as to whether a legislative scheme takes property without due process of law, or for a private purpose, by the decisions of the various state courts based upon the knowledge of those courts of the local conditions and not to interfere with such legislative schemes under the broad provisions of the federal Constitution where the Legislature and the courts of the state have virtually declared that the purpose is a public one; unless it is very clear that the purpose is not such. It is obviously the view of the Supreme Court of the United States, and in this view we concur, that the broad general restrictions against the taking of property without due process of law ought not to be construed so as to prevent legislative action adjusted to the growing needs and the changed condition of the people. The situation existing where there are relatively small areas of

public lands available for settlement is vastly different from that which confronted our ancestors when the great problem before the public was the settlement of the vast areas of fertile and vacant land which was offered to settlers at nominal prices. It is well recognized in this state that small tracts of 5, 10, 15, and 20 acres are sufficient for a single settler if accompanied by an adequate water right and used for horticulture, and that large areas of land without water are only available for perennial crops, and for that reason yield support to comparatively few people.

The Supreme Court of Washington, in *State ex rel. Reclamation Board v. Clausen*, 110 Wash. 525, 531, 188 Pac. 538, 541 (14 A. L. R. 1133), held a land settlement act constitutional. The problem is disposed of in the opinion as follows:

"Our problem, then, is reduced to this, is the raising of funds by taxation and the expenditure thereof for the purchase of land to the end that it be subdivided, improved and disposed of as by the terms of this act provided, the exercise of the power of taxation and the expenditure of public funds for a public purpose? * * * Is there not abundant room for arguing that the development of our unoccupied lands suitable for agriculture, by a land policy which would encourage the settlement thereon of home-owning farmers, will materially contribute to the welfare of our people as a whole? Can it not be argued with a fair show of reason that not only will such a policy ultimately lead to the enhancement of the material wealth of the state, but that it will also make for better citizenship, better notions of necessity for law and order, and a sounder and saner patriotism? In the light of the debatable character of these questions, we are quite convinced that it is not within the province of the judicial branch of our state government to answer them in the negative. Our decision sustaining the Workmen's Compensation Act of 1911, in *State ex rel. Davis-Smith Co. v. Clausen*, 65 Wash. 156, 117 Pac. 1101, 37 L. R. A. (N. S.) 466, 2 N. C. C. A. 823, 3 N. C. C. A. 599, seems quite in harmony with, and to lend support to, the conclusion we here reach. * * *

The Supreme Court of Montana, in the case of *Hill v. Rae*, 52 Mont. 378, 158 Pac. 826, L. R. A. 1917A, 495, Ann. Cas. 1917E, 210, held that a statute providing for loans to farmers authorized the raising of money by taxation for public and not private purposes. After reciting the fact that one-third of the productive population of Montana were engaged in agriculture and the agitation in favor of loans to farmers and the public necessity and advantage thereof, the opinion proceeds as follows:

"In the light of these circumstances it is impossible to avoid the conclusion that the subject appeared to be one 'held by the strong and preponderant opinion to be greatly and immediately necessary to the public welfare.' (*Noble State Bank v. Haskell*, supra [219 U. S. 104]),

and that, whether wisely or not, the Legislature, in enacting the law in question, did believe that it was legislating to develop the resources of the state and to add to its prosperity. It is not our province to assert that this was a mistaken belief."

In *Wheelon v. South Dakota Land Settlement Board*, 43 S. D. 551, 181 N. W. 359, 14 A. L. R. 1145, a land settlement act was held to be for a public and not for a private purpose. The Supreme Court of Oregon, in the case of *McMahan v. Olcott*, 65 Or. 537, 133 Pac. 826, held that a somewhat similar law was constitutional and that it did not authorize the expenditure of public revenue for a private purpose. That statute, however, differs from the one under consideration for the reason that a part of the land embraced in the district to be improved and sold already belonged to the state.

This court has taken a liberal view in determining what constitutes a public purpose. In *Daggett v. Colgan*, 92 Cal. 53, 28 Pac. 51, 14 L. R. A. 474, 27 Am. St. Rep. 95, an act appropriating money for the erection of buildings and maintenance of an exhibit at the World's Fair Columbian Exposition in 1893 was held constitutional. It was held in that case that the question of whether or not a statute affects a public purpose is held to be largely one for the determination of the Legislature itself, a determination only to be interfered with in cases where it is clear that the legislative discretion has been abused. A similar appropriation was upheld by the Supreme Court of the state of Kentucky (*Norman v. Board of Managers, etc.*, 93 Ky. 537, 20 S. W. 901, 18 L. R. A. 556). Our Constitution was amended to allow public debts to be incurred in furtherance of the Panama-Pacific International Exposition to be held at San Francisco. Our laws for the irrigation, reclamation, and drainage of land by moneys raised by taxation, or local assessment, have been held constitutional upon the theory that the work so authorized to be done was in furtherance of the public interest and promoted the general welfare and was for that reason a public and constitutional purpose. If it is legitimate to tax or assess the land within a given area described as an irrigation district for the purpose of bringing water to and distributing it upon the lands within the district, as has been so frequently held in this state and affirmed by the Supreme Court of the United States, it must follow that a land settlement plan by which an agency of the state is to secure land, conduct water to it, and provide for its distribution thereon, is equally a public purpose, although for the purpose of carrying out the plan the Legislature authorizes the acquisition of the title of the land and the subsequent sale of the land as so improved.

[6] We conclude therefore that the provi-

sions of this statute authorizing a bond issue for the purpose of acquiring, subdividing, improving, acquiring water rights for, and selling the land so improved at cost, is valid as authorizing the expenditure of public money for a public purpose.

In view of the fact that the money raised by the bond issue so far as it is to be applied to the purchase, subdivision, etc., of land under the Veterans' Welfare Act, is applied to a public purpose, it follows that the fact that incidentally there is a benefit derived by the purchaser from the credit of the state and that such purchaser is a veteran, should not render invalid such legislation. That is to say, where the transaction authorized by statute on its face purports to be a purchase and sale of land and there is no loan of credit in the ordinary acceptance of such terms and where in substance and effect the legislation accomplished a wholly different public purpose from the mere extension of credit, the law is not to be held unconstitutional as a violation of the substance and effect of the provision against lending or giving the credit of the state. In this connection, however, it should be clearly stated that we are not to be understood as approving those portions of the law providing for the loaning of money from the proceeds of the bonds to settlers to enable them to purchase personal property to carry on their farming operations. This would be as clearly a loaning of the credit of the state as in the case of the farm and home purchasing provision by which land selected by the veteran is to be purchased by the Veterans' Welfare Board and turned over to him upon long term credit is a loaning of the credit of the state.

It is true that the giving or lending of money as a bonus to an ex-soldier is also recognized as a public purpose, and we have this fact to consider in the Farm and Home Purchase Act. But the method of extending aid is one expressly forbidden by the Constitution, if we have regard to the substance and effect of the constitutional restrictions. The distinction between this situation and that involved in the purchase, improvement, subdivision, and sale of large tracts of land, already pointed out, is perhaps not very great, but enough, we think, to require us to give the benefit of the doubt, if any, of the constitutionality of this scheme, to the legislative determination of that matter.

[7] The next question that presents itself is whether the unconstitutionality of this Veterans' Bond Act of 1921, so far as it authorizes the use of money from the sale of these bonds in the farm and home purchasing scheme, affects the validity of the bond issue so far as it would authorize the Veterans' Welfare Board to use the money derived from the sale of bonds in the purchasing, improving, subdividing, and disposition

of such land so subdivided. If the whole scheme were so intimately connected that the failure of one part of it would indicate that the Legislature would not have passed the other without the unconstitutional provision, the whole law would have to be declared unconstitutional. In view of the fact, however, that there are 131,000 veterans in the state of California who would be entitled to the benefit of the act and that the act authorizes lands worth \$5,000 to be conveyed to one veteran, it is clear that the amount provided by the law will not be sufficient to extend the benefit of the Veterans' Welfare Act to each veteran, and it is doubted by the members of the Veterans' Welfare Board, who addressed the court in behalf of this law, whether there be sufficient money to take care of the wants of the wounded and disabled veterans who were given precedence under the law. In view of this fact, we cannot say that the Legislature would not have passed the act if they had known that the portion of it authorizing the expenditure of money for the farm and home purchasing features of the plan would have been declared unconstitutional.

[8,9] Article 16, § 1, provides that the Legislature shall not create a debt "unless the same shall be authorized by law for some single object or work to be distinctly specified therein." Article 4, § 34, also provides:

"No bill making an appropriation of money, except the general appropriation bill, shall contain more than one item of appropriation, and that for one single and certain purpose, to be therein expressed."

It is claimed by the respondent that the statute in question violates these provisions of the Constitution. The argument advanced in support of this proposition is that the law authorizes the use of the money for two purposes, that is, one for the Veterans' Welfare Act and the other for the Farm and Home Purchase Act. If this question were in doubt, it is settled by the fact that our conclusion is that the law does not authorize the use of the money derived from the sale of the bonds for the Farm and Home Purchase Act, because in so far as it does make such provision it is unconstitutional.

If it is to be assumed that article 4, § 34, applies to bond issues authorized by the voters of the state after submission to them under the provisions of article 16, § 1, it must

also follow that if the statute submitting the matter to the voters is for a single object, all the appropriations therein made are also for that object and therefore for a single object within the meaning of article 4, § 34. We have no doubt that the bond issue is for a single purpose within the meaning of article 16, § 1, and that in this respect the law is constitutional.

[10] It is next contended that the law is unconstitutional for the reason that it does not provide ways and means for the repayment of the loan as required by article 16, § 1. Section 5 of the act does provide in general terms that the bonds shall be paid from a fund to be raised in part by taxation in the same manner as moneys raised for the general purposes of the state. Under our present system of taxation, the rate to be paid for state taxes is fixed by the Constitution itself, and it requires a law passed by two-thirds of the members of the Legislature to increase this tax rate. The voting of these bonds in effect pledges the Legislature as a part of the tax raising machinery of the state to provide for such increase of taxes whenever the same is necessary in order to pay the interest and principal due on these bonds, regardless of whether or not the bond act was passed by a two-thirds vote. The provision is the one usually incorporated in the laws for the submission of bond issues to the people of the state. This matter is discussed at length in the case of *Morton, Bliss & Co. v. Comptroller General*, 4 S. C. 430, and we content ourselves with the citation of this well-reasoned case as stating the reasons for the validity of the act in question. That case also deals with the question as to whether or not more than one subject is covered by the law there in question, and we refer to that decision upon that point also as confirming our view on that matter.

The objections to the validity of this statute are not well taken. We are not called upon to determine whether or not there are or may be other features of the law which are unconstitutional. If any of its provisions are valid, it should be published and voted upon.

Peremptory writ of mandate will issue.

We concur: SHAW, C. J.; LENNON, J.; SLOANE, J.; SHURTLEFF, J.; LAWLOR, J.; WASTE, J.

(189 Cal. 193)

(208 P.)

FOLLETTE v. PACIFIC LIGHT & POWER CORPORATION. (L. A. 6332.)

(Supreme Court of California. June 27, 1922.)

1. Records $\S$ 9(7)—Torrens Act requires personal notice to be served on occupant if within jurisdiction.

Under Torrens Land Title Law, $\S$ 5, requiring the petitioner to set forth the name and address of each occupant of the land and what title he claims, and section 12, requiring publication of notice, but also providing that all occupants named in the petition shall be personally served with a copy of the notice attached to a copy of the petition if they reside in the state and can with reasonable diligence be found, personal notice is required to be served upon the occupants within the jurisdiction, and the publication is insufficient to give the court jurisdiction to adjudicate the claims of the occupants.

2. Constitutional law $\S$ 309(2)—Legislature can provide for substituted service of proceedings in rem without denying due process.

The Legislature can provide for substituted service of notice by publication in proceedings in rem by which the interests of the parties notified in that manner may be affected, without denying due process of law, but it did not make such provision by the Torrens Land Title Law of 1915.

3. Constitutional law $\S$ 309(2)—Decree registering title without personal service on occupant is without due process and void.

Since an occupant of land is presumed to know that under the Torrens Land Title Law he is entitled to personal service of notice in proceedings for the registration of the title, a decree rendered in such proceedings, registering the title free from claims of the occupant when he had not been personally served because the petition for registration failed to state he was occupying the premises as required, would deprive the occupant of his property without due process of law, and is utterly void.

4. Judgment $\S$ 521—Cross-complaint to quiet title in ejectment held direct attack on decree of registration.

In an action of ejectment, in which the plaintiff relied upon the title registered under the Torrens Land Title Law of 1915, a cross-complaint, which set forth facts showing want of jurisdiction in the court to render the decree of registration, and alleged it was procured by fraud and prayed for affirmative relief, was a direct and not a collateral attack upon the decree of registration.

5. Stipulations $\S$ 14(10)—Objection attack on decree was collateral held waived.

In an action of ejectment based on a Torrens registered title, in which defendant attacked the decree of registration for want of jurisdiction and fraud, an agreed statement of facts, assented to by plaintiff, which contained the facts invalidating the decree and a stipulation that all pleadings in the case might be

considered as amended so as to authorize relief to which either party was entitled under the facts, waived the objection that defendant's attack on the decree of registration was a collateral attack.

6. Vendor and purchaser $\S$ 232(1)—Purchaser is charged with knowledge of title of person in possession.

Except as it may otherwise be provided by statute, it is an ancient and universal rule of law that a purchaser of land is charged with notice of the title and claim of all parties in possession of the land at the time of the purchase.

7. Records $\S$ 9(13)—Torrens Land Title Law will not be construed to deny notice of claims of possessors of land unless such construction is necessary.

The Torrens Land Title Law will not be construed to overturn the universal rule that a purchaser of land is charged with notice of the title and claims of those who are in possession of the land at the time of purchase, unless such intention is made clearly to appear by express declaration or by necessary implication.

8. Constitutional law $\S$ 309(1)—Records $\S$ 9(2)—Provisions of Torrens Law, defeating right of occupants of registered land regardless of want of notice, denied due process.

The provisions of the Torrens Land Title Law of 1915, which make a purchaser of a registered title a bona fide purchaser entitled to hold as against all the world, regardless of notice with which such purchaser is charged by reason of the occupancy of the premises by another, who had not been personally served in the proceedings for registration, deprives the occupant of his property without due process of law, contrary to the United States Constitution.

In Bank.

Appeal from Superior Court, Los Angeles County; Lewis R. Works, Judge.

Action of ejectment by Channing Follette against the Pacific Light & Power Corporation. Judgment for defendant, and plaintiff appeals. Affirmed.

B. Rey Schauer, of Los Angeles, for appellant.

Gibson, Dunn & Crutcher, of Los Angeles (E. E. Bacon, of Los Angeles, of counsel), for respondent.

E. Swift Torrance, of San Diego, and Jas. W. Bell, of Los Angeles, amici curiæ.

RICHARDS, Justice pro tem. This appeal is from a judgment in the defendant's favor in an action of ejectment. The cause was tried upon an agreed statement of facts, which may be summarized as follows: On and prior to the 18th day of November, 1915, one Charles H. Bogart was the owner of the premises in controversy, which are situated near Baldwin Park, Los Angeles county, Cal. On the above date he made a deed to the Pa-

cific Light & Power Corporation, a California corporation having its officers and principal place of business in Los Angeles, Cal., of an easement of right of way over and across a portion of said premises for the uses of its light and power lines as a public utility corporation engaged in the transmission to its consumers and to the general public of electric energy in various forms. This conveyance was duly recorded, and the grantee took possession of the portion of said premises required for the exercise of its said easement, and has since continuously been in the actual and visible possession and occupancy thereof. On September 8, 1916, said Bogart filed a petition in the superior court of Los Angeles county for the registration of his title to said property under the provisions of the so-called "Torens Land Title Law," adopted as an initiative measure in 1915. Stats. 1915, p. 1932. The said Bogart did not in his said petition mention or in any way refer to the fact of the existence of said easement or of the occupancy and possession of any portion of said premises by his said grantee thereunder, nor did the name of or any reference to the Pacific Light & Power Corporation appear therein, but the said Bogart alleged that he himself was and for more than five years last past had been in the actual, exclusive, and adverse possession of said premises and of the whole thereof, claiming to own the title thereto in fee simple as against all the world. Upon the filing of said petition the court ordered notice of the hearing thereon to be given as provided in said law and the said notice was thereupon published in a newspaper of general circulation in said county for four successive weeks. No service of said notice other than by said publication was made, and it is an admitted fact in the case that no other service thereof, or of any other process, was had upon the Pacific Light & Power Corporation, and that neither said published notice nor any knowledge of the pendency of said proceedings ever came to its attention until about the time of the institution of the present action by the successor in interest of the said Bogart. On December 18, 1916, the trial court, upon proof of said publication of said notice and after hearing had upon said petition, made and entered a decree of registration, decreeing said Bogart to be the sole and exclusive owner in fee simple of said premises and the whole thereof; and thereupon a certificate of title was issued to him in conformity with said decree. Thereafter, and on January 17, 1917, said Bogart sold said premises to one Leo Gibbs, who paid full value therefor, and who relied exclusively upon the said certificate of title to support his claim of being an innocent purchaser for value. On February 16, 1917, said Gibbs sold the premises in

question to Channing H. Follette, the plaintiff herein, who similarly relied upon said certificate of title as supporting his claim as being an innocent purchaser thereof for value. Neither said Gibbs nor said Follette went upon or examined, either in person or by agent, the premises they were thus purchasing, nor did either of them have any actual knowledge of the claim, interest, easement, occupancy, or possession of the Pacific Light & Power Corporation in or to said premises, or any portion thereof. Shortly after the purchase of said premises by said Follette he inspected the same, and, finding the Pacific Light & Power Corporation in possession of its said portion thereof by virtue of its easement therein, commenced this action in ejectment against said corporation. The defendant appeared in due time and presented an answer, denying generally the plaintiff's averments as to his exclusive title and right of possession to the portion of said premises covered by its said easement. It also presented and filed a further and separate answer, setting forth in detail the proceedings which had been taken by said Bogart under said Land Title Act to obtain the registration of his title, and showing that all mention of said defendant of its interest in or possession or occupancy of said premises had been omitted from said proceedings, and that no notice thereof had ever been personally served upon said defendant, nor knowledge thereof been brought to its attention during the course of its occupancy of said premises or prior to the institution of the present action, and that said defendant had at all said times been and still was in the actual, exclusive, and complete possession and occupancy of the portion of said premises required in the exercise of its said easement and during all of the said time, and by the use and exercise thereof had been and was engaged in supplying electricity to its customers in its capacity as a public service corporation. It was further alleged that said defendant was a California corporation, having its officers and principal place of business in the city of Los Angeles, and being at all of said times within reach of personal service of notice. The defendant further alleged that the omission of the name, title, and interest of said defendant by said Bogart and of the fact of its possession and occupancy of said premises from his petition for the registration of the title thereof under the said Land Title Law and the failure of the said petitioner to serve upon said defendant any personal notice of the fact of the filing of said petition or of the hearing thereon were and each of them was willful and intentional, and done for the purpose of defrauding said defendant and depriving it of its said interest in said premises without due process of law. The defendant, while denominating its foregoing pleading as an

answer, prayed for the affirmative relief of having its title quieted to the portion of said premises occupied by its said easement and for such other and further relief as might be meet and just in the premises. The issues being thus made up, the parties, prior to the trial of the cause, entered into the stipulation as to the agreed facts in the case above noted, in the concluding paragraph of which it was stipulated and agreed that:

"For the purpose of enabling the court to enter any judgment in this action to which either of the parties may be entitled by reason of the law applicable to the facts herein set forth, it is further stipulated that the respective pleadings of the parties herein shall be deemed to be amended by incorporating therein appropriate allegations of any or all of the facts set forth in this stipulation, and appropriate prayer by each party for all of the relief to which such party is entitled upon the aforesaid facts."

Upon the submission of the cause upon the foregoing stipulation the trial court made its findings of fact in accordance therewith, and for its conclusions of law thereon found that the defendant was entitled to judgment that the plaintiff take nothing by said action; that the certificate of title issued to said Bogart pursuant to said proceedings under said Land Title Law, in so far as it purported in any way to affect the title, possession, and occupancy of said defendant in relation to that portion of said premises covered by its said easement and right of way, was fraudulently obtained by said Bogart, and was null and void, and that all subsequent certificates of title issued to the successors in interest of said Bogart which were predicated thereon were also null and void as to the interest of this defendant; that said defendant was the owner of its easement and right of way on and over the portion of said premises occupied thereby, and was entitled to have its right, title, estate, occupancy, and possession thereof quieted against the plaintiff and all persons claiming by, through, or under him. The decree followed accordingly, and from said judgment the plaintiff has taken and prosecutes this appeal.

The first contention of the appellant upon this appeal is that the proceedings providing for the registration and certification of title in and under the said Torrens Land Title Law are proceedings in rem, and that the notices required to be given to persons who are or may be affected by such proceedings as having claims to or interests in the premises described therein, constitute, when shown to have been properly given as required by said act, due process of law, so as to give jurisdiction to the court in which such proceedings are instituted, to render a decree establishing and quieting the title to said premises in the persons found to be entitled

thereto as against all the world, and that in the instant case such proceeding was instituted by said Bogart and such procedure followed in the proper publication of the notices required by said law as to give said court jurisdiction to render and enter the decree establishing the title of said Bogart against all the world, and particularly against the respondent herein, and hence the plaintiff and appellant herein, as successor of said Bogart, was entitled to a decree in his favor at the hands of the trial court in this action and hence is entitled to a reversal of the judgment herein. To the proposition that the proceedings under the so-called Torrens Land Title Law are in the nature of proceedings in rem, and that when, by pursuing the provisions of said law as to the giving of the notices required by its terms to be given to the persons or classes of persons entitled to notice, the court acquires jurisdiction to establish and quiet title to the premises affected by the proceedings, in the persons found to be entitled thereto, and such decree is good and valid against all the world, the appellant cites a large number of well-known decisions, both of this court and courts of other jurisdictions, dealing with proceedings in rem under similar enactments having for their purpose the establishing, quieting and registration of land titles. With these decisions the court has no quarrel upon this appeal. The only question presented upon this first contention of the appellant is as to whether or not the proceedings herein referred to have been commenced and conducted in conformity with the requirements of the said Land Title Law so as to have given to the trial court jurisdiction to render the decree it did render, establishing the title of said Bogart in said premises and the whole thereof, and quieting the same as against the claim, interest, and easement of the respondent herein. To resolve this proposition requires a closer examination of the several provisions of the so-called Torrens Land Title Law. By the express terms of section 5 of said law the petitioner is required to set forth, among the other facts which his application must contain, "a statement of whether or not the land is occupied, and if so, the full name and post office address of each occupant and what interest he has or claims." Section 12 of the said section provides for the form and contents of the notice to be issued upon the filing of the petition, and proceeds to provide for its service in the following manner:

"When the notice is issued, service thereof shall be made as follows: In all cases said notice shall be published in a newspaper of general circulation published in the county, to be designated by the court, for four successive weeks; if the notice is published in a daily newspaper, publication therein once a week

for four successive weeks, it shall be sufficient. All parties who have not been joined in the petition or assented thereto in writing and who appear by the petition or petition and abstract or report of the examiner of titles to be interested in the fee, all occupants named in the petition * * * shall be personally served with a copy of the notice, attached to a copy of the petition, if they reside in the state and can, with reasonable diligence, be found and served therein. All owners of adjoining lands who have not given their written consent to the hearing of the petition and who reside in the state and can, with reasonable diligence, be found and served therein, shall be served with a copy of said notice, without a copy of said petition, personally."

[1] From these excerpts from the body of the said Land Title Law it appears to be the clear intendment of the law that as to every occupant of lands with respect to which the establishment and registration of the title is sought there must be a personal service of notice which serves as the process by which such person shall be brought within the jurisdiction of the court in which the proceeding for the establishment and registration of the title to the premises is pending. Any other interpretation of these essential provisions of the act giving the court jurisdiction over the subject-matter and the parties interested in such proceedings would permit the petitioner, by the mere omission of the name or names of those persons who were in the actual occupation of the premises in question from his petition, to avoid the express requirement of the law as to the personal service of the notice or process upon such person or persons. This would be to permit him to take advantage of his own wrong, and to thus violate one of the most ancient and salutary axioms of our law. This view of the subject is in harmony with what has already been said by this court in several well-considered cases involving the power of the Legislature to provide for substituted service or notice and process in proceedings in rem. In the case of *Title, etc., Restoration Co. v. Kerrigan*, 150 Cal. 317, 88 Pac. 363, 8 L. R. A. (N. S.) 682, 119 Am. St. Rep. 199, Mr. Justice Sloss, in the course of an elaborate discussion of the subject, made use of this language:

"It is no doubt true that, so far as substituted service upon a class of unknown claimants is permitted at all, in proceedings which are merely quasi in rem, it rests upon the ground of necessity, and that this necessity will not justify the omission of personal service upon all who could with reasonable diligence be ascertained and found. This principle is recognized even in the cases which sustain the power to bind unknown owners by substituted service in actions of the character now under consideration. *Tyler v. Judges, etc.*, 175 Mass. 71, 55 N. E. 812; *Shepard v. Ware*, 46 Minn. 174, 24 Am. St. Rep. 212, 48 N. W. 773. But we think that, a proper construction of the act under examination [the McEnerney act] does

require the plaintiff to designate and to serve as known claimants all whom with reasonable diligence he could ascertain to be claimants. * * * The evident purpose of the act is to secure, so far as possible, actual notice of the proceeding to all known claimants by personal service if they reside and can be found within the state, by mailing if they cannot be so found or are nonresidents. We have no doubt that where the statute is thus careful to secure actual notice to known claimants, it should not be construed as intended to permit a plaintiff to willfully or negligently close his eyes to the means of knowledge and thus secure a decree by publication and posting alone, as against persons whose identity he might have learned by the use of due effort. * * * We are satisfied that the statute in question imposes upon the party seeking to proceed under it the duty of inquiry as to the names and residences of all persons who may claim an adverse interest in the property. * * * So construed the statute does not, nor can an action prosecuted under it, deprive any person of his property without due process of law."

In the case of *Robinson v. Kerrigan*, 151 Cal. 40, 90 Pac. 129, 121 Am. St. Rep. 90, 12 Ann. Cas. 829, which was a case involving the construction of the Torrens Land Title Act of 1897 (St. 1897, p. 138) for which the present law has since been substituted, attention was called to the fact that the proceeding under that act was in all important particulars of a similar character to that provided by the "McEnerney Act" (St. Ex. Sess. 1906, p. 78), and the decision of this court above referred to as construing that act was expressly approved and given application to the Torrens Land Title Act then under review. This earlier act provided (section 6) for the inclusion in the petition of a statement:

"(e) Whether the land is occupied or unoccupied and if occupied the name and post office address of each occupant, and what estate or interest he has or claims in the land.

"(f) Whether the land is subject to any easement, lien, or incumbrance, and, if any, the name and post office address of each holder thereof, the nature and amount of the same, and, if recorded, the book and page of the record."

The present law, as is shown by the foregoing excerpt therefrom, contains substantially the same requirement as to the contents of the petition. By the terms of the earlier act it was provided that notice of the time and place of hearing upon such petition should be given "to all parties interested as shown by the petition and the abstract or referee's report * * * and the owners of adjoining lands, in the same manner as the service of a summons in a civil action and by publication for at least four weeks in some newspaper of general circulation to be designated by the court."

It will thus appear that this provision of the earlier act has in its substantial effect

been carried into the present law. Commenting upon the foregoing provisions as to notice as embodied in the earlier act, Mr. Justice Shaw, in the case last above cited, says:

"We construe this provision for service of notice to mean that the service thus to be made on these persons must be personal service, except in those cases wherein, under sections 412 and 413 of the Code of Civil Procedure, service may be made by publication."

This construction of the earlier statute would require personal service of notice or process provided for in the act, upon occupants of the property who are residents of the state and admittedly within reach of personal service of process and as to which property the title was sought to be established and certified under said earlier act, and we are of the opinion that a similar interpretation must be given to the like provisions of the present law.

[2] It is not intended by this opinion to intimate that as to persons who are in the actual possession or occupancy of real estate, having or claiming an interest therein, the Legislature may not provide for the service of notice by publication of pending proceedings by which their said interests in the property may be affected, imperiled, burdened, or destroyed; such as proceedings for street improvements, for the assessment and collection of taxes or for the determination of the title to the premises. Such substituted service when provided for by the statute authorizing such proceedings has been uniformly held to be due process of law. This, however, is not such a case, since under the express terms of the Land Title Law under review the only service of notice of the proceedings to establish title which could be made upon occupants of the property was personal service. The provisions of the act as to publication of notice can have application only to those who were not in the possession or occupancy of the premises, and hence those provisions are a false quantity in the consideration of the case at bar. The case stands as though the only provision in the law as to the giving of notice was that requiring personal service upon the class of claimants in which this defendant is; and, that notice not having been given, there was in that proceeding and as to this defendant no due process of law. The distinction between these two classes of cases is expressly pointed out in *State v. Guilbert*, 56 Ohio St. 575, 47 N. E. 551, 38 L. R. A. 519, 60 Am. St. Rep. 756.

[3] There is another aspect of this subject which lends an added persuasiveness to the views above expressed. Persons who have an interest in real property, such as an easement therein, and who are in actual possession and occupancy of the portion of the property devoted to the exercise of such

easement, are presumed to know the law under which they hold and exercise their said property rights, and hence to know the content of the Torrens Land Title Law; and, having this knowledge, they are assured by the express terms of that law that their rights and interests in said property will not be imperiled or called into question in any proceeding undertaken under said law, in which they have not been named as parties, and to which they have not been brought by personal service of notice. To adopt a construction of said law which would permit a petitioner thereunder to imperil or destroy the vested rights and interests of the occupants of the property by the simple process of omitting their names as parties to such proceedings, and by so doing obtain jurisdiction by a mere publication of notice and without that personal service of process which the law designates as to those whose names are required to be set forth in said petition, would be a manifest injustice, and would work a departure from those constitutional principles which are as old as Magna Charta and which guarantee to the owners of vested interests in property that they shall not be deprived of these without due process of law. We therefore hold in this case that the decree obtained by Bogart declaring him to be the sole and exclusive owner of the fee-simple title to the property in question to the exclusion of the rights and interests of the respondent herein, having been obtained without that personal notice of such proceeding upon this defendant in the actual occupancy and possession of a portion of the premises in question, was obtained without due process of law as to this respondent, and hence was as to said Bogart utterly void.

[4] The appellant, however, contends that, conceding the decree obtained by Bogart establishing his title to the whole of said premises to be thus void as to him, it was not void upon its face, and hence, being regular upon its face, cannot be made the subject of collateral attack. The answer to this contention is that the assault which the defendant makes upon this decree is not a collateral but a direct attack. The plaintiff as the sole foundation of his right to maintain this action in ejectment bases his asserted title upon said decree. The defendant in his second and separate answer sets forth the facts showing lack of jurisdiction in the court to render and enter said decree, and avers that the same was procured by said Bogart by fraud, and it prays for affirmative relief. Although the defendant does not denominate its answer a cross-complaint, it is, in effect, a cross-complaint, and for the purposes of this appeal should be treated as such, particularly in view of the stipulation of the parties above referred to respecting the pleadings in the case. *White v. Patton*, 87 Cal. 151, 25 Pac. 270; *Hibernia, etc., v.*

London Assurance Co., 128 Cal. 633, 61 Pac. 278, 79 Am. St. Rep. 73.

[5] There is yet another answer to this contention to be found in the stipulation of the parties as to the facts of the case to which reference has above been made. After the service and filing of the defendant's answer herein, in which we have seen he directly assails said decree, the parties to this action entered into said stipulation, in which it was expressly admitted by the plaintiff that no personal service of notice or process in the prior proceedings under the Torrens Land Title Law was ever made upon the defendant, and further admits that prior to and at the time of the institution and prosecution of said proceeding the defendant was in the actual possession and occupancy of the premises, and was a resident corporation within reach of the personal service of the process. The said agreed statement of facts containing these admissions was offered and admitted in evidence without objection. When the attack which the defendant makes upon said decree is not only not resisted as collateral but when the facts upon which it relies to establish that the decree is void are expressly admitted by the party relying upon such decree, and also expressly permitted to be introduced in evidence without objection, his present objection that the attack is collateral must be held to have been waived, and if, as a matter of law, the decree upon the admitted facts is void, it is the duty of the court to so declare. *Hill v. City Cab, etc., Co.*, 79 Cal. 188, 21 Pac. 728; *People v. Harrison*, 107 Cal. 541, 40 Pac. 956; *Lake v. Bonyng*, 161 Cal. 120, 118 Pac. 535.

[6] In this state of the record it is obvious and undeniable that but for the provisions of the Land Title Law hereinafter to be considered the title of the plaintiff herein as the successor in interest of Bogart would have been subject to the infirmities above pointed out, as inherent in the Bogart decree, and would also be subject to the prior easement of the respondent herein by virtue of the well-established rule by which the actual possession and occupancy of the property imparts notice of the right of the possessor and occupant to those who undertake to deal with the property or the title thereto while such actual possession and occupancy exists. That under that rule a subsequent purchaser, even though he had paid full value for the property, could not be a purchaser in good faith under such circumstances, is borne out by the uniform course of decisions in this state from the very beginning of our judicial history. *Stafford v. Lick*, 7 Cal. 479; *Partridge v. McKinney et al.*, 10 Cal. 181; *Morrison v. Wilson*, 13 Cal. 494, 73 Am. Dec. 593; *Lestrade v. Barth*, 19 Cal. 660; *Landers v. Bolton*, 26 Cal. 393; *Killey v. Wilson*, 33 Cal. 690; *Pell v. McElroy et al.*, 36 Cal. 268; *Jones v. Marks*, 47 Cal.

242; *Pacific Mutual, etc., Co. v. Stroup*, 63 Cal. 150; *Dreyfus v. Hirt*, 82 Cal. 621, 23 Pac. 193; *Scheerer v. Cuddy*, 85 Cal. 270, 24 Pac. 713; *Hyde v. Mangan*, 88 Cal. 319, 26 Pac. 180; *Security Loan, etc., Co. v. Willamette, etc., Co.*, et al., 99 Cal. 636, 34 Pac. 321; *Bessho v. General Petroleum Co.* (Cal. Sup.) 199 Pac. 22.

This being so, the appellant herein is driven to his final contention, which is that, notwithstanding the infirmities in the Bogart decree, and notwithstanding the fact that he took the title to the premises while the respondent was in the actual possession and occupancy of said premises in the exercise of said easement, he is still protected in the supremacy of his title, ownership, and right of possession to the whole of said premises by virtue of the finding of the trial court that he took the title to said premises for full value and without any actual knowledge of the existence of the respondent's easement or of its possession and occupancy of the said premises thereunder, and also by virtue of the following further provisions of the Land Title Law upon which he particularly relies. These provisions of that act read as follows:

"Sec. 34. The registered owner of any estate or interest in land brought under this act shall, except in case of fraud to which he is a party, or of the person through whom he claims without valuable consideration paid in good faith, hold the same subject only to such estates, mortgages, liens, charges, and interests as may be noted in the last certificate of title in the registrar's office, and free from all others, except:

"1. Any subsisting lease or agreement for a lease for a period not exceeding one year, where there is actual occupation of the land under lease. The term 'lease' shall include a verbal letting.

"2. All land embraced in the description contained in the certificate which has theretofore been legally dedicated as declared by a competent court to be a public highway.

"3. Any subsisting right of way or other easement, created within one year before issue of the certificate upon, over, or in respect of the land.

"4. Any tax or special assessment for which a sale of the land has not been had at the date of the certificate of title.

"5. Such right of action or claim as is allowed by this act.

"6. Liens, claims, or rights arising under the laws of the United States, which the statutes of California can not require to appear of record upon the register. * * *

"Sec. 36. Except in case of fraud, and except as herein otherwise provided, no person taking a transfer of registered land, or any estate or interest therein, or of any charge upon the same, from the registered owner, shall be held to inquire into the circumstances under which, or the consideration for which, such owner or any previous registered owner was registered, or be affected with notice, actual or constructive, of any unregistered trust,

lien, claim, demand, or interest; and the knowledge that any unregistered trust, lien, claim, demand, or interest is in existence shall not of itself be imputed as fraud.

"Sec. 37. In case of fraud, any person defrauded shall have all rights and remedies that he would have had if the land were not under the provisions of this act; provided, that nothing contained in this section shall affect the title of a registered owner who has taken bona fide for a valuable consideration, or of any person bona fide claiming through or under him.

"Sec. 38. If a deed or other instrument is registered, which is forged, or executed by a person under legal disability, such registration shall be void; provided, that the title of a registered owner, who has taken bona fide for a valuable consideration, shall not be affected by reason of his claiming title through some one, the registration of whose right or interest was void, as provided in this section.

"Sec. 39. No unregistered estate, interest, power, right, claim, contract, or trust shall prevail against the title of a registered owner taking bona fide for a valuable consideration, or of any person bona fide claiming through or under him.

"Sec. 41. In any action or proceeding brought for ejectment, partition, or possession of land, the certificate of title of a registered owner shall be held in every court to be conclusive evidence, except as herein otherwise provided, that such registered owner has a good and valid title to the land, and for the estate or interest therein mentioned or described, and that such registered owner is entitled to the possession of said land."

[7] It is the contention of the appellant that these sections of the act in question entitle the purchaser of a registered title to the premises for which he has paid full value, to hold the same by a title which shall be superior to every claim, title, or interest which has not been protected in the decree of registration or which is not expressly excepted from the application of the foregoing sections of the act; and hence that even though the respondent herein was in the open, actual, and visible possession and occupancy of the portion of said premises upon and over which its said easement was being exercised, and even though said decree of registration of the title to said premises was void as to his predecessor, Bogart, because obtained without that personal service of notice of the proceedings leading up to said decree, which could alone constitute due process of law, plaintiff's asserted title as the sole and exclusive owner of said premises in fee simple, founded upon said decree, must prevail over the respondent's easement by virtue of the foregoing provisions of the Land Title Law. To give such a broad and far-reaching interpretation to these provisions of said law would be to sweep away all of those ancient safeguards which the person in the open, actual, visible, notorious possession and occupancy of the real property under whatever claim of interest or title had, against being deprived of his right

or claim of right therein, without his day in court; and would be to go so far as to declare that such a possessor and occupant of real property under a claim of right, interest, or ownership, however well founded, would be defenseless against the holder or transferee of a registered title under this act who had acquired the same, for a full consideration, but without any examination of the premises or any inquiry as to its actual possession and occupancy by another; and it would even go so far as to compel the conclusion that the purchaser of such a registered title, even with actual knowledge of the possession, occupancy, and claim of ownership of another, could still obtain by such purchase a superior title to the land. It is needless to say that such a destructive interpretation of these provisions of this law should not be adopted unless such a conclusion is found to be inevitable after a most searching scrutiny of the language and intentment of the law, since it is not to be presumed that the Legislature in the enactment of statutes, or the people in the adoption of laws, intend to overturn long-established legal principles, unless such intention is made to clearly appear by express declaration or by necessary implication. In *re Garcelon's Estate*, 104 Cal. 570, 584, 38 Pac. 414, 32 L. R. A. 595, 43 Am. St. Rep. 134; *Boyd v. U. S.*, 116 U. S. 616, 6 Sup. Ct. 524, 29 L. Ed. 746.

A cursory reading of the several sections of the Land Title Law above set forth discloses that in each of these the phrase "good faith" or its equivalent, "bona fide," is employed in relation to purchasers of registered titles. If it were possible to so construe these terms as used in said law as having the same scope and meaning as that given them by the long course of decisions prior to the adoption of this law, the case would be simplified, for the reason that such purchasers of such registered title would still be required to take notice of the actual possession and occupancy of the premises by another, and would still be bound to all that such notice imported, and hence could not be a bona fide purchaser of the premises as against the prior and superior rights and interests of such actual possessor thereof. But the framers of this law evidently intended that such should not be the interpretation to be placed upon these terms. By the provisions of section 34 of this law the only actual possession and occupation of the premises to which the title of the registered owner or his successor is subject is: (1) Of the holder of a lease or agreement for a lease for a period not exceeding one year; (2) of a public highway; (3) of a subsisting right of way or easement created within one year before issue of the certificate of title relied upon, over or in respect to the land; (4) the lien of taxes or special assessments; (5) liens, claims or rights arising under the

laws of the United States. The only two of the foregoing exceptions with which we are at present concerned are those relating to leases and easements. It might well be questioned, in passing, whether the selection of these two classes of occupants of premises claimed under a registered title as exempted from its terms does not deprive this law of that uniformity of operation which the state Constitution requires in all general laws. Const., art. 1, § 11. There would seem to be no reason why the actual occupant of premises under a lease for a term greater than one year should not be as much entitled to the protection which his actual occupancy thereunder would otherwise afford as would an occupant under a lease for less than a year; nor why an actual occupant of the premises under a contract of purchase should not be entitled to the same protection as that accorded the occupant under a lease for less than one year; or why a tenant in common or a holder of a life estate in possession, or in fact any owner of any other interest in the fee should not be entitled to rely as safely upon his occupancy of the premises as this section of the act permits the lessee for less than a year to do. Nor does there appear to be any substantial reason why the owner and user of a right of way or other easement in, upon, or over the premises created more than one year before the issue of the certificate relied upon should not be as fully protected as the holder of such easement created *within* one year before the issuance of such certificate. This phase of the subject has, however, not been adequately presented upon this appeal, and hence will not be finally passed upon at this time, since the decision, we think, can be placed upon other and broader grounds.

To return, then, to the purposes of the framers of this law as disclosed by its express terms, it would appear from a reading of section 36 thereof, above quoted, that except as to the favored classes of occupants above referred to the purchaser of a registered title shall not be held "to inquire into the circumstances under which any previous registered owner was registered," and shall not "be affected with notice actual or constructive of any unregistered * * * interest"; and this section further declares that "knowledge that any unregistered * * * interest is in existence shall not of itself be imputed as fraud." It is thus positively and expressly stated by this section of the law, not only that the actual possession and occupancy of the premises by the holders of interests therein other than those excepted by the earlier section shall not impart notice of the rights of such possessors and occupants, but that even actual knowledge of their said possession and occupancy on the part of the purchaser of a registered title shall furnish no protection against such title. Applying this inescapable interpretation

of these sections of this law to the case at bar, it would follow that even though the plaintiff had actual knowledge of the occupant's possession and occupancy of said premises in the exercise of its easement therein, and even though the plaintiff actually knew that the respondent was the owner of such easement by the purchase of the same from the plaintiff's predecessor, Bogart; and even though the plaintiff actually knew that the right and interest of said respondent and its actual occupancy of said premises thereunder antedated the proceedings for the registration of Bogart's title thereto, the plaintiff could still rest serenely upon his registered title as superior to the respondent's right and interest in the premises, and could maintain this suit in ejectment and oust the respondent therefrom. What, then, becomes of the ancient doctrine of bona fides and good faith in the purchases of real property? What of due process of law? Under this section of the law in question as thus interpreted these would no longer exist. It may be contended, however, that under section 37 of said law these ancient meanings and safeguards thus expressly destroyed have still been preserved and restored. That section reads as follows:

"Sec. 37. In case of fraud, any person defrauded shall have all rights and remedies that he would have had if the land were not under the provisions of this act; provided, that nothing contained in this section shall affect the title of a registered owner who has taken bona fide for a valuable consideration, or of any person bona fide claiming through or under him."

It may be pertinently inquired what the term bona fide, as twice employed in this section, is intended to mean. Was it intended that a purchaser having actual knowledge of the full extent of the prior rights and interests in the premises to be purchased could not with such knowledge be a purchaser in good faith? If so, what then becomes of the express terms of the former section declaring that such actual knowledge shall not be imputed as fraud? If not, then these two sections of the law are in open antagonism and confusion. This state of confusion is not relieved, but is rather increased and intensified by section 39 of the act, which declares that—

"No unregistered estate, interest, power, right, claim, contract, or trust shall prevail against the title of a registered owner taking bona fide for a valuable consideration, or of any person bona fide claiming through or under him."

In the effort to relieve ourselves of this confusion we are necessarily brought to the determination of the question whether a purchaser of property which is in the actual, open, exclusive, notorious possession and occupancy of another can be or become a bona

fide purchaser of such property, so as to acquire title thereto which shall be superior to the rights and interests of such possessor. In the course of this inquiry it is essential to take note of the important place which the fact of possession has always held under our Anglo-American system of laws in relation to rights in real property. The earliest mode of conveyance of corporeal hereditaments known to the common law was that of feoffment, to which livery of seisin or delivery of possession of the property was essential. This method of conveyance prevailed during all those earlier centuries when writings were infrequent, and persisted down to the time of Charles II, when the first statute of frauds was enacted. Persons out of possession of real estate under these ancient modes of conveyance could not transfer title to the same, and hence, necessarily, possession was the best and most often the only indicia of title which the owner had. From those ancient times down to the present, by the unbroken rule of the common law and by the uniform current of both English and American authority, the actual possession and occupancy of real property imparted to all the world notice of the rights and interests of the possessor. In Holmes' Lectures on the Common Law it is pointed out that possession of property is one of the most important concepts of the common law, having its origin in that instinct which man shares with certain of the lower animals, such as the dog and the seal, and by which he will not allow himself to be dispossessed by either force or fraud of what he holds without trying to get it back again. The learned author and jurist further proceeds to show that the rights of possession and of ownership have the same essential incidents, since, as to both, the use of the property is the main element of its value. For that reason he asserts that—

Under the common law, "the owner is allowed to exclude all and is accountable to no one; the possessor is allowed to exclude all but one and is accountable to no one but him."

This concept of the importance of possession as notice of the rights and interests of the possessor has been firmly engrafted upon our American system of jurisprudence. In Washburn on Real Property, vol. 3, p. 292 (6th Ed.) it is stated that—

"The courts in many states hold that open, notorious, exclusive, unequivocal, and visible possession by a grantee in a deed is to be deemed notice of its having been made."

The courts of California are in the list of those cited by the learned author in support of this doctrine. It was held in a very early period in our judicial history that—

"The fact of open, notorious, and exclusive possession and occupation of lands by a stranger to a vendor's title, as of record, at the time

of a purchase from and conveyance by such vendor out of possession, is sufficient to put such purchaser upon inquiry as to the legal and equitable rights of the party so in possession, and such vendee is presumed to have purchased and taken a conveyance from the vendor with full notice of all the legal and equitable rights in the premises of such party in possession and in subordination to these rights." *Pell v. McElroy*, supra.

And this court in the same case further held that—

"He cannot be regarded a purchaser in good faith who negligently or willfully closes his eyes to visible pertinent facts, indicating adverse interest in or incumbrances upon the estate he seeks to acquire, and indulges in possibilities or probabilities, and acts upon doubtful presumptions, when by the exercise of prudent, reasonable diligence he could fully inform himself of the real facts of the case."

In the case of *Scheerer v. Cuddy*, supra, this court said:

"Whether the respondent knew of the appellant's possession, or not, is immaterial. It was his duty to know who was in possession of the property before making the purchase, and his purchase without ascertaining the fact must be regarded as the strongest evidence of bad faith on his part. The burden of making the proper inquiry was cast upon him by the mere fact of actual possession on the part of the appellant. If it were allowed that by failing to acquaint himself with the fact of possession on the part of another than the vendor the vendee could avoid the effect of the rule above stated, he could purposely avoid any inquiry on the subject, and thereby evade the rule and its consequences entirely."

[8] In the recent case of *Bessho v. General Petroleum Co.*, supra, the foregoing language from the case last above cited was quoted and approved. It must therefore be taken to be the long and well-settled law of this state that the actual, open, notorious, and visible possession and occupancy of real property imparts notice to those dealing with the title thereto of the rights and interests of such possessor, and that a person attempting to obtain title to such premises with such knowledge, or duty to acquire such knowledge, as such notice imparts, cannot as to such possessor be or become a bona fide purchaser thereof to the extent of being able to assert a better right or title thereto than that which his predecessors had or could have asserted. The appellant herein cites no case in which the *Torrens Land Title Law* has been given such effect as against the actual possessor and occupant of the property sought to be brought, as to its title, within its terms. The cases of *Reeve v. Kennedy*, 43 Cal. 643, *Hayden v. Hayden*, 46 Cal. 332, and *Doyle v. Hampton*, 159 Cal. 729, 116 Pac. 39, relied upon by the appellant, are not in point upon this question for the obvious reason that in none of the said cases were the

rights and interests of possessors of property involved. Even in Australia and its adjacent islands, wherein the Torrens land title system had its origin and earliest development, it has been held that knowledge of existing rights in the possessor and occupant of property sought to be claimed under a registered title would serve to defeat the assertion of a superior right in the holder of such registered title. *Merrie v. McKay*, 16 N. Z. L. R. 124; *Independent L. Co. v. Gardner*, 3 Sask. L. R. 140; *Conroy v. Knox*, 11 Qd. L. J. 112; *Biggs v. McEllister*, 14 S. O. Aus. L. R. 86; *Hunter Torrens Land Title Cases*, 355, 366.

Our conclusion therefore is: (1) That the registration of the title to the premises in question by Bogart, under whom the appellant herein claims, was, as to the respondent herein, void, as obtained by fraud and without such service of notice upon the respondent in the actual possession and occupancy of the premises as was required by the terms of the Torrens Land Title Law in order to constitute due process of law. (2) That the respondent was entitled to assert the invalidity of said proceeding in this action, and that its affirmative pleading herein constituted a direct attack upon the decree in such proceeding. (3) That the appellant, as the successor in interest of said Bogart, taking title under said void decree, was not, as to the respondent in the actual possession and occupancy of the premises, a purchaser in good faith of said title. (4) That the provisions of the Land Title Law which purport to entitle the purchaser of a registered title to the premises in the actual possession and occupancy of another to hold the same superior to the prior rights and interests of such possessor, notwithstanding that such registered title is subject to the infirmities shown to exist in the instant case, are obnoxious to the provision of the federal Constitution, which provides that persons shall not be deprived of their property without due process of law.

The judgment is affirmed.

We concur: SHAW, C. J.; LENNON, J.; SLOANE, J.; LAWLOR, J.; WILBUR, J.

189 Cal. 254

**MILLER & LUX, Inc., v. BOARD OF SUP'RS
OF MADERA COUNTY et al.**
(Sac. 3346.)

(Supreme Court of California. July 11, 1922.)

1. Waters and water courses ⇨224—Proceeding to compel irrigation district to comply with law held not to preclude direct attack on de jure existence.

A proceeding to compel an irrigation district to comply with the law does not admit

the existence of the district as a corporation, so as to preclude determining its de jure existence in a direct attack to review the validity of the order of the county board of supervisors fixing its boundaries and ordering an election to determine whether or not it should be incorporated.

2. Waters and water courses ⇨225—Attack of validity of irrigation district not limited to quo warranto.

Determination of the validity of the formation of an irrigation district and of an order of a county board approving the same is not confined to a quo warranto proceeding by the Attorney General, notwithstanding California Irrigation District Act, § 72, as amended by St. 1915, p. 1370, § 8, providing all findings of fact or conclusions of such board shall be conclusive unless action is instituted within six months and St. 1921, p. 76, § 1, validating the district in question.

3. Constitutional law ⇨70(3)—Legislature presumed to have made necessary inquiry.

Where the Legislature established the boundary of an assessment district, it is assumed that it took such evidence and made such inquiry as was necessary in order to determine whether or not the property included in the assessment district would be benefited, and its action in establishing the district is conclusive on the court.

4. Waters and water courses ⇨225—Hearing as to fixing boundaries of irrigation district required.

Where the boundaries of an irrigation district to be taxed are to be fixed by some commission or the board of supervisors, a hearing must be afforded property owners as to whether their lands will be benefited so as to warrant assessment thereof and as to the amounts of the assessments made.

5. Waters and water courses ⇨216—Denial of hearing as to validity of assessment for irrigation district unconstitutional.

As California Irrigation District Act, § 69, providing for proceedings by a property owner to contest the validity of an assessment, does not contemplate inquiry as to the validity of the organization of a district, which, by section 4, as amended by St. 1911 (Ex. Sess.) p. 139, can only be attacked by a quo warranto proceeding, and section 72, as amended by St. 1915, p. 1370, § 8, provides findings of fact and conclusions of the board of directors and of the board of supervisors shall be conclusive unless contested by action within six months, the only hearing afforded a landowner to oppose inclusion of his lands within a district is that given by section 38 before the board of directors sitting as a board of equalization, whose valuation, by section 39, is the basis for the ad valorem tax imposed, and any denial of the right to such hearing by the board of supervisors or any statutory provision making the order of the board conclusive on the landowner without such hearing violates both the state and the federal Constitutions.

6. Courts ⇨97(5)—State Supreme Court bound by decisions on federal constitutional questions.

The State Supreme Court is bound by the decision of the federal Supreme Court on federal constitutional questions.

7. Waters and water courses ⇨225—Legislature could authorize formation of irrigation district without preliminary petition.

The Legislature could authorize the formation of an irrigation district without any preliminary petition, or could determine the nature and character of a required petition without regard to the landowners in the proposed district.

8. Waters and water courses ⇨224—Irrigation district not a public corporation which can tax without hearing on benefits.

An irrigation district created by a county board under an act of the Legislature is an assessment district created for the primary purpose of assessing upon private lands benefits to be derived by formation of the district, not a public corporation as to which inhabitants and property owners are subject to taxation for municipal purposes without any hearing as to benefits.

9. Constitutional law ⇨289—Waters and water courses ⇨216—Prohibition of contest by landowner of question of benefit from proposed irrigation district violates due process clauses of federal and state Constitutions.

California Irrigation District Act, § 4, as amended by St. 1911 (Ex. Sess.), p. 139, in giving conclusive validity to the order of the board of supervisors as to formation of a proposed district and depriving a landowner therein of the right to contest the question of whether his land would be benefited would violate the due process clauses of the federal and state Constitutions, unless opportunity for inquiry into the question of benefits is given elsewhere, notwithstanding section 69, which permits contest of the validity of an assessment, but not inquiry into that question.

10. Waters and water courses ⇨225—Limitation of inquiry into act of board of supervisors in forming irrigation district unavailing where board acts without jurisdiction.

California Irrigation District Act, § 72, as amended by St. 1915, p. 1370, § 8, in purporting to limit all inquiry into the action of a board of supervisors in forming an irrigation district, is unavailing to prevent such inquiry where the board has proceeded without jurisdiction.

11. Waters and water courses ⇨225—Decision by board of supervisors as to benefit of irrigation district to landowner conclusive on collateral attack if hearing afforded.

Where proper notice was given to an owner of land in a proposed irrigation district of a hearing as to whether his land would be benefited and he was actually present and made his objections and declined to introduce evidence on the theory that the burden of proof was on the board of supervisors to establish the irrigability of his land and the benefit thereto, a

decision by the board pursuant to such hearing is conclusive against collateral attack.

12. Certiorari ⇨68—Not proper to test jurisdictional facts.

Jurisdictional facts are not properly contested by a proceeding for a writ of review; the function of such writ being to bring the proceedings in the inferior court, including the evidence, before the court.

13. Waters and water courses ⇨225—Court bound by facts stated in complaint if any showing made by board of supervisors.

In a proceeding to annul an order of the board of supervisors approving a petition for formation of an irrigation district if any showing whatever is made in support of their action by report of the state engineer as required by California Irrigation District Act, § 2, as amended by St. 1917, p. 752, § 2, and St. 1919, p. 715, § 2, and section 2a, as added by St. 1917, p. 755, § 3, the court is bound by the facts stated in the complaint.

14. Waters and water courses ⇨225—Order of board annulled where no evidence to support.

In a proceeding to annul an order of the board of supervisors approving a petition for formation of an irrigation district, unless there was some sort of evidence or proof as to the allegations of the petition and as to the sufficiency of the signatures thereto, the order will be annulled.

15. Certiorari ⇨68—Some evidence required to prove jurisdictional facts.

In review proceedings, the courts will inquire into whether or not there was any evidence whatever to prove the jurisdictional facts, and in absence thereof will annul the order of the tribunal whose decision is under review.

16. Waters and water courses ⇨225—Certain documents may be considered by board of supervisors in determining jurisdictional facts; "evidence."

Under California Irrigation District Act, §§ 1, 2, as amended by St. 1919, pp. 714, 715, §§ 1, 2, section 2a, as added by St. 1917, p. 755, § 3, containing certain provisions with regard to the character of the evidence upon which the board of supervisors is entitled to act in its order fixing the boundaries of an irrigation district and proposing an election to determine whether such district shall be incorporated, the report of the state engineer, the certificate of acknowledgment, or the affidavit referred to therein can be considered by the board in reaching its conclusion upon the jurisdictional facts, and are "evidence" in the sense in which the term is used in proceedings to review their action.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Evidence.]

17. Waters and water courses ⇨225—Order of board approving petition for formation of irrigation district should be annulled, where no showing in support of petition.

Where the allegations of a petition for a writ of review to annul an order of a board of

supervisors approving a petition for formation of an irrigation district were sufficient to warrant its issuance and it appeared from the return that no showing whatever was made before the board in support of the latter petition, the order should have been annulled.

18. Constitutional law ⚡56—Statutory provision depriving superior court of jurisdiction to review action of board of supervisors fixing boundaries of irrigation district unconstitutional.

California Irrigation District Law, § 4, as amended by St. 1911 (Ex. Sess.), p. 139, providing that a finding of the board of supervisors in favor of the genuineness and sufficiency of the petition and notice shall be final and conclusive against all persons except the state upon suit commenced by the Attorney General, is unconstitutional in so far as it deprives the superior court of jurisdiction to review the proceedings of such board, since Const. art. 6, § 5, vests jurisdiction in the superior court in certiorari.

19. Constitutional law ⚡289—Statutory provision, prohibiting certiorari to inquire into whether board of supervisors afforded due process in hearing on proposed irrigation district unconstitutional.

California Irrigation District Law, § 72, as amended by St. 1915, p. 1370, § 8, in so far as it attempts to make the findings of the board of supervisors upon a hearing as to benefits to be derived from a proposed irrigation district conclusive, so as to prohibit inquiry upon direct attack in certiorari into the question of whether or not the supervisors afforded due process of law in exercising their jurisdiction, denies due process of law, which requires a hearing upon the question of benefits and evidence upon that subject.

20. Waters and water courses ⚡216—Validating act unconstitutional in prohibiting certiorari to inquire into jurisdiction of board of supervisors in forming irrigation district.

St. 1921, p. 76, validating the organization of the Madera irrigation district as organized by the board of supervisors of Madera county in so far as it purports to prohibit an inquiry upon certiorari into the jurisdiction of the board of supervisors in making its order fixing the boundaries of the district to be benefited, is unconstitutional, since the curative act cannot cure jurisdictional defects, but only such defects and irregularities as could have been omitted by the Legislature in the first instance.

21. Waters and water courses ⚡225—Validity of order calling election to vote on incorporation of irrigation district may be inquired after district has acted as a corporation de facto.

Where an irrigation district has been exercising the powers of a de facto corporation after the electors of the district have voted for incorporation, it is not too late to inquire by a writ of review into the validity of the order calling the election.

22. Constitutional law ⚡70(3)—Presumption that Legislature considered benefits in passing act declaring irrigation district valid not applied, where Legislature expressly adopts findings of board of supervisors as to benefits.

If St. 1921, p. 76, declaring the Madera irrigation district and all proceedings in the formation thereof valid, be considered as an act creating such district, the conclusive presumption indulged in by the courts to the effect that the Legislature has duly considered the benefits to be derived by the lands included within the district is not applicable when the Legislature expressly adopts the findings of the board of supervisors as to benefits.

23. Statutes ⚡76(1)—Special act as to irrigation district invalid, where same result possible under general law.

Since St. 1921, p. 76, declaring the Madera irrigation district and all proceedings in the formation thereof valid, was passed solely to correct errors in procedure required by a general law, and not for the reason that the district could not be created under a general law, it violates Const. art. 4, § 25, subd. 33, prohibiting a special law wherever a general law can be made applicable, when considered as a law whereby the Legislature exercises its own power to define the boundaries of a district by ratification of the act of the subordinate board to which it had delegated the power in the first instance.

In Bank.

Appeal from Superior Court, Madera County; E. N. Rector, Judge.

Petition for writ of review by Miller & Lux, Incorporated, a corporation, against the Board of Supervisors of the County of Madera and others, to annul an order of the board approving a petition for formation of an irrigation district and calling an election. From a judgment for defendants, plaintiff appeals. Reversed.

Edward F. Treadwell, of San Francisco (Joseph C. Sharp, of San Francisco, of counsel), for appellant.

Haven, Athearn, Chandler & Farmer, of San Francisco, A. L. Cowell, of Stockton, and Stanley Murray, of Madera, for respondents.

WILBUR, J. The plaintiff petitioned the superior court of the county of Madera for a writ of review for the purpose of inquiring into the validity of an order of the defendant board of supervisors calling an election for the establishment of an irrigation district, to be known as the Madera irrigation district. A demurrer for want of sufficient facts and alleging lack of jurisdiction was interposed and sustained by the trial court, and judgment was rendered against the plaintiff in pursuance of such ruling on demurrer. The plaintiff appeals from the judgment.

[1] The respondents moved to dismiss the

appeal upon the ground that the question involved has become moot. This contention is based upon the fact that since the bringing of this suit the plaintiff has sued the Madera irrigation district in the United States District Court and in doing so has specifically alleged in its complaint therein that the Madera irrigation district is and at all times therein mentioned had been an irrigation district incorporated under the laws of the state of California and under the act known as the California Irrigation District Act (St. 1897, p. 254, as amended). That suit was brought to restrain the alleged improper use of the funds of the district. It is claimed upon the application to dismiss the case at bar that by this action in the United States District Court the plaintiff has accepted the benefits of the judgment in the court below sustaining the validity of the incorporation of this district. It is further claimed that the plaintiff by filing in this court a petition for writ of mandate directed against the secretary of the Madera irrigation district to compel the secretary of the district to permit the inspection of the public writings and records of said district has further acquiesced in and accepted the judgment of the lower court. In a proceeding to enjoin the improper use of the funds of the district or to compel the inspection of its records the plaintiff could not attack the validity of the organization of a de facto corporation and for the purposes of those proceedings was not only entitled to proceed upon the theory that defendant was a corporation, but was compelled so to do. It follows that the proceedings taken by the plaintiff and its officers to compel the Madera irrigation district to comply with the law regulating irrigation districts is not such an admission of the existence of the corporation as would preclude the prosecution of an appeal in this proceeding, involving, as it does, the question of the de jure existence of the corporation in a direct attack by a review of the validity of the order of the supervisors fixing the boundaries of the district and ordering an election by the people of the district to determine whether or not it should be incorporated. The motion to dismiss this appeal should be denied.

We will proceed to a determination of the merits of the appeal. The petition for the writ of review herein alleges that the plaintiff's lands lie within the proposed district. The sufficiency of the petition to the board of supervisors and of the notice of the hearing thereof are not questioned except by the allegations that no evidence was introduced before the board of supervisors in support of the allegations of the petition or to establish the status of the petitioner. The petition alleges some 25 particulars, wherein it is claimed that evidence was essential to give the board jurisdiction to act in fixing the bound-

aries of the proposed district and ordering an election, and alleges that no evidence whatever was offered upon these matters. It is further alleged that on November 3rd, the date of the hearing upon the petition for the formation of the irrigation district, that the plaintiff filed written objection to the inclusion of its lands within the district upon the ground that said lands would not be benefited by being included within said district and that said lands were not susceptible of irrigation from the same source or by the same system of works as the remainder of the lands within the boundaries of the said proposed irrigation district.

Without mentioning in detail the various matters upon which it is alleged no evidence was introduced before the board of supervisors, it may be said generally that said objection relates to the sufficiency of the signatures attached to the petition, to the publication of the notice of hearing on said petition, and that no evidence was introduced in support of or opposed to the objection of the petitioner that its lands would not be benefited by the irrigation system described in the petition or by the formation of said district.

In *Imperial Water Co. v. Supervisors*, 162 Cal. 14, 120 Pac. 780, it was held that the order of the board of supervisors fixing the boundaries of a proposed irrigation district was a judicial act subject to review by the court upon a writ of certiorari. The law, as originally enacted, provided in section 4 for an appeal to the superior court of the county from the order of the board calling the election. That section was declared unconstitutional in *Chinn v. Superior Court*, 156 Cal. 478, 105 Pac. 580. See, also, *Inglis v. Hopkin*, 156 Cal. 483, 491, 105 Pac. 582; *Matter of Bonds of San Joaquin Irr. Dist.*, 161 Cal. 346, 119 Pac. 198.

The Legislature, at an extra session of 1911, amended section 4 of the act (Ex. Sess. of 1911, p. 139, c. 36) to read as follows:

"Sec. 4. A finding of the board of supervisors in favor of the genuineness and sufficiency of the petition and notice shall be final and conclusive against all persons except the state of California upon suit commenced by the Attorney General. Any such suit must be commenced within one year after the order of the board of supervisors declaring such district organized as herein provided, and not otherwise."

[2] It is contended that under this amended section the only way in which the validity of the order and of the formation of the district can be inquired into is in a quo warranto proceeding instituted by the Attorney General. The difficulty with respondents' contention in that regard is that the jurisdiction of this court and of the superior court to entertain writs of review is given by the Constitution (article 6, §§ 4, 5), and this power cannot be taken away by the Legislature.

Camron v. Kenfield, 57 Cal. 550; *Farmers' Union v. Thresher*, 62 Cal. 407; *City of Tulare v. Hevren*, 126 Cal. 226, 58 Pac. 530; *Pacific Telephone, etc., Co. v. Eshleman*, 166 Cal. 640, 652, 137 Pac. 1119, 50 L. R. A. (N. S.) 652, Ann. Cas. 1915C, 822; *Great Western Power Co. v. Pillsbury*, 170 Cal. 180, 186, 149 Pac. 35.

In addition to section 4, the California Irrigation Act, as amended in 1915 (Stats. 1915, p. 1370), contains certain curative provisions which will be hereinafter more fully discussed. The section is as follows:

"Sec. 72. *Contests.* No contest of anything or matter herein provided shall be made other than within the time and manner herein specified, and in any such action all findings of facts or conclusions of said board of directors, or of the board of supervisors upon all matters shall be conclusive, unless such action was instituted within six months after such finding or conclusion was made."

Furthermore, the Legislature on May 12, 1921 (page 76), passed an act validating the organization of the Madera irrigation district as formed and organized by the board of supervisors of said county, which act is in the following words and figures, to wit:

"Section 1. Madera irrigation district, in the county of Madera, state of California, as formed and organized by the board of supervisors of said county, and as now existing, or as the boundaries thereof may hereafter be modified according to law, is hereby recognized and declared a valid irrigation district with all the powers and authority vested in irrigation districts, and all proceedings on formation and organization of said district are hereby approved and in all respects declared valid."

Before considering the effect of sections 4 and 72, supra, of the California Irrigation Act and of the validating act, supra, we will first examine the question as to the power of the Legislature over the subject-matter in the light of the Fourteenth Amendment to the Constitution of the United States and similar provisions in our own Constitution prohibiting the taking of property without due process of law.

[3] Where the Legislature establishes the boundary of an assessment district it is assumed that the Legislature took such evidence and made such inquiry as was necessary in order to determine whether or not the property included in the assessment district would be benefited and its action in establishing the district is conclusive on the court. *People v. Sacramento Drainage District*, 155 Cal. 373, 103 Pac. 207; *Miller & Lux, Inc., v. Drainage District*, 182 Cal. 252, 265, 187 Pac. 1041; *Los Angeles County Flood Control District v. Hamilton*, 177 Cal. 119, 169 Pac. 1028; *Fallbrook Irr. Dist. v. Bradley*, 164 U. S. 112, 17 Sup. Ct. 56, 41 L. Ed. 369; *Brookes v. City of Oakland*, 160 Cal. 423, 427, 117 Pac. 433.

[4] Where the fixing of the boundaries of the district to be taxed is left to some commission or to the board of supervisors it is essential that property owners whose property is to be taxed shall be given a hearing upon the question as to whether or not their lands should be assessed at all, that is to say, whether or not such lands would be benefited by the proposed improvement, and also a hearing upon the amount of the assessment to be charged against the property. *Fallbrook Irrigation District v. Bradley*, 164 U. S. 112, 17 Sup. Ct. 56, 41 L. Ed. 369, supra; *Brookes v. City of Oakland*, 160 Cal. 423, 426, 428, 117 Pac. 433, supra; *Argyle v. Johnson*, 39 Utah, 500, 118 Pac. 487; *Book v. Thomas*, 61 Wash. 607, 112 Pac. 917; *Ellis v. Board of Supervisors*, 38 Cal. App. 480, 176 Pac. 709. It is immaterial at what stage of the proceedings this opportunity is given so long as the property owner is afforded the opportunity to contest the question of benefits and the amount of the tax to be assessed against his property. In *Fallbrook Irrigation District v. Bradley*, supra, it was held that the Wright Irrigation Law of California, then under consideration, similar to the present California irrigation law, gave the opportunity to the property owners whose property was sought to be included in the district to contest the question as to whether or not their lands would be benefited, at the hearing before the board of supervisors on the petition for the formation of the district, and that this hearing afforded due process of law to the property owner, and that such opportunity was essential to afford due process of law.

[5] The California Irrigation District Act provides for a hearing before the board of directors sitting as a board of equalization upon the proper valuation of the property within the district (section 38), and upon such valuation so determined an ad valorem tax is imposed upon all the property within the district for the proposed improvements (section 39). The California Irrigation District Act provides (section 69) for proceedings by the property owner to contest the validity of the assessment, but it is evidently not intended that this contest should include an inquiry into the validity of the proceedings for the organization of the district, because by section 4 its validity could only be attacked by a quo warranto proceeding brought by the Attorney General within one year after the organization of the district, and, furthermore, section 72 provides that findings of fact and conclusions of the board of directors and of the board of supervisors are conclusive unless the action to contest the validity thereof is instituted within six months after the findings or conclusions are made, and assessments are usually made more than six months after the district is formed.

It follows that the only opportunity given the property owner to oppose the inclusion of his lands within the district is at the hearing before the board of supervisors at the time noticed for the hearing upon the petition for the formation of the district, and that any denial of such right by the board of supervisors or any statutory provision purporting to make the order of the board conclusive upon the property owner without such hearing having been in fact had is violative of both state and federal Constitutions. *Fallbrook Irrigation District v. Bradley, supra*; *People v. Van Nuys Lighting Dist.*, 173 Cal. 792, 797, 162 Pac. 97, Ann. Cas. 1918D, 255.

In this connection attention should be given to the contention of the respondent with reference to the case of *Fallbrook Irr. Dist. v. Bradley, supra*. It is contended that this decision by the United States Supreme Court had not been followed by this court, and that it has been expressly repudiated by this court. It must be confessed that this contention finds support in the opinion in the case of *Henshaw v. Foster*, 176 Cal. 507, 169 Pac. 82, wherein it is said:

"Respondents insist that we are here dealing with a matter directly affecting private property. They call attention to the fact that in *Fallbrook Irr. Dist. v. Bradley*, 164 U. S. 112 [41 L. Ed. 369, 17 Sup. Ct. Rep. 56], the Supreme Court of the United States declared the necessity for a hearing 'at some time to those interested upon the question of fact whether or not the land of any owner which was intended to be included would be benefited by the irrigation proposed,' and that the Wright Act was upheld upon the express declaration of the court that an appropriate hearing before the board of supervisors is in that act provided. Notwithstanding any expressions in the *Fallbrook Irrigation Case*, we are committed to the reasoning of the *Madera District Case* [92 Cal. 296], which was followed in *People v. Ontario* [148 Cal. 267] long after the decision in the other case had been made. In the opinion in the *Madera District Case* the irrigation district was treated as a public corporation to be invested with certain political duties to be exercised in behalf of the state. That a water district such as the one sought to be established in San Diego county is also such a corporation may not be doubted under the authority of that decision. The statute in its scope is even broader than the Wright Irrigation Act and is quite as complex in its details as is that law. To classify a district created under its sanction with a sewer district such as that described in the *Brookes Case* would be to disregard the distinction pointed out in *Wilcox v. Engebretsen*, 160 Cal. 288 [116 Pac. 750]."

The author of the opinion then quotes extensively from *In re Madera Irr. Dist.*, 92 Cal. 296, 323, 28 Pac. 272, 675, 14 L. R. A. 755, 27 Am. St. Rep. 106. The decision of this court in the *Madera Irr. Dist. Case, supra*, was rendered before the decision of the United States Supreme Court in *Fallbrook*

Irrigation District v. Bradley, supra. In the *Madera Irr. Dist. Case* this court, in affirming the validity of the law and the regularities of the proceedings for the formation of that district, placed its decision upon the ground, among other things, that the property owner was not entitled to notice or an opportunity to be heard in the proceedings to include his property within the irrigation district for the reason that the irrigation district is in effect a "public corporation to be invested with certain political duties which it is to exercise in behalf of the state," and that the Legislature could fix the boundaries of such a district or authorize them to be fixed without any notice to the property owner whose lands were to be included in the district, and that no such notice was required under the due process of law clause of the federal and state Constitutions. The Supreme Court of the United States, however, in the *Fallbrook Case* after considering our decision in the *Madera Irr. Dist. Case*, expressly held that a judicial determination of the fact that the property included within the district was benefited by the proposed irrigation work was essential in order to comply with the due process of law requirement of the Fourteenth Amendment to the federal Constitution. In that regard the court said:

"The Legislature not having itself described the district, has not decided that any particular land would or could possibly be benefited as described, and, therefore, it would be necessary to give a hearing at some time to those interested upon the question of fact whether or not the land of any owner which was intended to be included would be benefited by the irrigation proposed. * * * Upon the question of fact as to benefits, decided by the board, it is held in the *Tregea Case* that its decision is conclusive. 88 California, 334, 26 Pac. 237, *supra*. Whether a review is or is not given upon any of these questions of fact (if the tribunal created by the state had power to decide them, and if an opportunity for a hearing were given by the act), is a mere question of legislative discretion. It is not constitutionally necessary in such cases to give a rehearing or an appeal. *Missouri v. Lewis*, 101 U. S. 22; *Pearson v. Yewdall*, 95 U. S. 294. * * *" (Italics ours.)

The Supreme Court of the United States upheld the Wright Act (St. 1887, p. 29, as amended), in the *Fallbrook Case* and the proceedings thereunder solely upon the ground that such an opportunity to be heard as was required by the federal Constitution was provided for and was in fact given under the statute in question. In dealing with that question the Supreme Court in *Fallbrook Case* said:

"Third. We come now to the question of the true construction of the act. Does it provide for a hearing as to whether the petitioners are of the class mentioned and described in the act and as to their compliance with the conditions of the act in regard to the proceedings prior to the presentation of the petition for the forma-

tion of the district? Is there any opportunity provided for a hearing upon notice to the landowners interested in the question whether their lands will be benefited by the proposed irrigation? * * *

"When the act speaks of a hearing of the petition, what is meant by it? Certainly it must extend to a hearing of the facts stated in the petition, and whether those who sign it are sufficient in number and are among the class of persons mentioned in the act as alone having the right to sign the same. * * *

"In the case of *People v. Hagar*, 52 California, 171, 182, it was held that the board of supervisors, on presentation of the petition, was to hear and determine the question of jurisdiction, and whether the allegations of the petition were true. An approval and confirmation of the petition and the establishment of the district was held to be a conclusive judgment by the board that the lands mentioned and in question were swamp lands; that the petitioners held the proper evidences of title thereto, and that the lands would be benefited by the reclamation. These jurisdictional facts, it was held, must exist before the district could lawfully be established. * * *

"The parties whose lands are thus included in the petition are entitled to a hearing upon the question of benefits, and to have the lands excluded if the judgment of the board be against their being benefited."

Unless the Legislature decide the question of benefits itself, the landowner has the right to be heard upon that question before his property can be taken. This, in substance, was determined by the decisions of this court in *Spencer v. Merchant*, 125 U. S. 345, 356, and *Walston v. Nevin*, 128 U. S. 578. Such a hearing upon notice is duly provided for in the act. * * *

"Thus the act provides for a hearing of the landowner both as to the question whether his land will be benefited by the proposed irrigation, and when that has been decided in favor of the benefit, then upon the question of the valuation and assessment of and upon his land included in the district. As to other matters, the district can be created without notice to any one. Our conclusion is that the act, as construed, with reference to the objections considered under this third head, is unassailable. * * *" (Italics ours.)

[6] This court is, of course, bound by the decisions of the United States Supreme Court upon the interpretation of the federal Constitution, and no matter how many decisions may have been subsequently rendered by this court opposing the conclusion of the Supreme Court of the United States in the *Fallbrook Irrigation District Case*, we would nevertheless be bound to follow the Supreme Court of the United States rather than our own decisions upon that subject where there is a conflict. We do not find, however, that there is such a conflict.

In *People v. Ontario*, 148 Cal. 627, 84 Pac. 205, cited in *Henshaw v. Foster*, supra, the court was dealing with the sufficiency of the proceedings for the annexation of territory to a city, and it was properly held that no hearing upon the question of proposed benefits was required. The decision of this court

in *Henshaw v. Foster*, supra, proceeds upon the theory that the municipal water district therein dealt with had powers in addition to those of an irrigation district and partook of the character of a public corporation invested with political duties in behalf of the state, and upon that basis sustained the law. It is true that the opinion follows the reasoning of the court in the *Madera Irrigation District Case*, 92 Cal. 323, 28 Pac. 272, 675, 14 L. R. A. 755, 27 Am. St. Rep. 106; but in so far as it purports to ignore the decision of the United States Supreme Court in the *Fallbrook Irrigation District Case*, where that decision is applicable, it must, of course, be disregarded. The same is true as to the following obiter dictum in *Matter of Bonds of San Joaquin Irr. Dist.*, 161 Cal. 345, 346, 119 Pac. 198:

"The Legislature having the unquestioned power to provide for the formation of such districts, might do so without giving the property owners any voice in the matter at all and may, without question, do so, by authorizing the presentation of a petition signed by a majority of those who, upon the last equalized assessment roll, appear as owners of the property. In re *Madera Irrigation District*, 92 Cal. 320 [27 Am. St. Rep. 106, 14 L. R. A. 755, 28 Pac. 272, 675]; *People v. Sacramento Drainage District*, 155 Cal. 373 [103 Pac. 207]."

[7] It is no doubt true as held in that case that the Legislature could authorize the formation of an irrigation district without any preliminary petition whatever, or could determine the nature and character of the petition, if one is required, without regard to the property owners in the proposed district, but the case does not decide, because the point was not involved, that the property owner was not entitled to be heard at some stage of the proceedings upon the question as to whether or not his land is benefited, where the power to fix the boundaries of the district is vested by the Legislature in a subordinate body, and where the formation of the district will impose a burden on all land included in it to pay the cost of a local public improvement to benefit such land.

The principle applied in the *Fallbrook Irrigation District Case* by the Supreme Court of the United States is well settled and has been constantly adhered to by this court in its decisions. *Wilcox v. Engebretsen*, 160 Cal. 288, 293, 116 Pac. 750; *Brookes v. City of Oakland*, 160 Cal. 423, 117 Pac. 433.

[8] The only difficulty in applying the decisions on this subject is to determine whether or not the district created by the subordinate body in pursuance of an act of the Legislature is in its nature a public corporation, the inhabitants and property owners of which are subject to taxation for municipal purposes without any hearing as to the benefits to be derived from the creation and conduct of such a corporation, or is an assessment district created for the primary

purpose of assessing upon private lands the benefits to be derived thereby from the public improvements for the purpose the district is formed.

In the present case, however, we are not subject to any embarrassment in such application because that question has been conclusively determined by the Supreme Court of the United States in its holding that an irrigation district organized under the Wright law is such a district as could only be properly formed by notice to the property owners at some stage of the proceedings of the inclusion of their lands within the district and by giving them a hearing before some tribunal having power to decide the matter, to advance, and, if possible, sustain their contention that their lands would not be benefited by the proposed improvement.

[9] In considering the curative provisions of the act in question and the provisions of the validating act, these statutes must be construed in the light of the constitutional power of the Legislature as determined in the Fallbrook Case, and, if so construed, they operate to deprive the property owner of due process of law, they must be to that extent disregarded as void and of no effect. For the foregoing reasons, section 4 of the act as amended in 1911, above quoted, in so far as it would give conclusive validity to the order of the board of supervisors in the absence of notice and hearing and would deprive the property owner at every subsequent stage of the proceedings of any right to contest the question as to whether or not his lands would be benefited, would be violative of the due process of law clauses of the federal and state Constitutions. This defect would not be met by the opportunity afforded to contest the validity of an assessment under section 69, if that section be construed, as we have hereinbefore indicated it should be, to prohibit any inquiry into the question of benefit in contests as to the validity of assessments, unless such opportunity had elsewhere been given.

[10] Section 72 of the act above quoted, in so far as it purports to limit all inquiry into the action of the board of supervisors in forming the district, must also be held unavailing to prevent such inquiry where that board has proceeded without jurisdiction.

The petitioner does not claim that it was prevented from offering testimony to the board of supervisors upon the question of the irrigability of its land or upon the subject-matter of its objection to its inclusion of its lands within the district or that proper notice was not in fact given of the hearing. Its claim is that no evidence was introduced before the board of supervisors of Madera county affirmatively showing that the lands would be benefited by the proposed plan of irrigation or of the publication of notice or of the sufficiency of the signatures

to the petition for the formation of the district.

[11] It may be conceded that, where proper notice was given and the petitioner was actually present at the time of hearing, presented its objections thereto, and declined to introduce evidence upon the theory that the burden of proof was upon the defendants to establish the irrigability of petitioner's lands and the benefit of the proposed plan of improvement, a decision by the board after such opportunity had been given to the petitioner would be conclusive upon a collateral attack. But the proceeding herein to review that order is a direct attack.

[12] We now enter upon the question of whether or not upon this proceeding at bar to review the order of the board of supervisors the petitioner can take advantage of the mere failure of proof of the allegation of the petition. Upon this question the defendants contend that the plaintiff has failed to state sufficient facts for the issuance of a writ of review or for the vacation of the order of the board because it has failed to allege the nonexistence of the jurisdictional facts, in that it is not alleged that the petition for the formation of the district was in any respect faulty, or that the signatures thereto were insufficient, or that the notice of the hearing was not published, or that the plaintiff's lands were not irrigable from the common source, or that such lands would not be benefited by the proposed plan of improvement, but that petitioner has contented itself with the mere allegation that no evidence was offered before the board of supervisors to prove these facts. In reply the plaintiff properly calls attention to the fact that the function of a writ of review is to bring before the court for consideration the proceedings before the inferior tribunal, including the evidence, and that the proceedings for a writ of review is not a proper one in which to contest the truth as to the jurisdictional facts. *Golden Gate M. Co. v. Superior Court*, 65 Cal. 187, 191, 3 Pac. 628; *Hoffmann v. Superior Court*, 79 Cal. 475, 21 Pac. 862; *De Pedrosena v. Superior Court*, 80 Cal. 144, 22 Pac. 71; *Los Angeles v. Young*, 118 Cal. 295, 50 Pac. 534, 62 Am. St. Rep. 234. This position is undoubtedly well taken. The court is limited in its proceedings to review the order of the board of supervisors to the record there made, and from that record the jurisdiction of the board to act in the premises must appear.

[13] It is alleged, and by demurrer admitted, that the board of supervisors acted upon the hearing without any evidence upon certain material matters. Whatever the actual facts may be, or whatever may have been in fact considered by the board of supervisors as sufficient to justify their action in the matter, if any showing whatever was made in support thereof by report of the state engineer, as required by law (sections

2, 2a [Stats. 1917, pp. 752, 755; Stats. 1919, p. 715]), or otherwise, we are bound by the facts stated in the complaint herein.

We will proceed to examine the matter from that standpoint, although it would be a much more satisfactory investigation if we had before us the return of the defendants, and were thus assured that the plaintiff's agent had not verified the complaint upon the theory that the supervisors were only authorized to act upon "evidence" within the strict meaning of that term as used in court proceedings.

In *Stumpf v. Board of Supervisors*, 131 Cal. 364, 63 Pac. 663, 82 Am. St. Rep. 350, it was held that a failure to prove the sufficiency of the signatures to a petition for the creation of a sanitary district was fatal to the validity of the proceedings when presented to the court by a writ of review. It was there said:

"The determination of these questions, upon which the jurisdiction of the board depended, required the exercise of judicial power, and as the statute did not prescribe the character of the proof by which they should be determined, *they must be established in accordance with the rules of evidence recognized by the courts and the common law.* 'An exception to the rule that the sufficiency of the evidence will not be reviewed is made when the question is whether jurisdictional facts were or were not proved. This exception arises out of the most important office and function of the writ—the keeping of inferior courts and tribunals within proper bounds. If the decision of the inferior tribunal as to the sufficiency of the evidence to establish jurisdictional facts were not reviewable, the writ of certiorari would be of no avail as a remedy against an assumption of jurisdiction. And for the purpose of enabling the reviewing court to determine whether jurisdictional facts were established, it will require a return to be made of the evidence upon which such facts are based.' 4 Ency. of Pl. & Pr. 262. This court has said: 'In all cases it is essential that there be proof of a sufficient petition, inasmuch as without it the board could acquire no jurisdiction to act, and its proceedings would be absolutely void. * * * Upon certiorari, though the inferior tribunal is required to certify only matters of record, yet if the jurisdictional facts do not appear of record, it must certify not only what is technically denominated the record, but such facts, or the evidence of them, as may be necessary to determine whatever question as to the jurisdiction of the tribunal may be involved.' In *re Madera Irr. Dist.*, 92 Cal. 296, 333, 335, citing *Blair v. Hamilton*, 32 Cal. 52; *Whitney v. Board of Delegates*, 14 Cal. 479; *Lowe v. Alexander*, 15 Cal. 300. * * *

(Italics ours.)

[14] However, in the case of *Wolfskill v. City Council of Los Angeles*, 178 Cal. 610, 174 Pac. 45, this court declined to follow the case of *Stumpf v. Board of Supervisors*, supra, in so far as it held that the only evidence which the board could consider upon such a hearing was evidence which would be acceptable in court. The case still stands,

however, as authority for the proposition that there must be some sort of evidence or proof, not only as to the allegations of the petition, but also as to the sufficiency of the signatures thereto. The petition in this case alleges that no such evidence was received.

[15] We have constantly under review proceedings in which various boards and inferior courts are called upon to exercise a special jurisdiction, and it has uniformly been held in such cases, such as proceedings from the Industrial Accident Commission, from the Railroad Commission, from the medical board in cases involving the taking away of the license of a medical practitioner, in the case of proceedings before the real estate board to deprive a real estate agent of his license, and in contempt proceedings, that the courts will inquire into the question as to whether or not there was any evidence whatever to prove the jurisdictional facts, and in the absence of such evidence have annulled the order of the tribunal whose decision was under review. *People v. Board of Delegates*, 14 Cal. 478, 501; *Schwartz v. Superior Court*, 111 Cal. 106, 43 Pac. 580; *Pacific T. & T. Co. v. Eshleman*, 166 Cal. 640, 137 Pac. 1119, 50 L. R. A. (N. S.) 652, Ann. Cas. 1915C, 822; *Great Western Power Co. v. Pillsbury*, 170 Cal. 180, 149 Pac. 35; *Suckow v. Alderson*, 182 Cal. 247, 187 Pac. 965; *Hewitt v. Board of Medical Examiners*, 148 Cal. 592, 84 Pac. 39, 3 L. R. A. (N. S.) 896, 113 Am. St. Rep. 315, 7 Ann. Cas. 750; *Lanterman v. Anderson*, 36 Cal. App. 472, 172 Pac. 625; *Brecheen v. Ray L. Riley* (Cal. Sup.) 200 Pac. 1042; *Dymert v. Board of Medical Examiners* (Cal. App.) 207 Pac. 409.

In *Schwartz v. Superior Court*, supra, it is said that the jurisdiction of this court on review extended, not "only to the whole record of the court below, but even to the evidence itself, where necessary to determine the jurisdictional facts," citing *People v. Board of Delegates*, 14 Cal. 479; *Lowe v. Alexander*, 15 Cal. 301; *Blair v. Hamilton*, 32 Cal. 49; *People v. Goodwin*, 5 N. Y. 568. In *Los Angeles v. Young*, 118 Cal. 295, 298, 50 Pac. 534, 535 (62 Am. St. Rep. 234), it is stated:

"The common-law writ of certiorari tried nothing but the jurisdiction, and incidentally the regularity of the proceedings upon which the jurisdiction depends. In many cases, therefore, under such writs, the evidence upon which the court acted in determining its jurisdiction was made a part of the record and reviewed under the writ, but the inquiry was always limited to the evidence before the tribunal whose determination was under review. If the jurisdiction of the inferior tribunal depended upon a question of fact, that fact was never tried de novo upon its merits, but the inquiry thereupon was limited strictly to the evidence upon which the inferior tribunal acted," citing *People ex rel. Whitney v. San Francisco Fire Dept.*, 14 Cal. 479.

[16] Sections 1 and 2 of the California Irrigation Act as amended (Stats. 1919, pp. 714, 715) contain certain provisions with regard to the character of the evidence upon which the board of supervisors is entitled to act in its order fixing the boundaries of the irrigation district and proposing an election to determine whether such district shall be incorporated. It provides that the equalized assessment roll or rolls of the county for the last preceding year shall be conclusive evidence of ownership and value of land by the signers of the petition and others, and that a certificate of acknowledgment before a notary public or justice of the peace of any state or an affidavit by any person in the presence of whom such petition was signed shall be sufficient evidence of the genuineness of such signature and residence of the petitioners. Upon the hearing of the petition it is provided that the board of supervisors shall hear the same and shall proceed to determine whether or not said petition complies with the requirements hereinbefore set forth and whether or not the notice required herein has been published as required, and must hear all competent and relevant testimony offered in support of or in opposition thereto. The state engineer is required to make a report to the board of supervisors upon the feasibility of the project (sections 2, 2a, supra). Under these provisions the report of the engineer, the certificate of acknowledgment or the affidavit referred to in the statute, can undoubtedly be considered by the board in reaching its conclusion upon the jurisdictional facts (*Wolfskill v. Los Angeles*, supra) and constitute evidence within the meaning of that term as used in proceedings to review their action. We must assume, however, that no such evidence was presented or considered in view of the allegations of the petition for the writ of review herein.

[17] Upon the allegations of the petition a writ of review should have been issued, and if it appeared from the return, as alleged, that no showing whatever was made before the board of supervisors in support of the petition, the order of the board of supervisors in question should have been annulled, unless other considerations to be next considered require a different conclusion.

[18, 19] The first question to be so considered is the effect of section 72, hereinabove quoted. This section, if given full effect, would prevent any contest with reference to the findings and conclusions of the board of supervisors at the time of the fixing of the boundaries of the district except in the manner specified in the act, namely, in a proceeding brought by the Attorney General of the state. Section 72 and section 4, as amended in 1911 (Stats. 1911, p. 139). But, as we have already shown, section 4, in so far as it deprives the superior court of jurisdiction to review the proceedings of the board of

supervisors, is unconstitutional, and section 72, in so far as it attempts to make the findings of the board of supervisors upon the hearing as to the benefits to be derived by the irrigation project conclusive, if construed to prohibit the inquiry upon direct attack in certiorari into the question of whether or not the supervisors conformed to the constitutional requirements of due process of law in exercising their jurisdiction, upon such direct attack, is also void because due process of law requires a hearing upon the question of benefits and evidence upon that subject. *Fallbrook Irrigation District v. Bradley*, supra; *Stumpf v. Board of Supervisors*, supra. See, also, other cases hereinabove cited on that subject. The Constitution vests jurisdiction in the superior court in certiorari, and hence to review the action of the board of supervisors in fixing the boundaries of the proposed assessment district as at common law (Const. Cal. art. 6, § 5; *Camron v. Kenfield*, 57 Cal. 550, supra; *Farmers' Union v. Thresher*, 62 Cal. 407), and this jurisdiction cannot be taken away by the Legislature. See concurring opinion of Mr. Justice Sloss in *Pacific Telephone, etc., Co. v. Eshleman*, supra, 166 Cal. 690, 691, 694, 137 Pac. 1119, 50 L. R. A. (N. S.) 652, Ann. Cas. 1915C, 822, and cases there cited. See, also, *People v. Van Nuys Lighting Dist.*, 173 Cal. 792, 797, 162 Pac. 97, Ann. Cas. 1918D, 255. See, also, *Great Western Power Co. v. Pillsbury*, 170 Cal. 180, 149 Pac. 35, supra, and *Western Indemnity Co. v. Pillsbury*, 170 Cal. 686, 151 Pac. 398.

[20] It follows that the curative provisions of the statute in question, in so far as they purport to prohibit an inquiry upon certiorari into the jurisdiction of the board of supervisors in making its order fixing the boundaries of the district to be benefited, are unconstitutional.

[21] The respondents contend that where the district has been exercising the powers of a de facto corporation, after the electors of the district have voted for incorporation, it is too late to inquire into the validity of the order calling the election by a writ of review. There is nothing in this contention. Upon this point respondents quote from a concurring opinion of Mr. Justice Finlayson of the Second District Court of Appeal, Second Division, in the case of *Mitchell v. Henry*, 31 Cal. App. Dec. 597.¹ This decision, however, dealt with the annexation of territory to the city of Glendale, a city of the sixth class, a proceeding wherein the question of due process of law is not involved. *People v. Town of Ontario*, 148 Cal. 625, 632, 633, 634, 84 Pac. 205, supra. Moreover, the decision of the District Court was vacated by an order of transfer to this court and subsequently decided on other grounds. *Mitchell v. Henry*, 184 Cal. 266, 193 Pac. 502.

¹ For hearing in Supreme Court, see 184 Cal. 266, 193 Pac. 502.

We will next consider the effect of the validating act passed by the Legislature of 1921 (Stats. 1921, c. 75, p. 76). The decisions all agree upon the proposition that a curative act cannot cure jurisdictional defects in the establishment of an assessment district and thus authorize the taking of property without due process of law. *People v. Van Nuys Lighting District*, 173 Cal. 792, 797, 162 Pac. 97, Ann. Cas. 1918D, 255, supra. This is true whether the curative provisions of the law are found in the statute authorizing the proceedings or in a subsequent statute attempting to validate such a proceeding. See cases cited in *People v. Van Nuys Lighting District*, supra, 173 Cal. 297, 298, 162 Pac. 97, Ann. Cas. 1918D, 255, and in *Oakland Paving Co. v. Whittell Realty Co.*, 185 Cal. 113, 195 Pac. 1058. See, also *Watkinson v. Vaughn*, 182 Cal. 55, 186 Pac. 753. It follows that, inasmuch as the defect in the proceedings now under consideration is jurisdictional, and that the validating act would therefore have the effect of depriving the plaintiff of its property without due process of law, the act is clearly unavailing to establish the validity of the incorporation of the Madera irrigation district considered purely from the standpoint of a validating or curative act. This conclusion, however, does not fully dispose of the question involved in determining the effect and constitutionality of the validating act for the reason that the Legislature had the power to directly create an irrigation district of this magnitude (300,000 acres), if there was any reason justifying special legislation for that purpose. Const. art. 4, § 25, subd. 33; *People v. Sacramento Drainage District*, 155 Cal. 373, 103 Pac. 207; *Miller & Lux v. Sacramento & San Joaquin Drainage District*, 182 Cal. 252, 187 Pac. 1041. Furthermore, if the Legislature itself establishes the boundaries of the Madera Irrigation District, the question of due process of law is not involved.

The respondents cite *State v. Squires*, 26 Iowa, 340, and subsequent decisions of the Supreme Court of Iowa as holding that a validating act, although necessarily special and local, is nevertheless not violative of the general constitutional prohibition against local and special legislation where general laws may be made applicable, for the reason that a general law cannot appropriately be made applicable. *Witter v. Board of Sup'rs of Polk Co.*, 112 Iowa, 380, 83 N. W. 1041; *McSurely v. McGrew*, 140 Iowa, 163, 118 N. W. 415, 132 Am. St. Rep. 248. These decisions, and others cited are based upon the proposition that a curative act per se cannot well be general in character. These decisions, however, recognize that a validating act cannot cure jurisdictional defects, but cure only such defects and irregularities as could have been omitted by the Legislature in the first instance. The Supreme Court of Iowa cites *Sutherland on Statutory Con-*

struction (section 483) with approval in *Witter v. Board of Sup'rs*, supra. The author of that text-book places this limitation upon legislative power, and this conclusion is in accord with our own decisions.

We have not so far followed the Supreme Court of Iowa in its conclusion that such a special curative act is not violative of our Constitution (see *People v. Van Nuys Lighting District*, supra), but even if we go so far, the validating act is void even under the Iowa decisions, as well as under our own. *People v. Van Nuys Lighting District*, supra. When, therefore, respondents rely upon the Iowa decisions to justify such legislation, as permissible because a general law is not applicable, they are met with the proposition that, considered merely as a curative statute, the act is unavailing to cure jurisdictional defects, while considered as an original exercise of legislative power, it is clearly violative of the constitutional prohibition of special legislation for reasons that presently will be more fully stated. In either event the validating act is unavailing to defeat the plaintiff's effort to secure a review of the action of the board of supervisors.

[22, 23] In considering the constitutionality of the validating act as an act *creating* the Madera irrigation district, we meet with several difficulties. In the first place the conclusive presumption indulged in by the courts, to the effect that the Legislature had duly considered the benefits to be derived by the lands included within the district is hardly applicable when the Legislature expressly adopts the findings of the board of supervisors as to benefits. In addition, the fact that the Legislature by its validating act adopts the proceedings of the board of supervisors for the establishment of a district to derive its powers from the general law for the incorporation of such districts is conclusive evidence that the district in question might be established in accordance with the general law then in force, if properly followed, and is therefore a legislative declaration to the effect that the validating act was passed solely for the purpose of correcting errors in the procedure required by a general law in that particular case, and not for the reason that the Legislature found it impossible to pass a general law upon the subject, which would authorize the formation of the Madera irrigation district. This validating act, then, is on its face violative of article 4, § 25, subd. 33, of the Constitution, prohibiting a special law in all cases where a general law can be made applicable, when considered as a law whereby the Legislature exercises its own power to define the boundaries of a district by ratification of the act of the subordinate board to which it had delegated the power in the first instance. In this connection we may refer to the discussion in the recent case of *Mordecai*

v. Board of Supervisors, 183 Cal. 434, 438, 192 Pac. 40.

The motion to dismiss this appeal is denied.

The judgment of the superior court is reversed, with instructions to overrule the demurrer and issue a writ of review requiring the defendants to certify the entire record before them, including the reports, affidavits, admissions of the parties, and any information or statements formal or informal upon which they acted in reaching the conclusions embodied in their orders fixing the boundaries of the Madera Irrigation District, and in determining the sufficiency of the petition for the formation of such district, and that upon return the court proceed to determine whether or not the orders sought to be reviewed should be annulled.

We concur: SHAW, C. J.; WASTE, J.; SHURTLEFF, J.; LAWLOR, J.; SLOANE, J.

(58 Cal. App. 372)

JACKSON v. DOLAN et al. (Civ. 4185.)

(District Court of Appeal, First District, Division 1, California. June 30, 1922.)

1. Appeal and error $\S$ 439—Trial court without authority to vacate order granting new trial after appeal therefrom is perfected.

The trial court is without authority to vacate or set aside an order granting a new trial after appeal therefrom is perfected, since the appeal removes from the court's jurisdiction the subject-matter of the judgment appealed from, including all questions going to the validity or correctness of such judgment or order.

2. Appeal and error $\S$ 440—Courts have power to correct mistakes in judgments after entry, notwithstanding appeal therefrom is taken.

Courts have power at all times to allow amendments to judgments for the purpose of having the judgment as entered express that which was rendered, so that the record will speak the truth, and the perfecting of an appeal does not impair this power.

3. Motions $\S$ 56(2)—Void order for want of jurisdiction cannot be given force by order nunc pro tunc.

An order nunc pro tunc cannot give force to a prior order void for want of jurisdiction.

4. Sunday $\S$ 30(7)—Entry of order on Sunday held a judicial act, and void as such.

Entry by the clerk on January 2, which was Sunday, of an order granting a new trial, but dating the same December 31, preceding, was a judicial, and not a nonjudicial, act, where the order, if made at all, was made on Sunday, and not on any other day, and, hence, such entry was void.

Appeal from Superior Court, Imperial County; Franklin J. Cole, Judge.

Action by L. A. Jackson against E. J. Dolan and Gregory Ashe. From order denying motion to vacate order granting new trial and to amend minutes, plaintiff appeals. Order refusing to vacate order granting new trial affirmed, and that portion of order denying motion for correction of minutes reversed, with directions.

C. L. Brown, of El Centro, for appellant.
Randall, Bartlett & White, of Los Angeles, for respondents.

TYLER, P. J. This is an appeal from an order denying a motion to vacate an order granting a new trial, and also a motion to amend the minutes of the court. The action in which these motions were made was one brought to recover damages for personal injuries received in an automobile accident. The case was tried before a jury, and a verdict in the sum of \$4,000 was rendered in favor of plaintiff, and judgment was entered thereon on December 15, 1920. Thereafter, on the 17th day of December, 1920, defendants made a motion for a new trial, and the motion was by the court taken under advisement. No action was had on such motion until January 3, 1921, when the minutes of the court show as of date of December 31, 1920, that the motion was granted as to defendant Ashe. The term of office of Honorable Phil D. Swing, the judge who tried the case, and who made the order, expired on January 3, 1921. January 1st and 2d were both legal holidays, so that, for all the judicial purposes of this case, the term of office of the trial judge expired December 31, 1920, the day the order bore date. After the granting of the motion for new trial plaintiff perfected an appeal from such order. Subsequently, on the 22d day of April, 1921, he moved the trial court to vacate and set aside the order granting a new trial, and to correct the minutes of the court so as to show that the order was made on Sunday, January 2, 1921, instead of Friday, December 31, 1920. This motion was denied, and this appeal is from the order denying such motion. The motion was based on affidavits. The affidavit of the clerk of the court who made the entry in the minutes was to the effect that the order was in fact made on Sunday, January 2, 1921, a legal holiday, and that no other order was ever made. This affidavit was not controverted. The affidavit of the attorney for plaintiff shows that, at the time the appeal from the order granting a new trial was taken, and at the time the bill of exceptions was settled and allowed, he did not know that the order appearing in the minute book was made on the day shown therein, and that he did not ascertain true knowledge of such fact until March 11, 1921, and that, in taking his appeal, he relied solely upon information derived from the record.

[1] So far as the motion is directed to the vacation of the order granting a new trial, respondent contends that the trial court, by reason of the appeal, lost jurisdiction to afford any relief in the matter, and that the motion to vacate the order was properly denied. We are of the opinion that respondent is correct in this contention. Conceding that the trial court was without jurisdiction to make the order granting a new trial, the appeal had the effect of removing from its jurisdiction the subject-matter of the judgment or order appealed from, including all questions going to the validity or correctness of such judgment or order. The case, in consequence of the appeal, was transferred to the Supreme Court. The trial court was therefore without authority to vacate or set aside the order granting a new trial. *Stewart v. Taylor*, 68 Cal. 5, 8 Pac. 605; *Rugles v. Superior Court*, 103 Cal. 125, 37 Pac. 211; *Peycke v. Keefe*, 114 Cal. 212, 46 Pac. 78; *Merced Bank v. Price*, 152 Cal. 697, 93 Pac. 866; *Parkside Realty Co. v. MacDonald*, 167 Cal. 342, 139 Pac. 805; 2 Cal. Jur. § 179.

[2] So far, however, as the motion was directed to the correction of the court's minutes to accord with the facts, a different situation is presented.

Assuming, as we must, for the affidavits of appellant are uncontroverted by the ex-judge or any other person, that the order was made as claimed, the trial court certainly had the power, and it was its duty, to have granted this motion. While the court by an appeal loses jurisdiction of the cause for the purposes of the appeal, it does not thereby lose jurisdiction of its records. These remain within its physical custody and control, and it has the right, after an appeal is taken, as before, to correct mistakes appearing upon the face of the record. Courts have power at all times to allow amendments to judgments for the purpose of having the judgment as entered express that which was rendered so that the record will speak the truth. *Fay v. Stubenrauch*, 141 Cal. 573, 75 Pac. 174; *Kaufman v. Shain*, 111 Cal. 16, 43 Pac. 393, 52 Am. St. Rep. 139; 2 Cal. Jur. § 182. The taking of an appeal does not impair this right. *Buckman v. Whitney*, 24 Cal. 267.

[3, 4] The claim of respondent that the entry of the order by the clerk was a purely ministerial act, and could therefore be made upon a nonjudicial day, is without force. The claim here made is that no order was ever made except the one in question. Had a previous order been regularly made, there might be some merit in the contention. There must be some record of the making of such an order. Here there is none. An order nunc pro tunc can never give force to a judgment void for want of jurisdiction on the part of the judge making it. Here the order itself, directing the clerk to enter the

decision nunc pro tunc, was a judicial act, and as such could not be performed on a legal holiday. The question of the power of courts to enter orders nunc pro tunc is therefore not here involved.

From what has been said, it follows that the order refusing to vacate and set aside the order granting defendant Ashe a new trial is hereby affirmed, and that portion of the order denying the motion for the correction of the court's minutes to accord with the facts is hereby reversed, with directions to the trial court to determine the true facts, and enter an order accordingly.

We concur: KNIGHT, Justice pro tem.; KERRIGAN, J.

58 Cal. App. 277

PEOPLE v. KOOSISTRA. (Cr. 1010.)

(District Court of Appeal, First District, Division 1, California. June 22, 1922. Hearing Denied by Supreme Court Aug. 21, 1922.)

1. Infants ⇐20—Evidence held sufficient to warrant conviction under Juvenile Court Law.

In a prosecution under Juvenile Court Law, § 21, evidence that defendant persuaded a 16 year old girl to disrobe and to pose in a nude condition for the purpose of being photographed held sufficient to warrant conviction.

2. Infants ⇐20—Any conduct by a person which causes minor to become a delinquent may be shown.

In a prosecution under Juvenile Court Law, any conduct on the part of defendant which causes or tends to cause a minor to become a delinquent may be shown, though such conduct may consist of one act or a series of acts.

3. Infants ⇐20—Age may be established by testimony of relative.

The age of a minor may be established by testimony of a relative or other person who is in a position to have personal knowledge of the minor's age.

Appeal from Superior Court, City and County of San Francisco; Harold Louderback, Judge.

Joseph Koosistra was convicted of violation of Juvenile Court Law, and he appeals. Affirmed.

Joseph A. Garry and Walter McGovern, both of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and John H. Rioridan, Deputy Atty. Gen., for the People.

TYLER, P. J. Defendant, by information, was charged jointly with one John De Young with a violation of section 21 of the Juvenile Court Act (St. 1915, p. 1225). He was separately tried, convicted, and sentenced to imprisonment in the county jail for a period

of eight months. This appeal is from such judgment of conviction and from an order denying his motion for a new trial.

The information charges that—

Defendants, on or about the 1st day of March, 1921, * * * "did then and there willfully and unlawfully show and exhibit to one Laura Duncan, then and there a female person under the age of 21 years, to wit, of the age of 16 years, various and divers lewd and obscene films, pictures, and photographs, and did then and there induce and persuade the said Laura Duncan to disrobe and to pose and expose her person, in a nude condition, before them, the said Joseph Koosistra and John De Young, and to permit them to photograph her, the said Laura Duncan, while in such nude condition, and to make, and they did then and there make, various lewd and obscene and indecent photographs and pictures of her, the said Laura Duncan, in such nude condition, all of which willful and unlawful acts and course of conduct of Joseph Koosistra and John De Young, as aforesaid, did thereby then and there manifestly tend to and did encourage, cause, and contribute to the said Laura Duncan becoming such a person as is described in section 1 of an act of the Legislature of the state of California entitled 'An act to be known as the Juvenile Court Law,' etc., approved June 5, 1915, to wit, a person under 21 years of age who is leading, or from any cause is in danger of leading, an idle, dissolute, and immoral life."

In support of the offense charged it was proved at the trial that Laura Duncan, the minor mentioned in the information, was of the age of 16 years, and that in company with certain male and female companions she visited apartments maintained by defendants. Upon the occasion of her first visit she met defendant, and was by his codefendant photographed in a group of some 18 persons, old and young. This photograph was introduced in evidence, and it shows several of the women contained in the group, including Laura Duncan, practically in a naked state. She again visited the same premises on at least two subsequent occasions, and was then shown pictures of women in the nude, and was so photographed by defendant in company with her girl companions. Other evidence shows that on at least one occasion Laura Duncan remained on the premises until an early hour of the morning, during which time music and dancing was indulged in by the frequenters of the place.

[1] Appellant contends that as it is no offense to induce and persuade a minor to disrobe and to pose and expose her person in a nude condition, that the evidence is insufficient to warrant his conviction. We

do not so consider it. The main purpose of the Juvenile Court Law is to protect young men and women from indulging in vicious practices, and to remove them from immoral and evil influences. It needs no discussion to show that the acts which defendant induced the minor to commit would manifestly tend to deprave the morals of a girl of her immature years, and to promote a general disregard of the rules of morality and decency. It would indeed be difficult to say, considering all the circumstances, that such acts would not strongly tend to cause a person of tender years to lead an immoral and dissolute life. To hold otherwise would be to remove the very safeguard that the law was designed to create for the purpose of protecting the youth of the state from the pitfalls attending immaturity of years. The contention is therefore without merit.

[2] Complaint is also made of failure on the part of the trial court to instruct the jury that they could find the defendant guilty of only one of the acts proven against him. Under the Juvenile Court Law it is permissible to show any conduct on the part of a person toward a minor which either causes or tends to cause such minor to become a delinquent, even though such conduct may consist in the doing of one act only or of a series of acts. *People v. Oliver*, 29 Cal. App. 576, 156 Pac. 1005.

[3] The further claim that proof of the age of the prosecutrix was not established is also without merit. The jury, it is true, did not have an opportunity of judging her age for the reason that she did not take the stand, she being out of the state, but her sister positively testified that she was 16 years of age. Proof of the age of a person may generally be made by the testimony of a relative or other person who is in such position as to have personal knowledge of such age. Accordingly it has been held that the date of a person's birth might be testified to by members of his family. 2 *Jones on Evidence*, § 300, p. 651.

Other objections relate to alleged errors on the part of the trial court in ruling upon the evidence and in failing to properly instruct the jury. Misconduct on the part of the district attorney is also assigned as error. These contentions are entirely without merit, and do not require discussion.

For the reasons given the judgment is affirmed.

We concur: RICHARDS, J.; PREWETT, Justice pro tem.

(58 Cal. App. 230)

Ex parte VON GERZABEK. (Cr. 1064.)

(District Court of Appeal, First District, Division 2, California. June 20, 1922.)

1. Divorce — 269(11, 12)—Contemner must be given opportunity to show his inability to comply with order of court.

In view of Code Civ. Proc. § 1217, making it the duty of the court to hear any answer which the person charged with contempt may make, it is the duty of the court to give one charged with contempt in failing to make a payment of alimony an opportunity to show that he is financially unable to comply with the order; the burden of proving inability being on the contemner, though the proceeding is quasi criminal.

2. Divorce — 269(10)—Affidavit for contempt must positively state facts showing ability of contemner to comply with order of court.

The affidavit, initiating a proceeding for contempt against a husband who has failed to pay temporary alimony as directed by an order of court, must state the facts tending to show the contemner's ability to comply with the order, and an affidavit, alleging mere conclusions of law and made upon information and belief, is insufficient.

3. Habeas corpus — 27—Proceedings for contempt held without jurisdiction so that writ will lie.

Where the affidavit in a contempt proceeding to punish a husband for failure to pay temporary alimony fails to show on its face a cause of contempt in that it does not aver that the husband is able to comply with the order, it shows a want of jurisdiction on the face of the record rendering the order of contempt void, and a writ of habeas corpus will lie to secure a discharge of the prisoner.

Original application for habeas corpus by Oscar Von Gerzabek, prayed to be directed to the Sheriff of the City and County of San Francisco. Writ granted.

Mervyn R. Dowd, of San Francisco, for petitioner.

Walker Peddicord, of San Francisco, for respondent.

NOURSE, J. The petitioner herein alleged that he was confined in the county jail under an order of commitment of the superior court for contempt of the court in failing to comply with a previous order for the payment of temporary alimony and suit money, made in a divorce proceeding then pending between the petitioner and his wife. The proceedings leading up to the entry of the order of commitment are not disputed. It appears that on the 3d day of April, 1922, after proceedings duly taken, the court made an order in the divorce action that the defendant (the petitioner herein) pay to his wife a certain sum for temporary alimony and suit money. On the 9th day of May, 1922, the wife of petitioner filed with the said court her affi-

davit, charging that the petitioner had failed to comply with this order, and praying that he be cited to show cause why he should not be adjudged guilty of contempt therefor. Upon this affidavit an order to show cause was issued, and in response thereto the petitioner was brought before the court on the 16th day of May, 1922. Hearing was then had before the court; both parties and counsel for the wife being present, but the petitioner not being represented by counsel. Some testimony was taken as to the amounts which had been paid by the petitioner in compliance with the order, and as to his ability to make further payments. The matter was continued until May 19th, when the petitioner appeared with counsel, and asked permission to present evidence of his inability to comply with the order of the court. This was denied him by the court, and an order was then made that, unless he paid the sum of \$50 before the 22d day of May, 1922, he would be adjudged guilty of contempt and confined in the county jail. At said time the court again refused to hear any testimony on the part of petitioner as to his inability to comply with the terms of the order, and stated to the petitioner that if his income was not sufficient to meet these payments he should obtain other employment. Without any further hearing the order of commitment was made.

Petitioner attacks this order as being beyond the jurisdiction of the court upon the ground that he was denied an opportunity of proving his inability to comply with the order, and upon the further ground that there is no showing of petitioner's ability to comply therewith.

[1] As to the first point urged, section 1217, Code of Civil Procedure, makes it the duty of the court to hear any answer which the person charged with contempt may make to the same. When a party is charged with contempt for failure to comply with an order of court, the most effectual answer thereto is a showing of his inability to comply therewith. Through numerous decisions of the Supreme Court the rule has been announced that, even though this is a quasi criminal proceeding, the burden of proof is upon the one charged with contempt to show his inability to comply with the order of the court. Such being the case, the parties should be given every opportunity to meet this burden.

[2, 3] As to the second point, the objection goes to the initiation of the contempt proceeding. The affidavit on the order to show cause which was the basis of the hearing on which the petitioner was committed fails to state any facts tending to show this petitioner's ability to comply with the order of the court. The only allegation in this connection is a plain conclusion of law made upon information and belief, and is wholly devoid of any statement of facts upon which the

court could draw the conclusion of this petitioner's ability to comply with the order. The affidavit in a proceeding of this nature must show upon its face a cause of contempt, and if it does not the court is wanting in jurisdiction and the order of contempt is void. *Overend v. Superior Court*, 131 Cal. 280, 284, 63 Pac. 372; *Hutton v. Superior Court*, 147 Cal. 156, 159, 81 Pac. 409. To allege on information and belief that a party is in the possession of "certain funds and moneys and in receipt of an income sufficient to enable him to pay" fails to meet the rule announced in the cases cited.

The prisoner is discharged.

I concur: STURTEVANT, J.

87 Cal. App. 785

RAMSEY v. CHILSON. (Civ. 3887.)

(District Court of Appeal, Second District, Division 1, California, May 24, 1922.)

1. Frauds, statute of § 116(5), 144—Owner of lot held not to have conferred authority on third party signing contract of sale without written authority, and not estopped to deny execution of contract so signed.

That the parties were present while a third party reduced a proposed agreement for sale of a lot to writing, that the owner suggested changes in the contract, which were made, and that, thus prepared, it was read to her, and she understood its contents, did not confer authority on such third party, acting in his own name, to sell the property, nor estop the owner from denying her execution of the contract, which was signed by such third party without written authority required by Civ. Code, § 1624, subd. 5.

2. Estoppel § 52—Not intended to work a gain to a party but to protect from loss.

Estoppel is never intended to work a gain to a party; its office is to protect him from a loss which, but for the estoppel, he could not escape.

3. Estoppel § 52—Rests, not alone upon wrong done, but upon inequity of wrongdoer to take advantage of wrong to injury relying upon wrongdoer's conduct.

An estoppel always rests, not alone upon the wrong done, but upon the inequity of permitting the wrongdoer to take advantage of that wrong to the injury of another relying upon and who is entitled to rely upon the wrongdoer's conduct.

4. Frauds, statute of § 144—Purchaser of lot under contract signed by owner's son without written authority held not misled, and not entitled to rely on owner's acts as showing son's authority to sell.

A purchaser of a lot was not misled as to the ownership, and was not entitled to rely on the owner's acts as showing that her son, from whom he purchased, and who signed the contract of sale in her presence, but without writ-

ten authority, was authorized to sell, where the purchaser knew she owned the lot, and might have secured her signature to the contract if she were willing to execute it.

Appeal from Superior Court, San Bernardino County; Rex B. Goodcell, Judge.

Action for specific performance by S. H. Ramsey against Nellie Irene Chilson. From judgment for plaintiff, defendant appeals. Reversed.

Halsey W. Allen, of Redlands, for appellant.

W. C. Shelton and James R. Choate, both of Los Angeles, for respondent.

SHAW, J. Action to enforce the specific performance of a contract whereby it is alleged defendant agreed to sell to plaintiff lot 12, Loma Vista tract, in the city of Redlands. Judgment went for plaintiff, from which defendant has appealed.

The complaint alleges:

That on July 3, 1920, D. A. Chilson was the duly authorized agent of defendant, and that as such agent he entered into a written agreement with plaintiff, a copy of which is as follows:

"7/3/20.

"I, the undersigned, agree to sell to S. H. Ramsey the property at 417 Eureka st. for a consideration of (\$2,850.00) twenty-eight hundred and fifty dollars, free of all incumbrances. Having received this day his check for (\$100.00) one hundred dollars as deposit on sale. House to be vacated for him inside of three weeks or four.
[Signed] D. A. Chilson."

That said agreement was written and signed by D. A. Chilson in the presence of defendant, who represented that he was her agent and authorized to sell the property. That plaintiff accepted the same, and paid defendant \$100 on account of the purchase price of the property—followed by an allegation of a tender of the balance of the purchase price made by plaintiff, together with other allegations necessary in stating a cause of action for specific performance.

By her answer defendant denied the execution of the contract, or that D. A. Chilson was her agent, or that she represented that he was authorized to act for her in selling the property, or that the contract was executed by him at her request, or that plaintiff paid to her any sum on account of the purchase price.

In response to the issues made by the pleadings, the court found:

"That, although the said D. A. Chilson, the said agent of defendant, was not authorized in writing to act as the agent of said defendant in the sale of said property, nevertheless the said defendant is estopped to deny said agency of the said D. A. Chilson, and that the said contract, entered into by the said defendant through the agency of her son, E. A. Chilson, is a valid

and binding agreement on her part to sell and convey the said property to the said plaintiff on the above-mentioned terms and conditions; that the said contract between the said defendant and plaintiff was prepared by defendant's son and agent, in the presence of the said defendant, and in the presence of the said plaintiff; that the said contract was read to the said defendant, and the contents thereof understood by her; that the said defendant dictated that the said contract be changed providing for possession of the said premises to be given in four weeks instead of three weeks; that by her conduct the said defendant represented to the said plaintiff that her son was duly authorized to represent her in the sale of the said property."

It is apparent from this mixed finding of fact and law that the court based the judgment upon its conclusion that defendant was estopped from denying D. A. Chilson's authority to sell the property, and not upon the fact that he had authority so to do which could only be conferred by a written instrument, as provided by subdivision 5, § 1624, Civil Code. The only findings of fact upon which to base the conclusion that defendant by her conduct represented that D. A. Chilson was authorized to execute the contract for her, and by reason of which she is estopped from denying such authority, are as follows:

"That the said contract between the said defendant and plaintiff was prepared by defendant's son and agent, in the presence of the said defendant, and in the presence of the said plaintiff; that the said contract was read to the said defendant, and the contents thereof understood by her; that the said defendant dictated that the said contract be changed, providing for possession of the said premises to be given in four weeks instead of three weeks."

[1] Assuming the truth of these findings, they are entirely consistent with the fact that the agreement as prepared was with the intention that, if satisfactory to defendant, she, as owner of the property, would execute it. The fact that plaintiff and defendant were present while a third party reduced a proposed agreement to writing for execution; that defendant, as owner of the lot, suggested changes in the contract, which were made, and as thus prepared it was read to her, and she understood its contents—are not sufficient to either confer authority upon such third party, acting in his own name, to sell her property, nor to estop the owner thereof from denying her execution of the contract. This conclusion is emphasized by the fact that, according to the testimony of both plaintiff and his wife they knew defendant was the owner of the property, and are presumed to know that, without her signature, a contract for the purchase thereof was invalid, and of no binding force, and also knew that the writing of the contract was objected to by defendant, who, according

to plaintiff's testimony, said to her son, "I don't believe you ought to do that." Upon the meager facts found to hold that defendant is estopped from denying the execution of the contract by her would be tantamount to a nullification of the statute made for the protection of those who hold estates in land. As was well said by the Supreme Court in *Davis v. Davis*, 26 Cal. 23, 85 Am. Dec. 157:

"The doctrine of estoppel in pais should not be too readily extended when the effect of it is to divest men of their estates in lands. It should be remembered that we have a statute which makes a writing essential to the assignment or creation of an estate in real property, and that one of the objects of such statute was to render estates secure."

[2] Moreover, estoppel is never intended to work a gain to a party; its office is to protect him from a loss which, but for the estoppel, he could not escape. *Conway v. Supreme Council*, 137 Cal. 384, 70 Pac. 223; *Scott v. Jackson*, 89 Cal. 258, 26 Pac. 898. In the instant case plaintiff has incurred no loss. As shown by the testimony, the check for \$100 was not given, as found by the court, to defendant, but was made payable to and given to D. A. Chilson on account of the purchase price. It was never delivered to defendant, and was never presented for payment, but tendered back to plaintiff, and, upon his refusal to accept it, the same was deposited in court to abide the result of the litigation. It is conceded that Chilson had no written authority, under which, as provided by the statute, he could bind defendant by the contract made in his own name, and both complaint and findings are barren of any facts essential to an estoppel, without which there is nothing upon which the court could base its conclusion. While the court finds that defendant by her conduct represented to plaintiff that Chilson was authorized to act for her, there is nothing, other than as stated, to show the acts by which defendant manifested such conduct. As said in *Fritz v. Mills*, 12 Cal. App. 113, 118, 106 Pac. 725, 727, "we are left entirely at sea as to what facts the court considered as constituting the estoppel," or exhibiting the conduct of defendant.

[3, 4] Moreover, an estoppel always rests, not alone upon the wrong done, but upon the inequity of permitting the wrongdoer to take advantage of that wrong to the injury of another relying upon and who is entitled to rely upon the wrongdoer's conduct. *Williams v. Williams*, 170 Cal. 625, 151 Pac. 10. As hereinbefore stated, it appears from plaintiff's own testimony that he knew the property which he was purchasing from D. A. Chilson was owned by his mother, the defendant, whose signature to the contract, if she were willing to execute it, he might easily have secured; hence he was not misled as to the ownership, nor, under the facts found, entitled to rely upon defendant's acts

as showing that D. A. Chilson was authorized to sell her property.

The judgment is reversed.

We concur: CONREY, P. J.; JAMES, J.

58 Cal. App. 382

MULCAHY v. YOUNG, Judge of Superior Court. (Civ. 2494.)

(District Court of Appeal, Third District, California. June 30, 1922. Hearing Denied by Supreme Court Aug. 28, 1922.)

1. Exceptions, bill of $\S$ 40(4)—Failure to present bill of exceptions within specified time held to cause loss of right to its settlement.

Under Code Civ. Proc. $\S$ 650, providing that a party desiring to have objections taken at a trial settled in a bill of exceptions may, within 10 days after receiving notice of an entry of judgment in an action tried without a jury, allow, prepare, or draft a bill and serve a copy of it upon the adverse party, and section 1054, providing that a judge may extend the time for the preparation of bills of exception, where the defendant in an action was notified July 28th that judgment had been entered against him, his time for filing a bill of exceptions expired August 7th, although on September 27th an order was made extending the time for filing the bill of exceptions until October 15th, in pursuance of which they were filed October 11th, since the order extending the time entered after the time allowed by law had expired was a nullity.

2. Exceptions, bill of $\S$ 53(7)—Burden is on party applying for mandate to compel settling of bill of exceptions to overcome presumption of regularity of order dismissing proceedings involving their settlement.

In an application by a party for a writ of mandate to a judge of a trial court to compel the settling of a bill of exceptions, the burden is on the applicant to overcome the presumption of regularity of an order of the trial court, dismissing a proceeding involving the settlement of the bill of exceptions.

3. Exceptions, bill of $\S$ 42—Submission of amendments to bill of exceptions held not an acquiescence, in order of trial court extending time to file bill of exceptions.

Where the 10 days given by Code Civ. Proc. $\S$ 650, for filing a bill of exceptions had expired and thereafter an order was made by the trial court extending the time for such filing, submitting amendments to the bill of exceptions by the opposing party, with a clause waiving the right to object on account of the order extending the time to file the bill of exceptions, did not amount to an acquiescence in the order so extending the time.

Application by James Mulcahy for a writ of mandate to D. M. Young, as Judge of the Superior Court of the State of California, in and for the County of San Joaquin, to com-

pel settlement of bill of exceptions. Writ denied.

A. H. Carpenter, of Stockton, for appellant.
Robert H. Schwab, of Sacramento, for respondent.

HART, J. This is an application for a writ of mandate to compel the respondent to settle a bill of exceptions in the case of Pioneer Fruit Company, a corporation, as plaintiff, against the petitioner herein, as defendant.

[1] The petition states that the said fruit company, on the 12th day of January, 1920, commenced an action in the superior court of said county of San Joaquin against James Mulcahy, the petitioner herein, to recover the sum of \$705.18; that, upon issue being joined in said action by the filing of answer to the complaint by said Mulcahy, the cause was tried before the court, sitting without a jury; and that, on June 29, 1921, the court filed its findings of fact and conclusions of law and thereupon and on the same day caused to be entered a judgment in favor of said fruit company and against the said Mulcahy. The petition proceeds:

"That, within the time allowed by law, the defendant in said case duly made, served, and filed his notice of intention to move for a new trial in said case; and that thereafter, on the 23d day of August, 1921, the said defendant duly filed his notice of appeal from said judgment, in said court and cause, with the clerk of said superior court, wherein and whereby the said action and the judgment entered therein was taken to this honorable court for review; and that thereafter and within the time allowed by law and granted by the said superior court, the defendant and your petitioner duly made and served his bill of exceptions in said case on the attorney for the plaintiff therein, and the same was a full, fair, and bona fide transcript of all the proceedings in said case and contained everything your petitioner honestly believed to be necessary for a full, fair, and final determination of said cause on its merits in the said appellate court.

"That amendments to said bill of exceptions were duly proposed and served upon your petitioner within such extension of time as was granted by the said judge of the said superior court, by the said attorney for the plaintiff therein, and that thereafter and within 7 days from the date of such service of such amendments, your petitioner handed said proposed original bill of exceptions, together with the plaintiff's said proposed amendments thereto, to the clerk of the said superior court, to be delivered by him to the said judge, who tried the cause as by law provided, as your petitioner could not accept or agree to said proposed amendments; and that, if the said proposed bill of exceptions and the said proposed amendments thereto have been filed with the clerk of said court, they have been so filed without your petitioner's knowledge or consent, and the act of so filing was unlawful, as the same was not settled.

"That, ever since the said proposed bill of exceptions and amendments were handed to the said respondent judge by the clerk of said court for settlement, and for several months last past, the said judge has kept said bill of exceptions and amendments in his possession and has neglected, failed, and refused to settle the same or any other or different bill of exceptions in said case, and still continues to refuse to settle any bill of exceptions whatsoever in said case; and your petitioner is without remedy in the premises, and has no plain, speedy, or adequate remedy in the ordinary course of law."

The respondent's answer to the petition alleges that the petitioner's notice of intention to move for a new trial was served and filed on the 23d day of June, 1921, or some 6 days prior to the entry of judgment therein. It is further stated in said answer that no other notice of intention to move for a new trial was filed in said case by the petitioner than the proposed notice filed on said 23d day of June, 1921. It is further alleged in the answer that the notice of the entry of judgment in said case was served on and received by the defendant on the 28th day of July, 1921; that the time for proposing a bill of exceptions expired on the 7th day of August, 1921; that, on the 27th day of September, 1921, the respondent made an order extending the time within which petitioner might prepare and perfect a proposed bill of exceptions in said case to October 15, 1921; that a proposed bill was filed or presented to the respondent herein on the 11th day of October, 1921, and that thereafter the plaintiff in said action proposed or submitted some 18 pages of typewritten amendments to said proposed bill of exceptions; that the said proposed amendments to said bill of exceptions "were proposed without waiving the objection of said Pioneer Fruit Company to said proposed bill of exceptions on the ground that the said bill of exceptions was not served within the time allowed by law, stipulation of counsel, or order of court"; that, on the 5th day of February, 1922, a notice of motion to dismiss proceedings to settle the proposed bill was filed and that said motion was, after a hearing granted on the 8th day of May, 1922.

The answer to the petition further alleges:

"That, after the said motion to dismiss had been presented and duly considered by your respondent, it was apparent that said proposed bill of exceptions was not filed in time required by law or stipulation of counsel or order of this court, and therefore there was no need of fixing any time to settle said proposed bill of exceptions.

[2] There is an apparent conflict between the statement of the facts contained in the petition and the like statement set forth in respondent's reply as to the dates on which the several steps looking to the settlement of the bill of exceptions were taken; but an examination of the petition will readily show

that, aside from the legal conclusions therein contained as to said dates, there is not a sufficient showing thereby made to warrant the granting of the relief herein prayed for. The answer of the respondent specifies the dates on which the defendant took the several steps essential to the settlement of a bill of exceptions, and thus clearly shows that the defendant allowed the time within which he could have done so to pass without taking the requisite steps for that purpose. We think that the plain duty of this court, in the absence of a specific showing in the petition sufficient to countervail the specific showing made in the respondent's answer, is to accept the facts as they are stated by the latter. Indeed, the burden was upon the petitioner to overcome the presumption of the regularity of the order dismissing the proceeding involving the settlement of the proposed bill of exceptions, and, to overcome the force of this presumption, it was incumbent upon him to show the existence of the essential facts upon which his right to the relief prayed for may only be allowed. This burden he has not sustained in this proceeding, while, on the other hand, the presumption of the due regularity of the order complained of is supported by the countershowing of the answer, in which, as opposed to the legal conclusions stated in the petition, the several dates on which the several acts were done by petitioner to obtain a settlement of a bill of exceptions in said action are specifically set forth.

The facts stated in the answer show, briefly, to recapitulate: That no valid notice of motion for a new trial was made; that notice of the rendition and entry of judgment was served on and received by the petitioner on the 28th day of July, 1921; that the respondent, on September 27, 1921, made an order extending the time within which the defendant in said action might prepare and present a bill of exceptions to October 15, 1921; that the proposed bill of exceptions was presented to the judge or filed on the 11th day of October, 1921.

It is clear from the above statement that the time for the presentation to the judge of a proposed bill of exceptions expired on the 7th day of August, 1921, which was the last day of the 10 days after the date that petitioner received notice of the entry of judgment. Code Civ. Proc. § 650. It is equally clear that the judge's order, extending the time for presenting the proposed bill, was an absolute nullity, inasmuch as it was long after the expiration of the time within which the petitioner was authorized by section 650, supra, to present a proposed bill and within which time he presented no bill. See Code Civ. Proc. § 1054. In other words, the time for the presentation of a proposed bill of exceptions, as prescribed by the section referred to, having expired without his having within said time presented his proposed bill, the de-

defendant thereupon lost his right to a settlement of a bill of exceptions, and obviously, the judge's order of September 27, 1921, purporting to extend the time for presenting a bill could not have the effect of reviving the lost or forfeited right. The judge was, under the circumstances, without the authority or power to make the order of September 27th, and his act in doing so was clearly *coram non iudice*.

[3] It is contended by the petitioner, however, that, by submitting amendments to the bill of exceptions proposed by the petitioner, the plaintiff in said action acquiesced in and ratified the action of the court in making the order of September 27th, extending the time for presenting the bill to October 15, 1921, and that therefore the plaintiff should be held to have waived the right to claim and be estopped from claiming a default against the defendant, petitioner herein, on the ground that the said order was void. *Kramm v. Stockton E. R. Co.*, 22 Cal. App. 737, 744, 136 Pac. 523. In that case though, it appeared that adverse counsel stipulated that an extension of the time might be granted to present a proposed bill of exceptions after the court or judge, without authority or legal right to do so, had extended the time to a certain date and that thereafter said counsel had obtained an extension beyond the time allowed by law to file or present proposed amendments to the proposed bill. In this case, the respondent's answer states (and the statement is not denied) that the plaintiff in said action proposed amendments to the proposed bill "without waiving objection of said Pioneer Fruit Company (plaintiff in said action) to said bill of exceptions on the ground that the said bill of exceptions was not served within the time allowed by law, stipulation of counsel, or order of court."

Counsel for petitioner cite these cases in support of the contention that the plaintiff in said action should be held estopped from claiming a default. *Patrick v. Morse*, 64 Cal. 462, 2 Pac. 49; *Churchill v. Flournoy*, 127 Cal. 357, 59 Pac. 791; *Horton v. Jack*, 115 Cal. 30, 46 Pac. 920. These cases are very much different in their facts from the instant case, to which, therefore, they have no application.

The courts should, it is true, so far as it may be done consistently with the rules of procedure, favor the right of a litigant to resort to and exhaust every legal means for a full, complete, and final determination of rights at issue in an action at law or a suit in equity; but it manifest from this record that the only escape from the consequences of his default, which was open to the defendant, was an application, based upon a sufficient showing, if one could be made, under section 473, of the Code of Civil Procedure. Under the facts presented here, however, there was no other course left to the

respondent but to dismiss the proceedings involving the settlement of the bill of exceptions presented by the petitioner, and it follows, of course, that there is no other alternative left to this court but to deny the prayer of the petition herein.

Accordingly, the application for a writ of mandate herein must be, and the same is, denied.

We concur: FINCH, P. J.; BURNETT, J.

(58 Cal. App. 388)

PIONEER FRUIT CO. v. MULCAHY.
(Civ. 2492.)

(District Court of Appeal, Third District, California. June 30, 1922. Hearing Denied by Supreme Court Aug. 28, 1922.)

Appeal and error $\S$ 627(2)—Failure to file transcript on appeal within specified time held to require dismissal of appeal.

Under rule 2 of the Supreme Court (176 Pac. vii) providing that an appellant in a civil action shall, within 40 days after perfecting an appeal, serve and file a printed transcript of the record, and rule 5 (176 Pac. ix) providing that, if a transcript of the record shall not be filed within the prescribed time, an appeal may be dismissed on motion, where notice of appeal was filed in the office of the clerk of the trial court August 23d and a proposed bill of exceptions to be used on appeal was filed in the office of the clerk of the trial court October 11th, and the proceedings for settlement of the bill of exceptions were dismissed by the trial court on the 8th of the following May, and no other proceeding under Code Civ. Proc. $\S$ 953A, providing that, in lieu of settling a bill of exceptions, a party desiring to appeal may have a general transcript made by the clerk of the trial court was instituted, the appeal will be dismissed on motion.

Appeal from Superior Court, San Joaquin County; D. M. Young, Judge.

Action by the Pioneer Fruit Company against James Mulcahy. Judgment for plaintiff, and defendant appeals. On motion to dismiss appeal. Appeal dismissed.

G. C. Allen and A. H. Carpenter, both of Stockton, for petitioner.

Robert H. Schwab, of Sacramento, for respondent.

HART, J. A motion on notice given has been made to dismiss the appeal herein, on the ground that no transcript or other record on appeal was filed within the time prescribed by rule 2 of the Supreme Court (176 Pac. vii). The motion is supported by the certificate of the clerk of the superior court, certifying the nature of the action and the relief demanded by the complaint, the amount of the judgment appealed from and a statement that the notice of appeal to this court was filed in the office of said clerk on

the 23d day of August, 1921. The certificate contains this further statement:

"A proposed bill of exceptions to be used on appeal from said judgment was filed in my office on the 11th day of October, 1921; that the above-entitled court (the superior court) dismissed the proceedings for the settlement of said bill of exceptions on the 8th day of May, 1922; that there is no other proceeding pending for the settlement of the bill of exceptions or for a transcript under section 953a of the Code of Civil Procedure of the state of California; that no such proceeding under section 953a of the Code of Civil Procedure was ever instituted, and the time to institute the same has expired."

See *James Mulcahy v. D. M. Young, etc.*, Civil No. 2494, filed this day, 208 Pac. 321.

Rule 2 of the Supreme Court reads in part as follows:

"The appellant in a civil action shall, within 40 days after an appeal is perfected, except as hereinafter stated, serve and file the printed transcript of the record, duly certified to be correct by the attorneys of the respective parties, or by the clerk of the court from which the appeal is taken. If a proceeding for the settlement of a bill of exceptions which may be used in support of such appeal is pending or may still be instituted, the time aforesaid shall not begin to run until the settled and authenticated bill of exceptions has been filed, or the time in which a proceeding for such a bill of exceptions may be instituted has expired, or such proceeding if instituted has been dismissed by the trial court. * * *

Rule 5 of said court (176 Pac. ix), among other things, provides that, "if the transcript of the record or appellant's points and authorities be not filed within the time prescribed, the appeal may be dismissed on motion, on notice given."

It results from the situation as thus explained that no transcript on appeal in this action has ever been filed in this court. The time having passed for the filing of such a transcript, and none being on file, it is the duty of this court to grant the motion to dismiss the appeal, and such is the order.

We concur: FINCH, P. J.; BURNETT, J.

(58 Cal. App. 267)

PEOPLE v. ANDERSON. (Cr. 1045.)

(District Court of Appeal, First District, Division 1, California. June 21, 1922.)

1. Homicide $\S$ 166(7)—Letter clandestinely received by married woman held admissible as tending to show motive for killing husband.

Where a woman was charged with killing her husband, the admission of a letter clandestinely received by her from another man at a feigned address, concerning a matrimonial venture, with knowledge that the husband was

jealous of her, was justified as tending to show a motive for the killing, as suggesting why she desired to get her husband out of the way, and a source for their admitted quarrels, in view of her admission that her husband had seen the letter, and that it made him "sore."

2. Homicide $\S$ 74—Offered instruction defining prudence as synonymous with "cautious" held incorrect.

In a prosecution for manslaughter, an instruction offered by accused, attempting to define the words "without due caution and circumspection" as the equivalent of the words "criminal negligence," and then further defining criminal negligence as the want of attention that a prudent man ordinarily bestows, was incorrect and properly refused; "prudent" differing in meaning from "cautious" which suggests the idea of timidity, with its secondary meaning as overprudent; fearful.

[Ed. Note.—For other definitions, see Words, and Phrases, First and Second Series, Cautious.]

3. Homicide $\S$ 34—Willful act need not be wantonly and recklessly committed to be involuntary manslaughter.

Under Pen. Code, $\S$ 192, subd. 2, defining involuntary manslaughter as the unlawful killing of a human being involuntarily, but in the commission of a lawful act which might produce death without due caution and circumspection, the act performed must be one which might and does produce death, but lack of due caution and circumspection need not go to the extent of being wanton or reckless, although it might properly be one that might be defined as culpable.

4. Criminal law $\S$ 829(1)—Not error for court to refuse amplification of charge clearly given.

In a prosecution for manslaughter, where the court has fully and clearly stated the law upon a given point, it was not error for it to refuse to amplify thereon.

5. Criminal law $\S$ 772(2)—Error cannot be predicated on the use of the language of the Legislature in instructions.

Ordinarily, the language employed by the Legislature in defining a crime is deemed to be best suited to that purpose, and error cannot be predicated upon its use in instructions.

6. Homicide $\S$ 309(1)—Refusal of mere commonplace instruction not reversible error.

In a prosecution for manslaughter, where an offered instruction attempted to expand upon and define "due caution and circumspection," which would have been no more than a mere commonplace, its refusal was not reversible error.

7. Homicide $\S$ 341—Refusal of instruction, where under evidence it could not change result, not error.

In a prosecution for manslaughter, where the evidence abundantly warrants the verdict, and there is no reason to believe that a different result would have ensued had an offered instruction concerning due caution and

circumspection been given, the refusal of this instruction held not reversible error.

8. Criminal law ⚡829(1)—Instructions, intended to emphasize propositions already given, properly refused.

Instructions, intended simply to emphasize propositions which are covered by the court in its charge to the jury, are properly refused.

9. Criminal law ⚡829(9)—Offered instruction held not prejudicial to accused in view of given instruction.

In a prosecution for manslaughter, where the court instructed that every presumption of law was in favor of the innocence of accused, and in order to convict every material fact necessary to constitute the crime must be proved beyond a reasonable doubt, held that an offered instruction that the presumption of innocence remained with the accused until a verdict was reached was properly refused.

Appeal from Superior Court, City and County of San Francisco; Michael J. Roche, Judge.

Josephine W. Anderson was convicted of manslaughter, and she appeals. Affirmed.

L. L. Solomons and Fred C. Peterson, both of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and John H. Rioridan, Deputy Atty. Gen., for the People.

PREWETT, Justice pro tem. The appellant brings this appeal from a judgment of conviction of the crime of manslaughter and from the order of the court denying her motion for a new trial.

The principal point discussed in the brief of appellant is the contention that the trial court erred in receiving in evidence certain written and oral admissions and confessions made by her to the police officers without other and further proof of the corpus delicti. This point, however, was abandoned on the oral argument, and it will therefore receive no further attention at the hands of the court.

It is insisted that the court erred in admitting in evidence a certain letter addressed to the appellant under her former name of Josephine O'Halloran. The evidence shows that the appellant and her husband—of whose unlawful killing she was convicted—had some differences and quarrels, and that he was jealous of her. The letter was dated on March 7, 1921, and long after her marriage to the deceased. The homicide occurred on October 15, 1921. It was written in reply to a letter addressed by the appellant to the writer and in answer to a matrimonial advertisement. The letter is as follows:

"Dear Madam: In reply to your letter will say that I am forty-three years old, five feet ten inches tall, weigh one hundred seventy-five. Pretty good looking, got a business of my own, good big house and some money in bank.

Now what I am looking for is some good woman, some one I can depend upon to be good. "She must be a Catholic and not a divorced woman.

"Now I have a good many letters, but yours is the only one I have ans. so far. So if you care to write again to me. Have you any family. If you could send a picture of yourself I will do the same so we will have some idea about each other. I am a good person to get along with good disposition, hope you are the same. Please write again."

[1] The appellant admitted to the officer that the letter had been addressed to her under her former name and at her former address. She furthermore admitted that her husband had seen the letter, and that it made him "sore." Her explanation to the officers of the incident was that she and some other women were having some fun answering matrimonial advertisements. The facts that the letter was clandestinely received by a married woman at a feigned address, concerning a matrimonial venture, and with the knowledge that her husband was jealous of her, justified the court in admitting the letter in evidence as tending in greater or less degree to show a motive for the killing. The letter may have suggested why she desired to get her husband out of the way. It was admissible as suggesting a source for the quarrels that admittedly took place between them.

[2] The court instructed the jury quite fully as to the various elements of the crime of manslaughter, and in doing so employed the words "without due caution and circumspection." The appellant offered and the court refused to give an instruction attempting to amplify the meaning of the words "due caution and circumspection." The following quotation from the proposed instruction will show its drift and purport:

"Without due caution and circumspection means the same thing as criminal negligence. The word 'negligence' as used in this instruction means a want of such attention to the nature and probable consequences of the act or omission as a prudent man ordinarily bestows in acting in his own concerns as in the omission to do something which a reasonable man guided by those circumstances which ordinarily regulate the conduct of human affairs would do, or doing something which a reasonable and prudent man would not do."

Conceding that this proposed instruction is a correct exposition of the law, it adds nothing to the meaning of the words used by the Legislature in defining the offense. The average juror is quite as much enlightened by one as by the other. All the words employed in the expression "due caution and circumspection" are in common and daily use, and are understood by the average person. "Caution" means care to avoid accident or misfortune, but the definition informs us of

little more than the meaning accorded to it by mankind in general.

But the instruction is not wholly correct. It attempts to define the words "without due caution and circumspection" as the equivalent of the words "criminal negligence," and then further defines criminal negligence as a want of the attention that a prudent man ordinarily bestows. This is erroneous. Prudence is not always the same as caution. We quote:

"Cautious" differs in meaning from "prudent." It suggests the idea of timidity and Webster gives its secondary meaning as over-prudent; fearful; timorous. A man is cautious chiefly as the result of timidity, etc. *Eggett v. Allen*, 106 Wis. 633, 82 N. W. 556; *McClafferty v. Philip*, 151 Pa. 86, 24 Atl. 1042.

Since this cause was submitted, the Supreme Court has had occasion to consider the meaning of the phrase in question. The District Court of Appeal used the following language:

"If one performs an act in a manner not forbidden by statute, but in a wanton, reckless, and culpable manner, and thereby kills another, he may be convicted under the definition of manslaughter as secondly described." *People v. Seiler*, 207 Pac. 396, March 28, 1922.

[3] And the Supreme Court, in commenting upon this instruction and rejecting it as inaccurate, says:

"The statute (Pen. C. § 192, subd. 2) defines involuntary manslaughter of this specified character as the unlawful killing of a human being, involuntarily, but 'in the commission of a lawful act which might produce death * * * without due caution and circumspection.' In order to constitute this kind of manslaughter the act may be lawful, but it must be one which might produce death, and which does produce death, and it must be committed without due caution and circumspection. The lack of due caution and circumspection need not go to the extent of being wanton or reckless, although it might possibly be such as would be defined as culpable. * * *" 207 Pac. 399.

The Code (Pen. Code, § 192) provision upon which the instruction is based reads as follows:

"Sec. 192. Manslaughter is the unlawful killing of a human being, without malice * * * involuntary * * * in the commission of a lawful act which might produce death * * * without due caution and circumspection."

[4] It is a familiar rule that once the court has fully and fairly stated the law upon a given point, it is not error for the court to refuse to amplify thereon. *People v. Quon Foo* (Cal. App.) 206 Pac. 1028.

[5] Ordinarily, the language employed by the Legislature in defining a crime is deemed to be best suited to that purpose, and error cannot be predicated upon its use in informations and instructions. An information must set forth the charge "in ordinary and

concise language [without repetition], and in such manner as to enable a person of common understanding to know what is intended." Pen. Code, § 950. And it is usually sufficient if it follows the language employed by the Legislature. *People v. Martin*, 32 Cal. 91; *People v. Ward*, 110 Cal. 369, 42 Pac. 894; *People v. Carpenter*, 136 Cal. 391, 68 Pac. 1027, and many other California cases. The instruction of which appellant complains as being inadequate is given in the very words of the statute. "Negligence," when so great as to be criminal in character, is stated in the proposed instruction as being the equivalent of want of "due caution and circumspection." "Negligence" is a word that has acquired a highly specialized meaning, and whole volumes have been written upon it; but the words "due caution and circumspection" as used by the trial court have their common and ordinary meaning and no other. When these words are stated to the jury they import to them this common meaning without further amplification. The Supreme Court in a recent case says:

"From this it is argued that the instruction must be condemned as erroneous. But the Legislature has the power to declare what the law shall be on the subject. It has done so by this section. * * * However this may be, it cannot be disputed that error cannot be predicated upon an instruction which states the law as the Legislature has fixed it by statute and which is applicable to the case." *People v. Fowler*, 178 Cal. 657, quoting from page 671, 174 Pac. 892 from page 897.

[6] But an attempt to expand upon and define "due caution and circumspection" would, if successful, be no more when given than a mere "commonplace"; and it is well settled that giving or refusing a mere "commonplace" does not constitute reversible error. *People v. Raber*, 168 Cal. 316, 143 Pac. 317.

[7] The evidence showing the circumstances of the killing is shown only by the testimony of the appellant herself, there being no other evidence on the point. It is not at all clear that her version of the matter would demand any instruction at all concerning "due caution and circumspection." But at most the refusal of the instruction, even conceding it to be correct, is not, in a clear case like the present, of sufficient importance to justify a reversal. The evidence abundantly warrants the verdict, and there is no reason to believe that a different result would have ensued had the proposed instruction been given.

[8] It is strenuously insisted that the court erred in refusing a proffered instruction on the presumption of innocence. The court, after fully and fairly instructing the jury in general terms on this subject, refused to give a further instruction to the effect that—

This "presumption continues throughout the trial and accompanies you when in your retire-

ment you consider your verdict and will avail to acquit her unless upon examination of the testimony you are satisfied beyond a reasonable doubt the presumption of her innocence is false."

This instruction correctly states the law, and it might well have been given, but this is far from saying that the refusal to give it constitutes reversible error. The jurors, of course, did not know the purport of the instruction, nor that the court had declined to give it. There arises no inference, therefore, that the jurors understood it to be an incorrect statement of the law. It remains only to inquire whether or not they were correctly and sufficiently instructed upon this point. It cannot be contended that a defendant on trial is entitled to an instruction in any set form of words. Instructions intended simply to emphasize propositions which are covered by the court in its charge to the jury are properly refused. *People v. Morrell*, 28 Cal. App. 729, 153 Pac. 977; *People v. Wilson*, 29 Cal. App. 563, 156 Pac. 377.

[9] It may be stated as a general rule that any form of instruction which fully and fairly presents the point at issue meets the requirements of the statute. The refused instruction may be summarized as stating that the presumption of innocence continues with the jury until they agree upon a verdict. It is quite clear that the court gave this instruction in substance in its general charge. Among other charges, the court gave the following to the jury:

"I instruct you that the law raises no presumption whatever against the defendant, but on the contrary, every presumption of the law is in favor of her innocence, and in order to convict her of the crime alleged or of any lesser crime which may be included in it, every material fact necessary to constitute such crime must be proved beyond a reasonable doubt; and if you entertain any reasonable doubt upon any single fact or element necessary to constitute the crime, it is your duty to give the defendant the benefit of such doubt and acquit her."

Manifestly, this instruction advises the jury that they must acquit the appellant if, at the moment of arriving at their verdict, they entertain any reasonable doubt of her guilt. The condition of mind of the juror bears a close and necessary relation to the moment of time when such condition ripens into a verdict. Any other reading of the instruction would be absurd. Again:

"The fact that the defendant has been arrested and charged with the offense, and that an information has been filed against her creates no presumption whatever of her guilt. It is incumbent upon the prosecution, not only to overcome the presumption of the defendant's innocence, but also the defendant's guilt must

be established by evidence sufficiently conclusive to exclude any reasonable supposition of her innocence. The testimony must establish affirmatively her guilt to a moral certainty and beyond a reasonable doubt; and, unless the evidence introduced in the case is such that it proves to your entire satisfaction and beyond a reasonable doubt that the defendant is guilty, she is entitled to an acquittal at your hands." And "these two propositions must be established by the prosecution to a moral certainty and beyond a reasonable doubt." And further: "In every criminal proceeding under our system of jurisprudence the defendant is presumed to be innocent until the contrary is proved, and in case of a reasonable doubt whether his guilt is satisfactorily shown he is entitled to an acquittal. Reasonable doubt is that state of the case which after an entire comparison and consideration of all the evidence leaves your minds in that condition that you cannot say you feel an abiding conviction to a moral certainty of the truth of the charge." And: "If upon a review and consideration of all the evidence before you, you should be satisfied beyond a reasonable doubt that the defendant here is guilty, you may under the information return either of the following verdicts," etc.

In several other places in the charge the court admonished the jury as to reasonable doubt and moral certainty.

There is, of course, no question that the presumption of innocence remains with the party on trial until a verdict of guilty is reached. *People v. McNamara*, 94 Cal. 509, 29 Pac. 953. If it ceased prior to that moment it would be of no value to a defendant, and would be no more than a mockery and a sham.

When a jury is once told in general terms that it must not convict a defendant unless satisfied beyond a reasonable doubt of his guilt, it is unnecessary to go into detail to say to the jury that this principle applies during the deliberations of the jury, for by its very terms it implies as much. No case has been called to our attention that is in conflict with the conclusions at which we have arrived. The cases of *People v. Arlington*, 131 Cal. 231, 63 Pac. 347, and *People v. James*, 5 Cal. App. 427, 90 Pac. 561, cited by appellant, are really adverse to her contentions. In each of those cases it was shown that other instructions, having the same general meaning, relieved the case from error.

We find no error in the record. The appellant was fairly tried and properly convicted. This is a proper case for the application of section 4½ of article 6 of the Constitution.

Accordingly, the judgment and order denying appellant's motion for a new trial are affirmed.

We concur: TYLER, P. J.; RICHARDS, J.

58 Cal. App. 329

NORTH CONFIDENCE MINING & DEVELOPMENT CO. v. FITCH et al.
(Civ. 2436.)

(District Court of Appeal, Third District,
California. June 27, 1922.)

Corporations  298(5)—Director who is attorney may not vote on resolution to settle client's claim, and could not make up a quorum for such action.

A director whose interest in a matter under consideration is adverse to the corporation he represents is disqualified to vote thereon, and under Civ. Code, § 2230, providing that a trustee may not participate in any transaction concerning the trust in which he or any one for whom he acts as agent has an interest adverse to that of his beneficiary, directors of a corporation are trustees thereof, and a director who is an attorney may not vote on a resolution authorizing execution of a note and mortgage in settlement of a client's claim against the corporation, and his presence is not effective to make up a quorum for such action.

Appeal from Superior Court, Tuolumne County; G. W. Nicol, Judge.

Action by the North Confidence Mining & Development Company, a corporation, against C. S. Fitch and Richard Chute. From judgment for part of the relief asked, both parties appeal. On plaintiff's appeal, judgment reversed.

See, also, 208 Pac. 330.

Frank W. Street and Horace M. Street, all of San Francisco, for appellant.

J. C. Webster, of Sonora, and Richard Chute, for respondents.

FINCH, P. J. This action was instituted to cancel a promissory note and mortgage for the sum of \$9,439.04 purporting to have been given by the plaintiff to defendant Fitch. The court found the note to be valid to the extent of \$1,787.89, and enjoined the defendants "from collecting any greater amount thereon," and adjudged the mortgage to be a lien on the lands described therein "to the extent of said sum of \$1,787.89, with interest." From this judgment both the plaintiff and the defendants prosecute separate appeals.

Plaintiff corporation was organized with a capital stock of \$75,000 divided into 75,000 shares of the par value of \$1 each. With the exception of a few shares issued to certain persons to enable them to serve as directors, the defendant Chute owned or controlled all the capital stock up to May 15, 1915. On that day he sold and conveyed 47,156 shares to Ella Kleinecke, but at all times, prior to July 28, 1919, he continued to be president of the board of directors, and controlled all of plaintiff's corporate acts. July

15, 1916, defendant Chute, claiming that the plaintiff was indebted to him in the sum of \$9,439.04 for money advanced by him as president, treasurer, and general manager, assigned his claim to defendant Fitch as security for moneys then owing from Chute to Fitch, and the latter still holds said claim and the note and mortgage given in consideration thereof as such security only. Immediately thereafter Fitch commenced an action against plaintiff herein for the amount of the claim. The corporation was duly served, and, on its failure to answer within the time allowed by law, judgment was entered against it July 31, 1916. Mrs. Kleinecke promptly moved to vacate the judgment, and her motion was granted October 6, 1916. April 18, 1917, Mrs. Kleinecke demanded a certificate for the 47,156 shares of the capital stock sold to her by Chute, the same then still standing in the latter's name on the books of the corporation, but her demand was refused. April 21, 1917, a purported special meeting of the board of directors was held, at which the note in suit was attempted to be authorized, and on the same day was executed by Chute as president and E. W. Holland as secretary. May 3, 1919, the same officers executed the mortgage in question to secure payment of the promissory note. This mortgage seems to have been executed without any previous authorization, but at a purported special meeting of the board of directors held May 21, 1919, a resolution was adopted ratifying its execution. Mrs. Kleinecke testified and the court found that she had no knowledge of the execution of the note and mortgage until July 14, 1919. April 25, 1917, Mrs. Kleinecke commenced an action against the plaintiff herein and Chute to compel the issuance to her of a certificate for the 47,156 shares of the capital stock and the transfer thereof on the books of the corporation. Defendant Chute filed an answer in that action, denying that Mrs. Kleinecke was the owner of the 47,156 shares of stock. Judgment was rendered in her favor, and the defendants therein appealed. The judgment was affirmed, and thereupon the certificate demanded was delivered to Mrs. Kleinecke June 27, 1919. July 28, 1919, at a meeting of the stockholders of the corporation, the same being the only meeting of the stockholders since the year 1907, a new board of directors was elected. From the time at which the new board was elected Mrs. Kleinecke has had the control and direction of the affairs of the corporation. This action was instituted October 25, 1919. The complaint alleges, among other things, that the promissory note and mortgage were given without consideration, and that the execution thereof was neither authorized nor ratified by the board of directors at any valid meeting thereof. The board of directors was

composed of seven members, and the by-laws provided that four directors should constitute a quorum. At all meetings of the directors at which any action was taken relative to the authorization or ratification of the promissory note or mortgage five directors only were present. Of these five the defendant was one, though he did not vote on any question pertaining to the promissory note or mortgage. Another of these five directors at all such meetings was J. C. Webster, who at all times was and is the attorney for Fitch in his aforesaid suit against the corporation. It appears from the testimony of Mr. Webster that such action is still pending. Mr. Webster testified that at the time the resolution was adopted authorizing the execution of the promissory note he was attorney for Fitch in the matter of the claim for which the note was given. He introduced the resolution authorizing its execution, and was one of the four by whose votes the resolution was adopted.

Admittedly, Chute's adverse interest disqualified him from voting for the adoption of the resolution, and he did not so vote. It is contended that Webster also was disqualified by reason of his client's adverse interest. This contention must be sustained. A director whose interest in the matter under consideration is adverse to that of the corporation he represents is disqualified to vote on such question. For equally cogent reasons such adverse interest of a director's client or principal ought to disqualify, and the Legislature has not left the question in doubt. Section 2230 of the Civil Code, with certain exceptions not pertinent here, provides:

"Neither a trustee nor any of his agents may take part in any transaction concerning the trust in which he or any one for whom he acts as agent has an interest, present or contingent, adverse to that of his beneficiary."

Directors of a corporation are trustees thereof within the meaning of section 2230. *Graves v. Mining Co.*, 81 Cal. 303, 22 Pac. 665; *San Diego v. Pacific Beach Co.*, 112 Cal. 53, 44 Pac. 333, 33 L. R. A. 788; *Schnittger v. Old Home, etc., Min. Co.*, 144 Cal. 603, 78 Pac. 9; *Pacific Vinegar, etc., Works v. Smith*, 145 Cal. 352, 78 Pac. 550, 104 Am. St. Rep. 42; *Highland Park Inv. Co. v. List*, 27 Cal. App. 761, 151 Pac. 162; *Palo Alto, etc., Ass'n v. First Nat. Bank*, 33 Cal. App. 214, 164 Pac. 1124. A director of a corporation "cannot take part in any transaction in which he, or any one for whom he acts, has an interest, present or contingent, adverse to that of his beneficiary." *Sims v. Petaluma Gas Light Co.*, 131 Cal. 656, 659, 63 Pac. 1011, 1012. An attorney is, of course, the agent of his client within the scope of his employment. *Carter v. Mining Co.*, 83 Cal. 222, 23 Pac. 317; *Wittenbrock v. Parker*, 102 Cal. 93, 36 Pac. 374, 24 L. R. A. 197, 41 Am. St. Rep. 172. From the foregoing it

seems clear that Webster was disqualified to vote on the resolution introduced by him. Being so disqualified, his presence was not effective in making up a quorum.

"The same rules which preclude an interested director from uniting with other directors in the creation of an obligation in favor of himself by his vote forbid him from uniting with them in creating such obligation by any act or exercise of his official position, and a meeting at which there is not a majority of the directors, exclusive of such interested director, is not a competent board for the transaction of any corporate business. * * * By reason of the disqualification of Wells from taking any part in passing the resolution for executing the note and mortgage to himself, he could neither vote in favor of the resolution, nor by his presence help to create a quorum by which the other two directors could adopt it. For the purpose of any action upon this resolution he was as much a stranger to the board as if he had never been elected a director, and, although he may have been physically present in the room with the other two directors, he was not for that purpose a component part of the board, any more than would have been any other bystander, and there was not, therefore, a quorum of the board 'present and acting' at the time the resolution was adopted." *Curtin v. Salmon River, etc., Co.*, 130 Cal. 345, 349, 62 Pac. 552, 554 (80 Am. St. Rep. 132).

In discussing the validity of a transaction between two corporations, where the same persons constituted a majority of the directors of each of them, in the case of *Sausalito, etc., Co. v. Sausalito Imp. Co.*, 166 Cal. 302, 306, 136 Pac. 57, 59, the court said:

"The correct doctrine is well stated in *O'Connor, etc., v. Coosa F. Co.*, 95 Ala. 618, 36 Am. St. Rep. 251, 10 South, 291, as follows: 'If the same persons as directors of two different companies represent both companies in a transaction in which their interests are opposed, such transaction may be avoided by either company, or at the instance of a stockholder in either company, without regard to the question of advantage or detriment to either company. Both the corporations are armed with the right to repudiate such a transaction, no matter how fair or open it may be shown to be. * * * The general rule is that such dealings are not absolutely void, but are voidable at the election of the respective corporations, or of the stockholders thereof. They become binding, if acquiesced in by the corporations and their stockholders.'

"If a person entitled to avoid a contract on such ground is informed of the facts upon which his right rests, and thereafter delays taking any steps to avoid or repudiate the transaction until a period equal to the statute of limitations has expired, the presumption is that he has ratified it. Under some circumstances a much shorter time will justify the presumption." *Sausalito, etc., Co. v. Sausalito Imp. Co.*, 166 Cal. 302, 307, 136 Pac. 57, 59.

There are no circumstances in this case to warrant the inference that the voidable transaction has been ratified or that the stat-

ute of limitations has run against plaintiff's cause of action, nor is anything in the nature of an estoppel disclosed by the evidence. The plaintiff derived no benefit from the transaction. Neither did the defendants surrender any rights thereby. Their suit on the alleged claim against the corporation is still pending. The default judgment entered therein was set aside on the ground that—

"Said corporation had forfeited its charter prior to the commencement of this action by failure to pay its license tax to the state of California."

The plaintiff therein appealed from the order setting aside the judgment, and it appears that the appeal is still pending. It appears that the corporation was relieved from such forfeiture on the 21st day of April, 1917. In *Kehrlein-Swinerton Con. Co. v. Rapken*, 30 Cal. App. 11, 156 Pac. 972, where the plaintiff had forfeited its franchise through the nonpayment of its license tax prior to the commencement of the action, it was held to be an abuse of discretion for the court to refuse to order the substitution of the names of the plaintiff's directors as trustees for its own name as party plaintiff. A petition in that case to have the cause heard in the Supreme Court was denied. No reason appears why the same rule should not be available to a plaintiff suing a corporation under similar circumstances, nor why an action commenced under such circumstances may not be prosecuted to judgment after the revival of the corporation. To uphold the validity of the promissory note and mortgage in any amount would be to give the defendants a preference over all other creditors of the corporation and to subject plaintiff's land to an unauthorized lien. The cancellation of those instruments will leave the defendants in the precise position they occupied prior to the unauthorized transaction.

Other grounds are urged for a reversal of the judgment, but in view of the conclusion reached it is not deemed necessary to discuss them. The points argued will not probably arise at the retrial of the case.

The judgment is reversed.

We concur: HART, J.; BURNETT, J.

58 Cal. App. 335

NORTH CONFIDENCE MINING & DEVELOPMENT CO. v. FITCH et al.
(Civ. 2442.)

(District Court of Appeal, Third District, California. June 27, 1922.)

Appeal and error §790(2)—Defendants' separate appeal dismissed, where reversal of judgment on plaintiff's appeal necessitated retrial.

Where both plaintiff and defendants had prosecuted separate appeals from a judgment

reversed on plaintiff's appeal, leaving defendants with their former remedies available and necessitating a complete retrial of the issues, so that consideration of the questions raised by defendants' appeal for the guidance of the trial court was rendered unnecessary, defendants' appeal will be dismissed.

Appeal from Superior Court, Tuolumne County; G. W. Nicol, Judge.

Action by the North Confidence Mining & Development Company, a corporation, against C. S. Fitch and Richard Chute. From judgment for part of the relief asked, both parties appeal. On defendants' appeal, appeal dismissed.

See, also, 208 Pac. 328.

J. C. Webster, of Sonora, and Richard Chute, for appellants.

Frank W. Street and Horace M. Street, both of San Francisco, for respondent.

FINCH, P. J. The defendants appeal from the judgment herein adjudging that a certain promissory note and mortgage in favor of defendant Fitch for \$9,439.04 are invalid for any amount in excess of \$1,787.89, and enjoining the defendants from collecting any greater sum upon said note. The facts are fully set forth in the opinion this day filed deciding plaintiff's appeal (No. 2436 [Cal. App.] 208 Pac. 328) from the judgment holding the note and mortgage valid to the extent of \$1,787.89.

Appellants contend that the plaintiff is not entitled to a judgment of cancellation because there is neither allegation nor proof that the plaintiff restored or offered "to restore defendants to the same position they would have been if they had not relied upon the instrument sought to be canceled." As pointed out in the opinion reversing the judgment, the defendants' position has not changed, but they may still pursue every remedy which was available to them at the time of the execution of the note. The reversal of the judgment on plaintiff's appeal necessitates a retrial of all the issues raised by the pleadings as fully as if the case had never been tried. The other points argued on this appeal will not probably arise on the retrial of the case, and no useful purpose would be subserved by a consideration of them in this opinion. It is sufficient to say that there is no merit in any of them.

If the defendants alone had appealed it would be necessary to affirm the judgment, but an affirmation would be inconsistent with the judgment of reversal already given, and would only lead to confusion. By the reversal already had, the questions presented by defendants' appeal become moot questions; their consideration not being necessary for the guidance of the court in the retrial of the case. Under such circumstances the appeal should be dismissed. *San Jose Bank of Savings v. Bank of Madera*, 121 Cal. 543, 54

Pac. 85; *Turner v. Markham*, 156 Cal. 68, 103 Pac. 319; *Horton v. City of Los Angeles*, 119 Cal. 602, 51 Pac. 956; *In re Treadwell*, 111 Cal. 189, 43 Pac. 584; *Read v. San Diego Union Co.*, 6 Cal. Unrep. 845, 67 Pac. 1; *Mendocino County v. Peters*, 2 Cal. App. 34, 82 Pac. 1124.

The appeal is dismissed; the respondent to recover its costs on appeal.

We concur: HART, J.; BURNETT, J.

58 Cal. App. 345

KERNS v. SCRIVANI et al. (Civ. 4076.)

(District Court of Appeal, First District, Division 1, California. June 28, 1922.)

Landlord and tenant — 160(4)—Evidence held to sustain finding that lessee's covenant to surrender premises in good condition was not broken where lessee failed to remove vines.

In an action by a lessor to recover upon lessee's covenant to surrender the premises in good condition, where it was shown that berries were planted when the lease was made, and that the berry vines were not old or unprofitable at the termination thereof, as opposed to lessor's contention that they were detrimental to the premises, evidence held sufficient to support a finding that lessor was not damaged.

Appeal from Superior Court, Santa Cruz County; Benj. K. Knight, Judge.

Action by Mary Kerns against Charles H. Scrivani and others. From a judgment for defendants, plaintiff appeals. Affirmed.

Charles B. Younger, of Santa Cruz, for appellant.

Wyckoff & Gardner, of Watsonville, for respondents.

TYLER, P. J. This action was brought by plaintiff to recover damages for the breach of a covenant in a lease requiring that, upon a surrender of the leased premises, the lessee would leave them in as good state and condition as reasonable use and wear thereof would permit.

It is alleged in the complaint that upon the termination of the lease defendants failed to remove certain blackberry vines from the premises, which, it is claimed, were old and unprofitable, and detrimental to the same; that the lessee did not therefore quit and surrender the premises in as good a state and condition as reasonable use and wear thereof would permit, as required of them, to plaintiff's damage in the sum of \$500. Defendants denied that the berries referred to were unprofitable or detrimental to the premises.

From the evidence it appears that plaintiff leased the lands in question to one B. Scri-

vani, who died during the term of his tenancy. Defendants are his children, and they succeeded to this and other property of their ancestor. It appeared in evidence that half of the leased tract was planted to berries at the time of the creation of the agreement, and that this same condition existed at the termination thereof.

The trial court found, in substance, that the vines were not old, unprofitable, or detrimental to the premises. It further found that the berries were on the land prior to the execution of the lease, and that it was not true that defendants did not surrender the premises in as good a state and condition as reasonable use and wear thereof would permit, and, further that plaintiff did not suffer damage in any amount. Judgment was accordingly entered for defendants.

An examination of the record shows that the evidence fully sustains the finding of the trial court. This being so, the judgment is affirmed.

We concur: RICHARDS, J.; PREWETT, Justice pro tem.

58 Cal. App. 282

CORISON v. WILLIAMS. (Civ. 3850.)

(District Court of Appeal, Second District, Division 2, California. June 23, 1922.)

1. Evidence — 80(1)—Law of foreign state regarding adoption will be presumed to be same as this state in absence of showing to contrary.

The law of a foreign state in regard to adoption in 1903 will be presumed to be identical with the law of this state in the absence of a showing to the contrary.

2. Evidence — 397(3)—Adoption papers held not such a written agreement as to exclude evidence of an oral contract.

A petition for adoption, alleging that "declarants desire to adopt the child for the purpose of giving her a home with them, of raising her as if she were their own, making her their legitimate heir and giving her their name," as required by Civ. Code, § 226, did not constitute such a written agreement as to call for the exclusion from evidence of an oral contract by the adoptive parents to leave all their property to the child upon their deaths.

3. Adoption — 20—Natural parents and adoptive parents may make separate agreement concerning future welfare of child.

Civ. Code, § 226, prescribing mode of proceedings for adoption, merely requires an agreement that the adopted child will be treated like an ordinary child, and does not preclude the natural parents and the adoptive parents from making a separate enforceable agreement concerning the future welfare of the child.

4. Adoption ☞7—Only surviving parent can give consent, and not grandparents.

Under Civ. Code, § 224, requiring consent of parents in adoption of minor children, grandparents cannot give consent where a parent is living.

5. Evidence ☞313—Of admissions against interest by one since deceased is weak.

Evidence of admissions against interest made by one since deceased is weak.

6. Evidence ☞78—Evidence willfully suppressed is presumed to be adverse.

Under Code Civ. Proc. § 1963, subd. 5, evidence willfully suppressed is presumed to be adverse.

7. Appeal and error ☞1011(1)—Findings of trial court based on conflicting evidence are final.

Findings of fact of the trial court, based on conflicting evidence, are final.

8. Specific performance ☞121(7)—Evidence held sufficient to support finding that oral contract was not made.

In an action by an adopted daughter against the executrix of the estate of her adoptive mother, to enforce an oral contract by deceased to leave all her property to plaintiff upon her death, evidence held sufficient to support a finding that the contract was not made.

9. Wills ☞58(1)—Use of term "legitimate heir" in petition held not to constitute agreement to leave property to adopted child.

The use of the term "legitimate heir" in a petition for adoption did not constitute an agreement by the adoptive parents to leave all their property to the child upon their deaths; "legitimate" meaning nothing more than lawful [citing Words and Phrases, First and Second Series, Legitimate].

Appeal from Superior Court, Los Angeles County; John W. Shenk, Judge.

Action by Gladys Corison against Lydia R. Williams, personally and as executrix of the estate of Grace A. Troy, deceased. Judgment for defendant, and plaintiff appeals. Affirmed.

Arthur W. Eckman and Wm. B. Himrod, both of Los Angeles, for appellant.

G. P. Adams and W. W. Orme, both of Los Angeles, for respondent.

WORKS, J. From the time of her birth until in her eighth year plaintiff bore the name of Nina C. Hunt. At the time when she reached the age mentioned she was adopted by Jerome Troy and Grace A. Troy, husband and wife, and acquired the name of Gladys Troy. After arriving at maturity she became, and she is now, the wife of John D. Corison. This action was instituted by plaintiff to specifically enforce an agreement which she alleges was made in her favor by Mr. and Mrs. Troy at the time of her adop-

tion. Both of the Troys were deceased when the action was commenced. Lydia R. Williams was made a defendant personally because Mrs. Troy in her lifetime had conveyed to the former certain of her property, one of the purposes of the action being to set the conveyance aside. Mrs. Troy also made a will in favor of Mrs. Williams. Defendants had judgment, and plaintiff appeals.

The formal adoption of appellant was preceded by certain conversations between the Troys, on the one hand, and her father, David E. Hunt, and her grandparents, Mr. and Mrs. Fleming, on the other, the mother of appellant, who was a daughter of the Flemings, having died some time before the negotiations looking toward the adoption had commenced. It is alleged in the complaint that these negotiations culminated in an oral agreement that, if they were permitted to adopt appellant through Hunt's consent to the adoption, the Troys "would leave to the plaintiff at their deaths all of the property which they then had, or which they might accumulate, or of which they might become possessed." The trial court found that this averment was untrue, and appellant contends that the finding is without support in the evidence.

[1-3] At the trial the evidence as to the oral agreement went in over respondents' objection, their contention being that the formal adoption papers constituted the only agreement between Hunt and the Troys, and that the oral negotiations between them could not be received, as they tended to vary or add to the terms of the written agreement. That ground is now insisted upon in support of the contention that the disputed finding of the trial court should be upheld. If this position is well taken, the evidence of the oral agreement should have been excluded. Upon that theory the finding would be proper, as the record would in effect show no evidence to support the alleged oral agreement. The adoption of appellant occurred in the then territory of New Mexico, but no claim is made that the law of that jurisdiction concerning adoptions was different from the law of California on the same subject. Counsel on both sides therefore correctly argue the cause upon the presumption that the law of the territory was identical with the law of this state as it stood in 1903, when the adoption was consummated. At that time section 226 of our Civil Code, after directing that adoption should be made pursuant to petition addressed to the superior court, further provided.

"The person adopting a child, and the child adopted, and the other persons, if within or residents of this state, whose consent is necessary, must appear before the judge of the superior court of the county where the person

adopting resides, and the necessary consent must thereupon be signed, and an agreement be executed by the person adopting, to the effect that the child shall be adopted, and treated in all respects as his own lawful child should be treated."

The petition for the adoption of appellant alleged, considering only so much of it as may by any possibility bear upon the point now under consideration:

"That said declarants [the Troys] desire to adopt said child for the purpose of giving her a home with them, of raising her as if she were their own child, and making her their legitimate heir, and giving her their name."

The consent of Hunt to the adoption is merely to the effect that "he hereby consents to the adoption of his said child" by the Troys "as set out in their declaration and application herein," and the order of the court sanctioning the adoption casts no particular light on the subject. We cannot indorse the view that these adoption papers constitute such a written agreement between Hunt and the Troys as to call for the exclusion from evidence of an oral contract connected with the subject. It will be noted that section 226, as it stood in 1903—and, in fact, it has not been changed since in that respect—required only as to the matter of contract that the party adopting should execute an agreement "to the effect that the child shall be adopted, and treated in all respects as his own lawful child should be treated." We do not mean to say that promises taking a wider range in a petition for adoption either could or could not be enforced, as the question is not before us. We do say, however, that the petition in this instance shows no more than an attempt to comply with the statute, notwithstanding the use in it of the clause, "making her their legitimate heir," as to which expression we shall have more to say in discussing another point presented by appellant. As the statute required nothing, in effect, but an agreement that an adopted child should be treated like an ordinary child of the adopting person, and as the petition for adoption did not attempt to go beyond the requirement of the enactment, there is no reason why Hunt and the Troys, entirely apart from the terms of the petition for adoption, might not have made an enforceable agreement concerning the future welfare of appellant. Such statutes as section 226 "prescribe precisely what is essential to accomplish adoption without reference to what other understandings may have been had between the parties. If others there have been, they have no place in the articles of adoption as such, which aim only to put the minor in the same relation legally to the adoptive parents as though their offspring." *Horner v. Maxwell*, 171 Iowa, 660, 153 N. W. 331. See, also, *Strakosch v. Connecticut T. & S. D. Co.*, 96

Conn. 471, 114 Atl. 660. We conclude that the trial court committed no error in receiving evidence of the alleged oral agreement.

[4] Still dealing with the same finding of the trial court, we have now to determine whether there was a conflict of evidence concerning the oral agreement and whether the finding can be sustained upon that theory. No evidence upon the question was offered by respondents, and appellant insists that the trial court was concluded by the evidence presented by her, and that no finding was possible except that the agreement was made as pleaded. When the negotiations for the adoption of appellant were opened by the Troys, she was residing at Raton, New Mexico, with her grandparents, the Flemings, her mother being deceased, as already remarked, and her father being at some distance from Raton under employment with a railroad company. Together with an indication by the Troys of their desire to adopt the child, her grandparents both testified to expressions used in their presence by the would-be adoptive parents, but without the presence of the father, tending to show that if the adoption were consented to they would leave all their property to appellant. Nothing was concluded on the subject, however, nor could there have been, as the grandparents were powerless to enter into an agreement on the subject, the surviving parent being the only one who could give consent to the proposed adoption. Civ. Code, § 224. Moreover, and aside from this state of the law, Fleming testified:

"I talked with Mr. Troy and told him he [Hunt, the father] would come up there and he would talk to Mr. Troy himself and see about it, and I think that is all I told him—that he would come up and he would talk to Mr. Troy himself."

The evidence shows without dispute that Hunt did come to Raton and that he had one or more conversations with the Troys, or with one of them, upon the subject of the proposed adoption, and that both Troy and his wife and Hunt were in court at the time the adoption was consummated. We are pointed to no showing in the record that any witness who testified was present at any conversation between Hunt and the Troys, except that a Mrs. Eaton testified, the italics being ours:

"I heard Grace Troy say in the presence of Mrs. Fleming and Mr. Hunt *before the adoption took place*: 'I expect to take her in my home and give her my love. I will school her, and I am going to take her to California to live, and after that we will travel, and at the end of my life she is to have all my earthly possessions.'"

Mrs. Fleming, however, did not testify to this statement. Her testimony, on the contrary, contradicts that of Mrs. Eaton, for she said, "I don't think he [Hunt] ever met

Mrs. Troy." It is certain that no person who took the witness stand at the trial was present in court with Hunt and the Troys when the adoption was concluded. Hunt was not produced as a witness, nor was his deposition taken, although both appellant and the Flemings knew of his whereabouts. Several witnesses testified to statements made by the Troys, after the adoption was perfected, to the effect that they expected or intended to leave their property to appellant.

[5-8] In determining whether this state of the evidence made it incumbent upon the trial court to find that the oral agreement was consummated, various considerations are to be invoked. In the first place, the Supreme Court has said several times that evidence of oral admissions against interest made by one whose lips are sealed in death is the weakest kind of evidence that could be produced, and that "it is not stating it too strongly to say that evidence so given under such circumstances must appear to any court to be in its nature the weakest and most unsatisfactory." *Estate of Emerson*, 175 Cal. 724, 167 Pac. 149, and cases cited. If the evidence in the record which is opposed to the contested finding is to be considered in so unfavorable a light, what is to be said of the fact that Hunt was not called as a witness? He was the only living person who could have told of the final agreement between himself and the Troys, if any there was, affecting the future welfare of appellant. The failure to produce his testimony casts the gravest suspicion upon appellant's case. It is to be presumed, under subdivision 5 of section 1963, Code of Civil Procedure, "that evidence willfully suppressed would be adverse if produced," and it has been determined that this factor may be considered wherever it applies, in passing upon the question whether there is evidence to support a particular finding of fact. *Estate of Thomas*, 140 Cal. 397, 73 Pac. 1059. And this court said in a late case, in which a disputable presumption was alone looked to as sufficient support for a finding of fact:

"It is contended by appellant, however, that the presumption was overcome by testimony introduced by him. There was considerable testimony presented by appellant on the subject, it is true, but we cannot say that it was sufficient to outweigh the presumption. The solution of that question was within the peculiar and final province of the trial court, for the presumption on the one hand and the testimony opposed to it on the other presented but a conflict of evidence. The finding of the trial court on the subject is final. *French Bank v. Beard*, 54 Cal. 480." *Fowler v. Enriquez*, 204 Pac. 854.

In the present case, under the presumption which must be indulged pursuant to the terms of subdivision 5, § 1963, Code of Civil

Procedure, it is as if the record disclosed testimony of Hunt actually opposed to that produced by appellant, not forgetting the weak and unsatisfactory character of the latter under the pronouncements of the Supreme Court already mentioned. We are satisfied that the disputed finding is supported by the evidence.

[9] It is contended by appellant that she was entitled to recover under the "contract" disclosed by the formal adoption papers, and this because of the use of the term "legitimate heir" in the petition for adoption. The contention cannot be upheld. The word "legitimate" added nothing to the word "heir," for legitimate means nothing more than lawful (5 Words and Phrases [1st Ed.] p. 4090, tits. "Legitimate," "Legitimate Purpose," and see title "Legitimate Heirs"; 3 Words and Phrases [2d Ed.] 88, tit. "Legitimate"); and "the heirs of a person are those whom the law appoints to succeed to his estate in case he dies without disposing of it by will" (*Wittenbrock v. Wheadon*, 128 Cal. 150, 60 Pac. 664, 79 Am. St. Rep. 32). It is plain to us that the Troys, in using the term "legitimate heir" in the petition for adoption, intended only to put appellant in the same place in their family which a child of their blood would have occupied, or, as we have already said, they were merely employing the petition for the purpose directed by the law; that is, to show that appellant was to "be adopted and treated in all respects as [their] own lawful child should be treated." Civ. Code, § 226.

Judgment affirmed.

We concur: FINLAYSON, P. J.; CRAIG, J.

58 Cal. App. 280

McGOLDRICK v. VISALIA MIDWAY OIL CO. (Civ. 3852.)

(District Court of Appeal, Second District, Division 2, California. June 22, 1922.)

Appeal and error ¶110—Separate appeal from order granting new trial lies only after jury trial had as matter of right.

Under Code Civ. Proc. § 963, as amended in 1915, a separate appeal does not lie from order granting new trial after judgment on trial before the court without a jury, the amendment contemplating an appeal only from "an order granting a new trial in an action or proceeding tried by a jury where such trial by jury is a matter of right."

Appeal from Superior Court, Kern County; J. W. Mahon, Judge.

Action by John McGoldrick against the Visalia Midway Oil Company, a corporation. From an order granting plaintiff's motion for new trial, defendant appeals. Appeal dismissed.

Miller, Thornton, Miller & Watt and Miller, Thornton & Miller, all of San Francisco, for appellant.

Thos. Scott, Sr., and Kaye & Siemon, all of Bakersfield, Edson Abel, of Taft, and L. E. Nathan, of Los Angeles, amici curiæ.

WORKS, J. This is an action for damages for personal injuries, and was tried without a jury, with the result that judgment went for defendant. Upon motion by plaintiff the court made its order granting a new trial of the cause. From this order defendant appeals.

Section 963, Code of Civil Procedure, before it was amended in 1915, provided that an appeal might be taken from "an order granting or refusing a new trial." By the amendment of the year mentioned, the passage of the amendment long antedating the order now appealed from, this language was changed so as to permit an appeal only from "an order granting a new trial in an action or proceeding tried by a jury where such trial by jury is a matter of right." The Supreme Court, in reciting the history of this amendment and of others affecting appeals, has said:

"Separate appeals from orders granting new trials can be had only in those cases where a jury trial has been had as a matter of right." Estate of Waters, 181 Cal. 584, 185 Pac. 951.

Appeal dismissed.

We concur: FINLAYSON, P. J.; CRAIG, J.

58 Cal. App. 375

HUGHES v. PACIFIC ELECTRIC RY. CO. (Civ. 3856.)

(District Court of Appeal, Second District, Division 2, California. June 30, 1922.)

1. Railroads ☞350(11)—Negligent speed of interurban electric train approaching street intersection held for jury.

Where a pedestrian, plaintiff's companion, was killed at a street intersection by an interurban electric locomotive with two freight cars attached, running down grade along a private right of way in the middle of a broad thoroughfare, and there was evidence that the train's speed was as low as 15 miles an hour, the fact that deceased was thrown 43 feet by the impact, and the train was stopped 255 feet from the point of impact, held not to show as a matter of law that the train was negligently operated.

2. Appeal and error ☞882(12)—Party not entitled to object to instructions given at his request or instructions covering same legal principles.

A party may not complain of instructions given to a jury at his request or to instructions

which pertain to a legal question which he requested the judge to submit to the jury.

3. Appeal and error ☞882(12)—In two cases tried together, parties submitting requests, without indicating to which case they were applicable not entitled to object that requests were given in wrong case.

Where two cases conducted by the same attorneys were by stipulation tried together, and one resulted in a directed verdict, a party submitting requests without specifying to which case they were applicable, or indicating that, in the event of a directed verdict in one case, only stated instructions were desired, or without withdrawing requests on direction of verdict in one case, was not entitled to object that the substance of instructions requested in one case was given in the other.

Appeal from Superior Court, Los Angeles County; Louis W. Myers, Judge.

Action by Helen Hughes, a minor, by Florence Hughes, her guardian ad litem, against the Pacific Electric Railway Company. Judgment for defendant, and plaintiff appeals. Affirmed.

Alfred H. McAdoo and Wm. J. Carr, both of Los Angeles, for appellant.

Frank Karr, R. C. Gortner, and W. R. Millar, all of Los Angeles, for respondent.

WORKS, J. This is an action for the recovery of damages for personal injuries suffered by a child under five years of age, who sues by her guardian ad litem. Under stipulation the cause was tried together with an action for damages for the death of one Kate Johnston, an adult who lost her life in the same accident in which plaintiff in this cause was injured. The trial was by a jury. In their main circumstances the two causes of action were intimately related, as the plaintiff child was being led by the hand by the decedent when the accident occurred. The trial judge instructed the jury to render verdict in favor of defendant in the Johnston Case on account of the contributory negligence of the deceased, and that outcome of course followed. As a result of this instruction, then, the case of the minor was alone left to the actual deliberation of the jury, and a verdict was returned favorable to defendant in that action also. Both plaintiffs were represented by the same counsel, but no appeal was prosecuted from the judgment in the Johnston Case. Plaintiff minor, however, appeals from the judgment entered against her.

[1] Appellant contends that she was entitled to have the jury instructed that, as a matter of law, respondent was negligent in the operation of its interurban electric cars which were concerned in the accident resulting in her injuries, which instruction was refused by the trial court. As a basis for the discussion of this question appellant cites

Rudd v. Byrnes, 156 Cal. 636, 105 Pac. 957, 26 L. R. A. (N. S.) 134, 20 Ann. Cas. 124, to the effect that—

Although "the question of negligence is ordinarily one to be determined by the jury, yet, where the facts are undisputed, and no inference but that of negligence can be drawn from them, the court may determine that negligence is shown as matter of law."

Appellant insists that the present case is within this rule, for the reason that the uncontradicted evidence shows that Miss Johnston, who was alone struck directly by the moving cars, was thrown at least 43 feet by the impact, and that the motorman in charge of the train could only, with all the braking power at his command, bring the cars to a stop at a distance of 255 feet from the point at which she was struck. From this it is argued that the evidence shows conclusively that the train was moving at an unsafe rate of speed, and *Young v. Atlantic Ave. R. Co.*, 10 Misc. Rep. 541, 31 N. Y. Supp. 441, is cited as establishing the rule that courts will take judicial knowledge of the fact that "a trolley car" moving "at an ordinary safe rate of speed can be stopped, emergency or no emergency, in a much shorter space" than 102 feet, the distance which was of interest in that case. For various reasons the opinion cited can be of no value here. There the damage was caused by a single trolley car, apparently an ordinary street car. Here Miss Johnston was struck by an interurban freight train, composed of an electric motor, or locomotive, and two cars. There the trolley car was proceeding up a "very steep" grade. Here the train was running on a down grade. There it was shown by direct testimony that "the car was moving very rapidly." Here there was some testimony that the train was running at as low a rate of speed as 15 miles an hour. It is true that the present case is like the case cited in that the accident occurred at a street intersection in each. There the car was being operated, apparently, along an ordinary city street. Here, however, the train was proceeding down the middle of a broad thoroughfare, along which respondent had a private right of way, except across street intersections, in which ran its double tracks, with ties and rails, exposed "like a steam railroad in the open country," they being thus a prominent feature of the landscape. Under all these circumstances we cannot say that the train was proceeding at an unsafe rate of speed, or that the motorman in charge did not have his train under reasonable control as it approached the intersection at which occurred the tragedy out of which this litigation arose. The instruction was properly refused.

Following immediately upon the discussion of the question of which we have just made disposition, and as a preliminary to the consideration of the next point, it is to be noted

that the motorman in charge of the train did not attempt to exercise his control over it by an application of his emergency brakes until within 35 feet of the place at which the accident occurred, his ordinary brakes being already "on" in order to keep the train "from increasing speed." This failure to apply the emergency brakes was due to the contributory negligence of Miss Johnston, which caused the trial judge to direct the jury to render a verdict for defendant in the case instituted to recover damages for her death. We need not recite the facts going to show that Miss Johnston was guilty of contributory negligence. It is enough to say that counsel for appellant, who were also counsel for plaintiff in the Johnston Case, do not question the propriety of the instruction which was based upon that negligence. They do, however, object to certain instructions which went to the jury, and which dealt with the acts of Miss Johnston as affecting the rights of appellant in the premises, the case of the latter being the only one left to the jury after the instruction directing the jury to find for defendant in the Johnston Case. The instructions to which objection is now made were several in number, but their general nature may be shown by a reference to the one of them which appellant evidently regards as among the most drastic and injurious of the lot. It is as follows:

"The railroad track is itself a warning of danger to any one of the age of discretion, and any such person in or about or seeking to cross a railroad track or tracks must give to himself or herself, if possible, an opportunity to know whether or not a car is approaching on any or either of such tracks, and must not only listen, but must also look carefully both before she crosses and as she crosses, and must see and heed that which, by the exercise of such care, can be seen and heard on said tracks, or any of them."

In her assault upon these various instructions appellant calls attention to the rule to the effect that the contributory negligence of Miss Johnston was not imputable to her, a rule which was recognized by the trial judge, as he instructed the jury according to its mandate. Appellant says that, after the giving of the instruction which disposed of the Johnston Case, there was left for the jury under this rule no question involving the law of contributory negligence. Respondent contends, however, that the questioned instructions are to be viewed as statements of rules of law bearing upon the duty of the motorman under the circumstances which confronted him, in view of the fact that Miss Johnston held appellant by the hand during the commission of the acts which, according to the instruction given by the trial judge, amounted to negligence on her part. We need not determine whether this view of respondent is correct.

Counsel for appellant, who were at the

time counsel for plaintiff in the Johnston Case, requested the trial judge to give to the jury instructions covering the same questions of law as are embraced in the instruction above quoted and in the others to which appellant makes objection. One of the instructions thus requested was given by the judge with modifications which are immaterial to the point now under discussion. This instruction, as presented to the jury, read, the italics being ours:

"An interurban electric railway, such as the evidence shows the defendant to be, occupies a status somewhat between that of a steam railroad and an ordinary street railway. *Whether the rules of caution resting upon a pedestrian about to cross the tracks of an interurban electric railroad are those applicable to the crossing of the tracks of a steam railroad or the tracks of a street railway depends upon the circumstances under which the interurban railroad is operated.* Where it is operated under conditions substantially similar to those under which a steam railroad is usually operated *then the same rules of caution apply in the case of one as the other.* But where the conditions under which the interurban railway is operated approximate those under which a street railway is usually operated, *then the rules of caution applicable to the latter obtain.* Here the defendant's tracks run along a private right of way immediately between two parallel roadways which constitute a traveled thoroughfare in the city of Glendale. At the intersection of Park avenue and such thoroughfare, on each side of the thoroughfare, were stores. Foot and vehicle traffic passed over the tracks at Park avenue. Freight or work trains were at times run along defendant's tracks at this place. Passenger trains which traveled the tracks of the defendant at frequent intervals sometimes stopped on signal at Park avenue to take on passengers, and sometimes did not. *Under such circumstances, a pedestrian crossing the tracks of the defendant at Park avenue is not to be held to that high amount of care which is required of him when crossing the tracks of an ordinary steam railroad running through the country, on which heavy trains of cars are moved at a high rate of speed and cannot be quickly stopped or controlled, but must exercise a greater amount of care than in crossing an ordinary street railway track. A pedestrian crossing the tracks at this point was chargeable with exercising such care as was reasonable under all the conditions and circumstances."*

[2, 3] It is a well-established rule, finding expression in many cases, that one may not complain of instructions given to a jury at his request (*Emerson v. County of Santa Clara*, 40 Cal. 543), or to instructions given which pertain to a legal question which he himself has asked the trial judge to submit to the jury (38 Cyc. 1788, 1789). Under all the circumstances it is plain to us that this rule applies in the present instance. By their

stipulation that the two cases might be tried together counsel subjected the case of appellant to all the vicissitudes which might attend the consideration by the jury of the Johnston Case, granting, which counsel must have believed to be true, that the latter case would get to the jury. In requesting instructions counsel for appellant could have saved appellant's right to object to the instructions now assailed by taking any one of at least three courses: (1) They could have specified their requested instructions as bearing respectively upon either appellant's case or the Johnston Case. If both cases had gone to the jury, that body could have applied the instructions accordingly. If the instructions had been so framed, also, the trial judge would have been charged, in directing a verdict in the Johnston Case, with the duty of refraining from giving to the jury all instructions requested as bearing alone on appellant's case, provided that as a matter of law they actually had no application to that case. (2) In requesting the various instructions counsel could have indicated that, in the event of a direction to find for defendant in the Johnston Case, they desired certain indicated instructions—that is, those in their judgment not applying to appellant's case—not to go to the jury at all. Considering the state of the evidence, counsel might well have anticipated such a termination of the Johnston Case. (3) When the jury were given the direction as to the Johnston Case, counsel might have arisen in their place and have withdrawn any or all of the instructions offered by them. This direction was given before the judge began the reading of what may be termed the instructions proper, including those given at appellant's request and those now assailed. Counsel having taken neither of these three courses, nor any other course which might operate as the equivalent of either of them, appellant may not now urge objection to any of the instructions now questioned by her.

Appellant contends that the instructions of the court as to proximate cause were confusing and erroneous "because to the jury they could only mean that the jury must find the negligence of defendant the sole and exclusive proximate cause to entitle plaintiff to recovery." We have examined the instructions thus attacked, and find no error in them, especially in view of the fact that appellant requested no instructions under which the jury might have determined that appellant was injured because of the concurring negligence of Miss Johnston and respondent.

Judgment affirmed.

We concur: FINLAYSON, P. J.; CRAIG, J.

58 Cal. App. 366

HERR v. JOHNSON. (Civ. 2473.)

(District Court of Appeal, Third District, California. June 24, 1922.)

1. Municipal corporations $\S$ 706(5)—Evidence held to warrant finding that truck driver attempted to unlawfully pass bicycle rider at intersection.

In an action for injuries received in the collision of an automobile truck with a bicycle, evidence held to warrant a finding that the truck driver attempted to unlawfully pass plaintiff on his bicycle at a street intersection.

2. Damages $\S$ 132(1)—\$3,000 held not excessive for fractured skull of 59 year old man.

Where plaintiff, who was 59 years of age, received a fracture of the skull, which resulted in some permanent injuries, in addition to other injuries, a verdict of \$3,000 was not excessive.

Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

Action by G. B. Herr against F. E. Johnson. Judgment for plaintiff, and defendant appeals. Affirmed.

Howe & Hibitt and O. F. Meldon, all of Sacramento, for appellant.

Martin I. Welsh and Ray T. Coughlin, both of Sacramento, for respondent.

PREWETT, Justice pro tem. In this case a verdict was rendered in favor of the respondent for damages for personal injuries arising out of a collision of an auto truck driven by an employee of the appellant, with a bicycle ridden by the respondent upon Thirtieth street in the city of Sacramento.

On the evening of May 21, 1920, the respondent, a man 59 years of age, was traveling on his bicycle along the westerly side of said street in a southerly direction. At the same time the motor truck was moving on the same street in a like direction. When the respondent reached the intersection of Fourth avenue and said street, he turned at right angles toward the left, intending to proceed in an easterly direction. The driver of the truck approached and attempted to pass the respondent while the latter was traveling on the intersection of said street. If the respondent had continued to travel in a southerly direction, it is probable that the collision would not have occurred. But just as the respondent had commenced to turn to the left, the driver of the truck drove his machine against the bicycle in such a manner that the right fender of the truck struck the rear of the bicycle.

[1] The appellant insists that the driver of the truck was not trying to pass the respondent, but that the respondent for some unexplained reason suddenly turned his bicycle to the right and rode directly into the

path of the truck. The actual collision, however, took place very close to the center of the street intersection. The jury was fully justified in concluding that the driver of the truck was attempting unlawfully to pass the respondent on a street intersection.

[2] The jury awarded a verdict in the sum of \$3,000. The appellant claims that this sum is excessive, but in view of the extent of the respondent's injuries, we cannot concur in this view. In addition to other injuries, the skull of the respondent was fractured, and some permanent injuries seem to have resulted therefrom.

Other points made by the appellant do not require extended examination. The ruling of the court in admitting the shoes in evidence was proper.

We find no error in the record, and accordingly the judgment of the court is affirmed.

We concur: FINCH, P. J.; BURNETT, J.

57 Cal. App. 716

MILLER CO., INC., v. SUPERIOR COURT OF CALIFORNIA et al. (Civ. 3820.)

(District Court of Appeal, Second District, Division 2, California. May 19, 1922.)

1. Justices of the peace $\S$ 138(10)—Allegations of petition for writ against appeal proceedings in superior court held to prevail over unofficial entry in justice docket.

Where petition for writ of prohibition against appeal proceedings in the superior court alleged that respondent had appealed from a justice court decision in favor of petitioner, and set forth a copy of the justice's docket showing an entry reciting, "June 16—Notice of exception to bond and requiring sureties to justify filed," but alleged that this notice was filed June 15, and that a cash deposit in lieu of bond was made June 21, held, in view of Code Civ. Proc. $\S$ 978a, the docket entry was not paramount to the allegation, since under section 911 such entry as that referred to was not provided for and it is therefore not official, but merely the statement of an individual.

2. Prohibition $\S$ 20—Petition held not to adopt unofficial entry in justice's docket set forth as exhibit.

Petitioner prayed for writ of prohibition against proceedings upon appeal in the superior court, on the ground that appeal sureties had not justified within the time required under Code Civ. Proc. $\S$ 978a, after petitioner's exception to their sufficiency, and alleged that in the justice court the case was tried on a certain day and judgment rendered, etc., "all of which will more fully appear by a copy of the transcript of said justice's court * * * hereunto annexed" as an exhibit and "made a part hereof," held, upon demurrer to the petition, that the inclusion of the docket was not an adoption by the petitioner of an unofficial en-

try therein containing the date of petitioner's notice of exception to the sureties at variance with allegations in his petition.

Petition by the Miller Company, Incorporated, for a writ of prohibition against the Superior Court of the State of California in and for the County of Los Angeles, and Hon. Charles S. Crail, Judge thereof. Upon filing of petition an alternative writ was issued. Upon general demurrer the case was then heard upon the question whether a peremptory writ should issue. Demurrer overruled, and writ granted.

Tanner, Odell & Taft, of Los Angeles, for petitioner.

F. D. Macomber, of Santa Monica, and Fogel & Beman, of Los Angeles, for respondents.

WORKS, J. Petitioner is plaintiff in an action pending before respondent superior court. That action originated in the justice court and was tried there, with the result that judgment went in favor of petitioner. The defendant in the action prosecuted an appeal to respondent superior court and petitioner made a motion to dismiss the appeal; the motion being denied. Petitioner contends that the motion should have been granted, and by its petition seeks to prohibit respondents from taking further proceedings in the action. Upon the filing of the petition an alternative writ of prohibition was issued and the matter is now before us upon the question whether a peremptory writ shall go forth. Respondents have interposed a general demurrer to the petition, and the question is therefore to be settled upon the face of the latter pleading.

The petition alleges that in due time after the filing of his notice of appeal and undertaking on appeal by the defendant in the action mentioned petitioner served and filed a notice that it excepted to the sureties on the undertaking, and required them to justify. It is averred that this notice was filed June 15, 1921. The next allegation is that the defendant in the action never gave petitioner notice of justification of the sureties on the undertaking, and never gave notice that a new undertaking had been filed, and "that on the 21st day of June, 1921, without any notice to plaintiff or its attorneys, defendant deposited" with the justice of the peace an amount in cash in lieu of undertaking. According to these allegations, then, it will be observed, the deposit of cash with the justice was made six days after the filing of the notice requiring a justification of the sureties on the undertaking. Petitioner contends that this situation is fatal to the appeal, as section 978a of the Code of Civil Procedure, relating to appeals from justice courts, provides as to undertakings on appeal that—

"The adverse party may except to the sufficiency of the sureties within five days after the filing of the undertaking, and unless they or other sureties justify before the justice or judge within five days thereafter, upon notice to the adverse party, to the amounts stated in their affidavits, the appeal must be regarded as if no such undertaking had been given."

[1] Respondents, in arguing the point made by petitioner, call our attention to the fact that a copy of the docket of the justice in the action is attached to the petition as an exhibit. On this copy appears the entry, under the year 1921:

"June 16—Notice of exception to bond and requiring sureties to justify filed."

If this statement is to control the allegation of the petition that the notice was filed June 15, the deposit of cash in lieu of undertaking was in time, for it will be remembered that the deposit was made June 21. Respondents insist that the entry in the docket is paramount to the allegation, but we think the contention cannot be sustained. Section 911, Code of Civil Procedure, requires every justice to keep a docket, but it also designates the entries to be made by him in the book, and such an entry as that made by the justice in the present instance is not among them. The act of the justice in making the entry was not therefore an official act. It could have no more effect than the voluntary statement, not made under oath, of an ordinary private individual. In truth, that in reality is all it was. We are convinced that the allegation of the pleading that the notice was filed on June 15 is uncontradicted and conclusive, and that the deposit of cash in lieu of undertaking was one day too late. The appeal should have been dismissed by respondents.

[2] Before concluding we should remark that the inclusion of the copy of the docket of the justice as an exhibit to the petition was not brought about in such a manner as to amount to an adoption by petitioner of the assertion contained in it to the effect that the notice was filed June 16. The exhibit was imported by means of an allegation to the effect that the cause was tried by the justice on a certain day, and that judgment was rendered in favor of plaintiff on the next day for certain damages, interest, and costs, "all of which will more fully appear by a copy of the transcript of said justice's court as certified to the superior court, and hereunto annexed and marked" as an exhibit "and made a part hereof."

The demurrer is overruled, and a peremptory writ of prohibition will issue as prayed.

We concur: FINLAYSON, P. J.; CRAIG, J.

58 Cal. App. 257

PEOPLE v. SICHOFSKY. (Cr. 807.)

(District Court of Appeal. Second District, Division 2, California. June 21, 1922. Hearing Denied by Supreme Court Aug. 17, 1922.)

1. Criminal law ⚡1023(8)—Order overruling motion in arrest of judgment is not appealable.

An order denying a motion in arrest of judgment is not appealable.

2. Convicts ⚡5—Custody of federal agent does not deprive state court of jurisdiction to try prisoner.

That a federal convict indicted in a state court must remain in custody of a federal agent during his trial in the state court does not deprive the state court of jurisdiction to try him, since he is present in the state court, and can conduct his defense as effectively as if he were in the custody of officers of that court.

3. Larceny ⚡65—Evidence held sufficient to warrant conviction.

In a prosecution for grand larceny, evidence held sufficient to warrant conviction.

4. Larceny ⚡1—Fraudulent appropriation of money obtained through fraud and deceit constitutes larceny.

Where money is obtained through fraud and deceit, with the intention of appropriating it, and the owner has parted with possession, but not title, the appropriation of the money constitutes larceny.

5. Embezzlement ⚡1—Fraudulent appropriation of goods honestly received constitutes embezzlement.

The fraudulent appropriation of goods honestly received upon a trust constitutes embezzlement.

6. Larceny ⚡68(2)—Whether accused obtained money fraudulently with intent to appropriate held for the jury.

In a prosecution for grand larceny, whether accused obtained the money fraudulently with intent to appropriate it held for the jury.

7. Indictment and Information ⚡125(45)—Stealing of several articles from same place may be charged in one count.

Where several articles were stolen at the same time and from the same place, the offense may be charged as one crime, and in a single count, though the ownership is in different persons.

8. Criminal law ⚡29—Stealing of money from different owners at same time and place held separate crimes.

Where money was obtained from different owners through fraud and deceit practiced upon each owner, each act constituted a separate offense, though the money was taken at the same time and from the same place.

9. Witnesses ⚡267—Court may restrain cross-examination where questions are frivolous or trivial.

While the right of cross-examination, where it is being used in good faith for the pur-

pose of eliciting the truth from a reluctant witness, should be allowed with great liberality, the court may restrain the examination where it appears that time is being needlessly consumed by tedious or frivolous questioning.

Appeal from Superior Court, Los Angeles County; Sidney N. Reeve, Judge.

Albert Sichofsky was convicted of grand larceny, and from the conviction, and overruling of motions for a new trial and in arrest of judgment, he appeals. Affirmed.

Cooper, Collings & Shreve, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., John W. Maltman, Deputy Atty. Gen., and Lorrin Andrews, of Los Angeles, for the People.

FINLAYSON, P. J. [1] In an indictment containing four counts defendant was charged: In the first count, with the larceny of \$3,000, the property of O. M. Justice; in the second, with the embezzlement of the same \$3,000; in the third, with the larceny of \$4,500, the property of S. Levin; and, in the fourth, with the embezzlement of the same \$4,500. He was acquitted of the embezzlement charges and was convicted of the two larceny charges. A separate judgment was entered upon each conviction. From those judgments, and an order denying his motion for a new trial, he now appeals. He also appeals from an order denying his motion in arrest of judgment, but, as that order is not appealable, the appeal therefrom must be dismissed.

It was the theory of the prosecution that, though defendant obtained possession of the moneys with the consent of the owners, their consent was obtained through deceit practiced by defendant, and that therefore the larceny was perpetrated by means of fraud and trickery. The case as disclosed by the witnesses for the people is, briefly, as follows: Defendant, posing as a Polish count who had but recently arrived in Los Angeles from the republic of Mexico, represented to the complaining witnesses, Levin and Justice, both of whom were physicians practicing their profession in the city of Los Angeles, that he had some friends in Mexico who held a lease on a parcel of valuable oil property at Huntington Beach; that his Mexican friends wanted to dispose of their lease; that it could be obtained through a Mexican who lived upon the land, and who would execute the necessary documents; that defendant's friends in Mexico wanted him to sell the lease for them; that it could be purchased for \$7,500, but that, if the complaining witnesses wished to buy it, they must act quickly. It finally was agreed that Dr. Levin would contribute \$4,500 toward the purchase of the lease, and that Dr. Justice, the other complaining witness, would contribute the balance of the purchase price

--\$3,000. Defendant told Drs. Levin and Justice that they ought to give him the \$7,500 in cash, to be paid by him to his Mexican friends, as money would impress the Mexicans, and there were many persons trying to buy the lease. It was agreed that the purchase money would be given to defendant as the agent of the prosecuting witnesses, and also as the representative of defendant's Mexican friends. As the result of many conversations, extending over a period of several days, defendant and the two doctors met, on the evening of November 15, 1920, at Dr. Levin's office in Los Angeles, where, after some preliminary conversation, Dr. Justice took from his pocket and handed to defendant \$3,000 in currency, and Dr. Levin took from his safe and delivered to defendant \$4,500 in currency. Defendant put the two amounts in his inside coat pocket, and agreed with his two unsuspecting victims that he would procure the lease, signed by the Mexican who lived upon the property, that he would conduct the Mexican and his wife to a bank at Huntington Beach, that he would deposit the money in that bank, taking a receipt therefor, and that the money should remain in escrow with the bank until such time as the title could be examined by an abstract company. Shortly after the moneys were intrusted to him, defendant fled the state. He later was arrested and brought back. There are many other circumstances which need not be related tending to show that defendant was not acting in good faith. Needless to say, the gullible victims of the pseudo count's winning ways have seen neither the lease nor the money which they so guilelessly intrusted to their magnetic friend.

Appellant contends: (1) That the state courts, for reasons presently to be stated, are without jurisdiction of his person; (2) that the evidence is insufficient to justify the verdict; (3) that, if any offense was committed, it was embezzlement, not larceny; (4) that, if the crime of larceny was committed, there was but one larcenous taking, not two, and that therefore there should have been but one verdict of guilty and but one judgment of conviction; (5) that defendant's right of cross-examination was unduly curtailed.

The facts upon which appellant bases his contention that the court was without jurisdiction to try him are as follows: He was arraigned in the superior court for Los Angeles county on December 6, 1920. His trial in that court was commenced on April 7, 1921, and continued until April 13, 1921, on which date he was convicted on the larceny charges. He is a citizen of Poland, and, prior to his trial in the state court, had been indicted by the federal grand jury, charged with entering the United States from the republic of Mexico without having a duly viséed passport. See *Ex parte Sichofsky*, 273 Fed. 694. To that charge he entered a plea

of guilty in the United States District Court for the Southern District of California, and on March 22, 1921, was sentenced by that court to confinement in the federal penitentiary at McNeil's Island for the term of three years. The United States District Court then made an order staying execution of its sentence for a period of 15 days and directing the United States marshal to take Sichofsky to the court room of the superior court for Los Angeles county at such times as his presence in the case there pending against him should be required, and to keep him in custody for the purposes stated in the order. Pursuant to that order appellant was taken by the United States marshal to the superior court for Los Angeles county, and was there tried, convicted, and sentenced.

[2] There is no merit in the claim that the court *a quo* did not acquire jurisdiction of appellant's person. It probably is true, as appellant contends, that, after the sentence by the federal court, and until the end of his term and discharge, no state court could assume control over his body without the consent of the United States (*Ponzi v. Fessenden*, 257 U. S. —, 42 Sup. Ct. 309, 66 L. Ed. —); but there is no force in the contention that in this case the United States Attorney General, and he only, could give such consent on behalf of the United States. Here execution of the sentence imposed by the United States District Court had not commenced when that court ordered a stay of execution and directed that Sichofsky be taken to the state court at such times as his presence there should be required in the case there pending against him. As was said by the United States Circuit Court of Appeals on Sichofsky's appeal from an order discharging the writ of habeas corpus, "there was no point of time, therefore, at which the jurisdiction of the appellant was lost" by the United States District Court. *Sichofsky v. United States*, 277 Fed. 762. This being so, the United States District Court was the sole agency possessing authority to give consent, on behalf of the United States, to the assumption by the state court of control of the body of appellant. When, therefore, appellant was produced in the state court, and was personally present there, with full opportunity to make his defense, jurisdiction of his person was had by the superior court exactly as if he had been brought before that court by its own officer. *Ponzi v. Fessenden*, *supra*.

[3] The evidence was amply sufficient to sustain the verdict. The testimony indicates that, from the beginning, appellant had undertaken to obtain the money from Levin and Justice, ostensibly to use in paying for the purchase of the lease, but really to convert all of it to his own use. The theory of the prosecution that appellant, by trickery and deceit, fraudulently caused the prosecuting witnesses to believe that they were part-

ing with the possession of their moneys for a valuable oil lease, to be purchased with the moneys which they credulously intrusted to appellant, is fully sustained by the evidence, which shows a bald scheme to deceive two unsuspecting physicians by drawing them into the snare set for them.

[4] That the evidence shows this to be a case, not of larceny, but of embezzlement, is the next point made by appellant. The circumstances all show that neither of the complaining witnesses intended to part with the ownership of the money at the time when it was delivered to appellant. At the time when the money was delivered each complaining witness intended that appellant should receive it for him, and that it should be carried by appellant to the bank at Huntington Beach, and there be deposited in escrow until such time as the abstract company should certify to the title to the lease, when, if the title should be found to be in appellant's supposed Mexican friends, it was to be paid to the latter as the purchase price of the lease. Had all this been done as intended, the moneys delivered to appellant would have remained in law the properties of the complaining witnesses, respectively, until final delivery to the supposed owners of the lease. It follows, therefore, that it was the intention of each complaining witness that the title to the money delivered by him to appellant should remain in such complaining witness, and that, as a consequence, it was subject to larceny as his property, and that the crime could not be that of obtaining money by false pretenses. *People v. Tomlinson*, 102 Cal. 23, 36 Pac. 506. Not only did the title not pass, but appellant's possession of the money was not received honestly. Had he received the possession honestly, the offense would have been embezzlement, not larceny. *People v. Tomlinson*, *supra*. But, as it is, the possession of the money of each complaining witness was obtained through fraud and deceit. It therefore follows that its fraudulent appropriation by appellant to his own use, he having had from the beginning the intention to obtain it for that purpose, constituted, in law, an act of larceny. *People v. Delbos*, 146 Cal. 734, 81 Pac. 131; *People v. Schwartz*, 43 Cal. App. 697, 185 Pac. 686. As was said in *People v. Tomlinson*, *supra*, there must often be, on the facts, a very narrow margin between cases of larceny and embezzlement, because the character of the crime depends upon the secret intention of the parties, which is often difficult to ascertain; but, so far as the law is concerned, the principles upon which the question of guilt or innocence is to be determined are plain.

[5, 6] Where one honestly receives the possession of goods upon a trust, and, after receiving them, fraudulently converts them to his own use, it is a case of embezzlement. But, where the possession has been obtained

through trickery or deceit, with the intent at the time the defendant receives the goods to convert them to his own use, and the owner of the goods parts merely with the possession, and not with the title, the offense is larceny. It was a question for the jury to decide whether appellant obtained possession of the money fraudulently, with the intent at the time he received it to convert it to his own use, and whether the complaining witnesses intended to part with the ownership at the time of delivery. By its verdict the jury has decided these matters adversely to appellant's contention; and, as there is ample evidence to sustain the jury's conclusion, we may not disturb it.

[7] It next is contended that, if appellant was guilty of larceny, there was but one larcenous taking, notwithstanding \$3,000 was received by defendant from one complaining witness and \$4,500 from the other. The rule generally adopted is that, where several articles are stolen at the same time and from one place, the offense may be charged as one crime and in a single count, even though the ownership is in different persons. Whether in such cases the person stealing the property of different owners at the same time and place may be prosecuted and punished as for separate and distinct offenses is a question upon which the authorities are in conflict. The author of the note to *Hughes v. Commonwealth*, 31 L. R. A. (N. S.) 723, says that the weight of authority holds that the person stealing from different owners at the same time may be punished for separate and distinct offenses. However, we do not find it necessary to pass upon this question. So far as our researches have gone, the cases wherein it has been held that there is but one larcenous taking and but one crime where several articles belonging to different owners are stolen at the same time and place are all cases where the thief took the articles without the owner's consent. The reason for the rule that there is but one crime where articles belonging to different owners are stolen at the same time and place is that in such cases there is but one act of taking; and, if the caption constitutes but a single act, there is but one offense. 17 R. C. L. p. 54. Where articles stolen from different owners are located at different places, as, for example, where they are located in different rooms of the same house, each asportation with intent to steal constitutes a different offense, although the thefts may all have been committed in rapid succession and in pursuance of a formed design to steal. *State v. Maggard*, 160 Mo. 469, 61 S. W. 184, 83 Am. St. Rep. 484; *State v. Emery*, 68 Vt. 109, 34 Atl. 432, 54 Am. St. Rep. 878. See, also, *Hudson v. State*, 9 Tex. App. 151, 35 Am. Rep. 732. On the same principle it is held that, where the thief takes articles from off the persons of different owners, the several captions do not constitute a single

act, even though they be committed at practically the same time, as, for example, where the thief holds up a stage coach and robs the several passengers. In re Allison, 13 Colo. 525, 22 Pac. 820, 10 L. R. A. 790, 16 Am. St. Rep. 224; State v. Bynum, 117 N. C. 752, 23 S. E. 219. In the Allison Case the Colorado court is careful to distinguish between the felonious taking of articles from the stage and the felonious taking from the person of each of the several passengers traveling on the stage. In that case the court employed this language:

"Relator was not tried for robbing the stage; each of the indictments charged him with robbing a different individual passenger upon the stage. And no doubt can be entertained but that these various robberies were distinct offenses, although committed at the same place and in rapid succession. They constituted separate acts."

[8] A fortiori, the takings from several owners do not constitute a single act where, as in the instant case, the larceny is perpetrated by means of fraud and deceit practiced upon each owner. In a case such as this, a case where each of the complaining witnesses voluntarily delivered his money to the defendant with the understanding that it should be used by the latter in accordance with the representations which he previously had made to each owner, it is necessary, in order to make the act of taking larcenous, that the defendant, by his previous fraudulent deceptions, should have caused each owner to intend to part with the possession of his property, and not with the title thereto. The previous fraudulent representations cannot be separated from the actual captions and asportations. The misrepresentations give color to the acts of taking, and determine their larcenous character. In this case the representations which were calculated to deceive and ensnare these two physicians extended over a period of several days. They were not always made in the presence of both prosecuting witnesses. Sometimes the fraudulent representations were made to Dr. Levin without the presence of Dr. Justice, and sometimes they were to Dr. Justice without the presence of Dr. Levin; so that, when each of these gentlemen handed his money to appellant, the latter's previous conduct, the conduct which gave color to his captions and asportations and to his subsequent felonious conversions, and determined their character to be larcenous, was made up of separate and distinct representations. We hold, therefore, that the taking and conversion of each sum of money was a separate and distinct transaction, and that there were two larcenies.

[9] There is no merit in appellant's claim that he was unduly restricted in his cross-examination of the people's witnesses. His

examination of these witnesses proceeded at great length. It covers a very great number of pages of the record on this appeal. Much of it is trivial and frivolous. In the exercise of that discretion with which it is vested, the trial court very properly sought to confine the examination to such questions as would tend, in at least some degree, to throw light upon the matters under investigation, and to see that the trial was not needlessly prolonged by useless cross-examination. Though not always successful in these efforts, its laudable endeavor to avoid a useless prolongation of the trial by sustaining objections to questions that could have aduced naught but frivolous trivialities was not an abuse of sound discretion. While the right of cross-examination, where it is being used in good faith for the purpose of eliciting the truth from a reluctant, evasive, or interested witness, should be allowed with great liberality, the court may always restrain the examination whenever it becomes apparent that time is being needlessly consumed by a tedious or frivolous questioning of the witnesses.

The appeal from the order denying the motion in arrest of judgment is dismissed. The judgments and the order denying a new trial are affirmed.

We concur: WORKS, J.; CRAIG, J.

(58 Cal. App. 308)

PEOPLE v. THOMAS. (Cr. 634.)

(District Court of Appeal, Third District, California. June 24, 1922.)

1. Indictment and Information $\S$ 91(3)—Information charging that manslaughter was committed "feloniously" held sufficient.

An information, charging that manslaughter was committed willfully, unlawfully, and "feloniously," was sufficient, since "feloniously" means of, or pertaining to or having, the quality of felony.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Felonious—Feloniously.]

2. Criminal law $\S$ 1186(4)—Charging that manslaughter was committed feloniously held harmless.

Though an information charging that manslaughter was committed feloniously might have been erroneous, it was not such error as to cause reversal, in view of Const. art. 6, $\S$ 4½.

3. Homicide $\S$ 234(1)—Evidence held sufficient to identify accused.

In a prosecution for involuntary manslaughter evidence held sufficient to identify accused as the one who committed the crime.

4. Homicide $\S$ 34—Involuntary manslaughter is of two kinds.

Involuntary manslaughter consists either of the commission of an unlawful act not

amounting to a felony, or the commission of a lawful act which might produce death in an unlawful manner, or without due caution and circumspection.

5. Homicide — 163(1)—Good reputation of accused for peace and quiet not involved, where act charged was involuntary.

Where accused was charged with involuntary manslaughter, his good reputation for peace and quiet was not involved, and evidence on that point was inadmissible.

Appeal from Superior Court, Sacramento County; C. P. Vicini, Judge.

H. E. Thomas was convicted of manslaughter, and he appeals. Affirmed.

Henry P. Andrews, of Sacramento, for appellant.

U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

PREWETT, Justice pro tem. The appellant was convicted of the crime of manslaughter committed in the city of Sacramento on the evening of December 21, 1921. It is charged in the information that he "willfully, unlawfully, and feloniously" committed the act.

[1] The appellant insists that, as the offense was feloniously committed, it must therefore have been malicious. Since manslaughter is an unlawful killing without malice, he argues that the information does not charge that offense. But manslaughter is clearly a felony, and to charge that the crime was "felonious" is no more than to charge that it constituted manslaughter. One of the approved definitions of the word "felonious" is given by Merriam's Webster as follows: "Felonious—Of, or pertaining to or having the quality of felony."

In the ordinary information for murder, the crime is charged as committed "feloniously, and with premeditation and malice aforethought." It is universally held that an information so charging will justify a conviction of the crime of manslaughter. This is based on the assumption that the lesser crime is included within the greater. In this case we have an information which clearly charges all the elements of manslaughter; and the appellant insists that it charges even more. So far as it exceeds the necessary requirements for manslaughter, it merely charges, to that extent, the acts necessary to constitute the crime of murder. If, therefore, an information that charges the offense as committed with malice aforethought will sustain a conviction of manslaughter, it follows that an information which charges all the elements of manslaughter and at least some of the elements of murder, will support a conviction of the

lesser crime. It is held in *People v. Pearne*, 118 Cal. 155, 50 Pac. 376, that the addition of more elements in charging the crime makes it none the less a crime.

[2] Moreover, if a more strict interpretation of the word "felonious" could be justified, it is sufficient to say that the appellant was not misled by the use of the word, and that section 4½ of article 6 of the Constitution should be invoked.

There is no pretense that the prosecution has omitted from the information any element necessary to charge the crime of manslaughter. The information is sufficient.

[3] The principal point urged in behalf of a reversal is the lack of sufficient evidence to identify the appellant as the person who committed the crime. He is charged with having run over and killed a human being while driving his auto along the streets of Sacramento on a dark and very stormy night. The evidence shows without conflict that the car which struck the deceased was driven north from L street along Sixth toward J, and that the accident happened while the car was moving at a speed of from 8 to 15 miles per hour at the north margin of Sixth and on the wrong side thereof. The lights of the car were very dim, and a very heavy rain so obscured the vision through the wind shield that the driver could only imperfectly see the roadway.

The driver did not stop to render any assistance, but kept on his way toward the north. Earl Duchow was the chief witness for the people. Without his prompt and efficient action it seems probable that the driver would have escaped. Mr. Duchow immediately impounded an auto standing at the curb and pursued the fleeing car. He states that at no time did it pass out of his sight, and that when about a block from the scene of the accident the driver turned off his lights, and thence drove in the dark. The witness followed the car in a devious course along Sixth to H, thence to Eighth or Ninth, thence north to about C, then east to Eleventh, thence south to about E, at which point the witness was enabled to recognize the number of the fleeing car. It was discovered later the same evening that this was the number of appellant's car, and guided by this, he was arrested and charged with the offense of which he was later convicted. There is no dispute that appellant's car is the one that struck the deceased. Appellant himself admits this, and in so doing he virtually admits the whole case. This admission was made in the course of the trial and in the following words:

"District Attorney: The defense will stipulate that the number of the car which struck the deceased was also the number of the car registered in the name of the defendant.

"Mr. Andrews. We admit that, your honor."

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VAN WAGENER v. MacFARLAND et al.
(Civ. 3954.)

(District Court of Appeal, Second District,
Division 1, California. June 16, 1922.)

[4] But even if this admission was inadvertent or the record erroneous and the error not heretofore discovered, still the evidence of the identity of the appellant is abundant. His car was a Ford delivery truck, and therefore much easier to follow and identify than a touring car. When arrested that evening he denied that he had been at any time that night in the vicinity of Sixth and K. On the trial he admitted that he drove up Sixth from L to I that evening. He admitted going northward and eastward for some blocks, and then, without stopping to execute any mission, he turned about and drove into the southern part of the city, where his garage is located. Apparently he did not know that he was pursued or his number ascertained until the moment of his arrest. He admits that the night was dark, that his lights were burning very low, owing to the slow motion of the car, and that the rain was so heavy that he "couldn't see anything." He asserts that he felt no impact with any object, that he does not know whether or not he was on the wrong side of the street, and that he did not turn off his lights. That the appellant committed the crime of involuntary manslaughter seems to admit of no question.

"Involuntary manslaughter is of two kinds:

"1. In the commission of an unlawful act not amounting to a felony; and

"2. In the commission of a lawful act which might produce death in an unlawful manner, or without due caution and circumspection."

Appellant was driving his car on the wrong side of a prominent street intersection in a large city at one of the busiest hours of the evening, and practically unable to see where he was going. The acts of the appellant resulting in the death of the deceased were committed without due caution and circumspection.

[5] The court refused to hear evidence of the good reputation of the appellant for peace and quiet. This was proper. *People v. Fair*, 43 Cal. 137; *People v. Roberts*, 6 Cal. 214; *People v. Cowgill*, 93 Cal. 596, 29 Pac. 228. The act charged was involuntary, and therefore involved no element of peace or quiet. The appellant was permitted to show that he was a careful driver.

The objection to the form of the judgment is untenable. The judgment conforms strictly to the requirements of the statute. Even if the form of the judgment were open to cavil, the only result would be that the case would be remanded for a further sentence.

The judgment and order denying appellant's motion for a new trial are affirmed.

We concur: FINCH, P. J.; BURNETT, J.

1. Schools and school districts $\Leftarrow$ 22—Act declaring school districts which have existed for five years to be duly incorporated held retrospective.

St. 1905, p. 243, providing that school districts acting as such for a period of five years under the laws of this state are declared to be duly incorporated, is retrospective in its effect, and affords no aid to school districts organized after its passage.

2. Schools and school districts $\Leftarrow$ 36—County board held to have authority to annex territory within city of sixth class to school district outside of city.

Under Pol. Code, § 1576, providing that every incorporated town, except towns of the sixth class, shall constitute a separate school district, the county board of supervisors has the power to annex the territory within a city of the sixth class to the territory outside of the city for school purposes only.

3. Schools and school districts $\Leftarrow$ 28—Irregularly organized district held to have a de facto existence.

Where a city of the sixth class was carved out of a school district, but no separate school district was maintained, trustees were elected jointly by the residents of the city and those of the remaining portion of the district, the schools were maintained as before the incorporation of the city, and all the residents of the district acquiesced, such district had a de facto existence.

4. Schools and school districts $\Leftarrow$ 24(2)—Regularity of proceedings creating school district cannot be attacked by individual.

The regularity of the proceedings by which a district was created can be questioned only by the state, and cannot be attacked by an individual, whether the attack is made in defense of a tax levied to pay existing bonded indebtedness, or whether it be by injunction to prevent the issuance of bonds after an election has been held within the territory affected.

5. Certiorari $\Leftarrow$ 28(3)—Lies to annul irregular proceedings creating school district.

Where a school district has been created by irregular proceedings before a de facto character has attached, certiorari will lie at the instance of a citizen to secure the annulment of the proceedings as being taken in excess of jurisdiction.

Appeal from Superior Court, Kern County;
H. A. Peairs, Judge.

Action by J. H. Van Wagener against J. B. MacFarland and others, as Supervisors of the County of Kern, and others. Judgment for defendants, and plaintiff appeals. Affirmed.

Sherwood Green, of Madera, for appellant. J. R. Dorsey and R. B. Lambert, both of Bakersfield, and M. G. Gallaher, of Fresno, for respondents.

JAMES, J. Plaintiff brought this action to secure an injunction restraining the defendants from issuing and causing to be sold bonds in the amount of \$360,000 of the Conley school district, county of Kern. The relief prayed for was denied. Plaintiff has appealed. The questions involved arise upon the judgment roll.

The regularity and manner in which the bond election was conducted are not claimed to have been invalid. The whole contention advanced by appellant concerns the matter of the organization of the Conley school district, particularly as to portions which it insisted were not regularly annexed thereto. Prior to November, 1910, Conley school district was composed in part of an unincorporated town called "Moron." The latter, in the month mentioned, after proceedings regularly had, was incorporated as a city of the sixth class under the name of "Taft." In February, 1920, the board of supervisors of Kern county passed a resolution purporting to annex to Conley school district the territory within a district called "Signa," which latter had been duly formed in November, 1919, but had conducted no schools up to the time of the annexation resolution. From the date of the incorporation of the city of Taft until the commencement of this action no separate school organization was caused to be made within the municipality, but the inhabitants of that territory continued to regard themselves as still being within Conley school district. Schools were conducted by that district, trustees were elected generally, some from within the city of Taft and some from the outlying territory. The school organization of the Conley district was not disturbed in any manner whatsoever by reason of the incorporation proceedings. (However, the board of supervisors in September, 1911, upon recommendation of the county school superintendent, made a resolution which in terms directed that the territory within the city of Taft be annexed to Conley school district.) In like manner, after the attempted annexation of the Signa school district, the inhabitants of that district acquiesced in the order of annexation, as did the remainder of Conley school district. Plaintiff expressly alleged in his petition:

"That since the respective orders of the board of supervisors of Kern county in respect to the annexation of the territory in the city of Taft and of the territory in Signa school district to Conley school district, the territory within said city of Taft and within Signa school district, as incorporated as aforesaid, has at all times been regarded and treated by the school board of said Conley

school district and by the taxing officers of said Kern county, and by the public generally, as constituting portions of said school district and the children therein have attended the school of said school district."

Appellant questions the validity of the order of annexation of the Signa district for lack of compliance with statutory formalities. He also claims that the board of supervisors in no event had authority to annex the territory of a municipality to a school district made up of unincorporated territory—this because of the provisions of section 1576, Political Code, as the same existed at the times material to the controversy, and which provided that—

"Every city or incorporated town, * * * unless subdivided by the legislative authority thereof, shall constitute a separate school district. * * *"

Respondents concede that there were irregularities in the attempted annexation of the Signa school district, and that the authority of the supervisors to annex territory within the municipality of Taft to the Conley school district may be subject to question. They look largely to certain curative acts of the Legislature as validating the attempted annexation proceedings. The case will be considered, therefore, with the question as to the irregularity of the two annexation proceedings as admitted.

[1] Attention is first called to an act of the Legislature passed in the year 1905 (Stats. 1905, p. 243), which provides that school districts, acting as such for a period of five years under the laws of the state, are "declared" to be duly incorporated. An examination of this act leads to the conclusion that it was retrospective only in its effect. It was adopted prior to any of the proceedings referred to in this case; hence affords no aid to respondents. The second act is one of 1915 (Stats. 1915, p. 106), which provides in part as follows:

"Where the board of supervisors of any county have purported to establish a school district of any kind or class situated within such county and such district has acted as a school district for a period of one year previous to the taking effect of this act, all acts and proceedings taken * * * are * * * legalized, validated and declared sufficient."

This act was passed before the annexation of the "Signa" territory, but after the incorporation of the city of Taft and the making of the alleged order annexing the municipality to Conley school district. Appellant argues that this act has no reference to annexation proceedings, but relates wholly to the establishment of new districts. It has been held that curative acts are remedial in their nature, and that they will not be construed within the narrow limits of the letter of the law, but rather be given liberal

effect to promote the general object sought to be accomplished. *Kramm v. Bogue et al.*, 127 Cal. 122, 59 Pac. 394. The argument to the last point is one which nevertheless suggests room for debate, but in view of what is hereinafter stated it will be unnecessary to announce a definite decision upon that point. There are two further remedial statutes, both passed by the Legislature in 1921, one of which expressly validates defective proceedings for the change of boundaries of a school district, the second of which validates proceedings for the establishment of such districts, each containing the proviso that the district affected shall have acted as such for a period of one year previous to the taking effect of the law. These acts became effective on July 29, 1921. They are both found on page 457 of the Statutes of 1921. Another curative act (Stats. 1921, p. 456) was intended to validate bonds of school districts where the proceedings resulting or to result in the issuance of such bonds are faulty in any particular. It is not denied by appellant in his reply that the curative act relating to cases where boundaries of a school district have been changed would have the effect of validating the annexation of the "Signa" territory; hence no further consideration need be given to that question.

[2] Appellant insists, however, that as to the alleged annexation of territory within the city of Taft to the Conley school district, the board of supervisors was without any jurisdiction whatsoever; hence that their action in that regard was not a matter attended by irregularity merely, which curative acts might make good, but that it was wholly void. Under provisions of section 1576, Political Code, the board of supervisors of Kern county possessed the power to annex the remainder of the school district outside of the corporate limits of Taft to the city district for school purposes; in other words, we have a situation where precisely the same territory might have been properly included within the same school district and governed in precisely the same way by a board of school trustees, with the exception only that the district would bear the name of "Taft" instead of "Conley." The law, as it related to the government of schools embracing territory comprised within municipal limits of cities of the sixth class, at the times here concerned was different than that where the city was of higher grade in point of classification.

"Under the code system the city territory, with its inhabitants, constitutes a mere 'school district' * * * and hence is a corporate body or quasi municipality, distinct from the municipal corporation or city, and in no way different from the country district in nature or function." *Board of Education v. Board of Trustees*, 129 Cal. 599, 62 Pac. 173.

The court there was referring to cities of the sixth class, and called attention to the

fact that as to other classes of cities the law was different, and that as to the latter there were city boards of education, which constituted a department of the general city government.

[3] It will be remembered that from and after the incorporation of the city of Taft as a city of the sixth class no separate school district organization was attempted to be maintained. The school trustees for the Conley district were elected jointly by the inhabitants of the city of Taft and those resident in the remaining portion of the district named. The schools continued to be maintained as before the incorporation proceedings were had, and full acquiescence was made, so far as appeared, by all of the inhabitants until this action was brought on December 21, 1921. Hence, if in no better right, the district has at all these times had a de facto existence.

[4] The proposition that the regularity of the proceedings by which a public corporation of a municipal character has been called into existence cannot be questioned at the suit of an individual citizen or taxpayer is too well settled to admit now of any debate. The reason upon which this holding is founded is far-reaching and admits of no exception. In theory, public corporations of any character whatsoever, exercising governmental functions, do so by reason of a delegation to them of a part of the sovereign power of the state. Where they are claiming to act and are actually functioning without having complied with the necessary prerequisites, they are usurping franchise rights as against paramount authority, to complain of which it lies only within the right of the state itself. The attack by the individual is unauthorized, whether it is made in defense of a tax levied to pay existing bonded indebtedness, or whether it be by injunction to prevent the issuance of bonds after an election has been held within the territory affected, authorizing such securities to be issued.

[5] It may be conceded that, upon the attempted establishment by irregular proceedings of such a corporation and before a de facto character has attached, certiorari will lie at the instance of a citizen or taxpayer to secure the annulment of such proceedings, as being taken in excess of jurisdiction, but we have here no such case. On the general subject that the organization of municipal corporations is immune from attack by an individual or in a collateral way, reference may be made to *Coe v. City of Los Angeles*, 42 Cal. App. Rep. 479, 183 Pac. 822, where a number of California decisions are cited, and to that list can be added *Coler et al. v. Dwight School Township*, 3 N. D. 249, 55 N. W. 587, 28 L. R. A. 649; *People ex rel. Scraf-ford v. Board of Supervisors*, 41 Mich. 647, 2 N. W. 904; *People ex rel. Quisenberry v. Ellis*, 253 Ill. 369, 97 N. E. 697, Ann. Cas. 1913A,

589; *Blackwell v. Newkirk*, 31 Okl. 304, 121 Pac. 260, Ann. Cas. 1913E, 441; *Kuhn v. City of Port Townsend*, 12 Wash. 605, 41 Pac. 923, 29 L. R. A. 445, 50 Am. St. Rep. 911; *Arapahoe Village v. Albee*, 24 Neb. 242, 38 N. W. 737, 8 Am. St. Rep. 202; *State v. Bailey*, 106 Minn. 138, 118 N. W. 676, 19 L. R. A. (N. S.) 775, 130 Am. St. Rep. 592, 16 Ann. Cas. 338; *Topeka v. Dwyer*, 70 Kan. 244, 78 Pac. 417, 3 Ann. Cas. 239; *People v. Ellis*, 253 Ill. 369, 97 N. E. 697, Ann. Cas. 1913A, 589.

In some cases it has even been held that the state itself, by long recognition of a de facto municipal organization, may be estopped from attacking the regularity of the proceedings by which it was formed. *People ex rel. Attorney General v. Alturas County*, 6 Idaho, 418, 55 Pac. 1067; *State ex rel. Young v. Harris*, 102 Minn. 340, 113 N. W. 887, 13 L. R. A. (N. S.) 533, 12 Ann. Cas. 260. In the case of *Hamilton v. County of San Diego*, 108 Cal. 273, 41 Pac. 305, the court sustained the acts of a school district having a de facto existence only, and in the course of the discussion laid emphasis upon the fact that the de jure district, to wit, municipality, within the limits of which the de facto district was situated, had "abdicated its functions, at least not attempting to discharge them within those limits." And the court went on to say:

"There was acquiescence not merely by the San Diego school district but by the county and state in the assumption of such corporate prerogatives by the new district; the county officers levied and collected taxes in its behalf, and there was apportioned to it, and it expended school moneys of both the county and state in like manner as other school districts in the county."

The plaintiff there was denied the right to maintain an action to recover back taxes paid to the de facto district. There is a close analogy between plaintiff's position and that of a litigant before a de facto judge. It is clearly established that the parties affected by the acts of such an officer cannot question their validity or object to the proceedings. As was said in *Mayor and City Council of Nashville v. Thompson*, 80 Tenn. (12 Lea) 344:

"He [the de facto judge] may be removed from office and his powers terminated by proper proceedings but until that is done his acts are binding. * * * The jurisdiction and authority of an officer de facto, although he may be ineligible to the office, cannot be questioned or inquired into in this manner, and * * * his authority is complete, and his official acts valid and binding until he is removed in the manner prescribed by law."

And also in the *Matter of Danford*, 157 Cal. 425, 108 Pac. 322, where the court said:

"The fact, if it had been a fact, that the judge presiding at the trial was an alien and therefore ineligible, made him none the less a de facto officer. His right to hold the office could be questioned only in proceedings regularly instituted for that purpose. It could not be attacked collaterally by motion to set aside his official acts. *People v. Sassovich*, 29 Cal. 480; *People v. Hecht*, 105 Cal. 621."

The reason is found in the rule of public policy which is as fully applicable where a public agency of governmental nature like a school district is concerned as where the proceedings of a judicial tribunal are in question. It follows as a necessary conclusion that the bonds referred to may be legally issued, and that when sold they will represent binding obligations against all of the property of the de facto district. Other questions presented in the briefs of counsel all turn upon the decision of the propositions already discussed, and require no separate consideration.

The judgment is affirmed.

We concur: CONREY, P. J.; SHAW, J.

58 Cal. App. 174

GALUSHA v. MESERVE et al. (Civ. 3899.)

(District Court of Appeal, Second District, Division 1, California. June 19, 1922. Rehearing Denied July 14, 1922. Hearing Denied by Supreme Court Aug. 17, 1922.)

1. Time $\S$ 9(4)—Publication of first notice on October 6th for sale on December 1st held sufficient under deed requiring publication once a week for eight weeks.

Where the trustee, under a trust deed requiring notice of sale to be published once a week for eight weeks, published the first notice on October 6th for a sale on December 1st, such publication was sufficient, in view of Code Civ. Proc. $\S$ 12, and Civ. Code, $\S$ 10, declaring that, in computing time by days, the first day is to be excluded and the last day included.

2. Corporations $\S$ 383—Recitals in first published notice of sale with corporate seal affixed held to imply authority of board of directors.

If corporate action by the board of directors of a corporation trustee was necessary to authorize a sale under a deed of trust, such action may be implied by recitals in the first published notice of sale with the corporate seal attached.

3. Corporations $\S$ 384—Postponement of sale under deed of trust by a corporation trustee held a routine matter, not required to be attested by corporate seal.

Where a sale by a corporation trustee under a deed of trust was authorized by the board of directors, the postponement of the sale was a routine matter, and did not have to be attested in writing with the corporate seal attached.

4. Mortgages ⚡369(2)—Validity of trustee's sale cannot be attacked on ground that the debtor was not allowed further time to pay debt.

That the debtor, under a deed of trust authorizing a sale of the property upon default in the payment of the debt, informed the trustee at the time of the sale that he was making arrangements to obtain money with which to pay the debt did not obligate the trustee to grant a postponement of the sale, nor could the debtor attack the validity of the sale because he was not allowed further time in which to pay the debt.

5. Mortgages ⚡335—Trust deed held admissible in action to set aside sale.

In an action by a debtor to set aside a trustee's sale under a trust deed authorizing a sale upon default in payment of the debt, the trust deed was admissible though the creditor did not file in the recorder's office a notice of election to sell the property in satisfaction of the debt, since the instrument was made before the amendment of 1917 to Civ. Code, § 2924, became effective.

6. Mortgages ⚡335—Notice to debtor under trust deed that interest would be due at a certain time did not waive right to declare principal and interest due upon default in payment of interest.

Where a trust deed provided that the creditor might declare both principal and interest due and payable upon default in payment of the interest, the giving of notice to the debtor by the trustee that interest would be due and payable at a certain time did not waive such right.

7. Appeal and error ⚡673(2)—Objection that debtor under trust deed was under protection of moratorium act at time of sale is without merit where no reference was made to any act.

An objection by a debtor under a trust deed given to secure a debt that the sale thereunder was invalid because he was within the protection of a moratorium act is without merit where no reference was given to any act in force at the time, and the court's attention was not directed to anything in the record showing the contents of the moratorium affidavit referred to in the brief.

8. Mortgages ⚡8—Trust deed given to secure a debt held not a mortgage.

A deed of trust, running to a trustee and not to the creditor, given to secure a debt, and authorizing the sale of the property upon default in payment of the debt, is not a mortgage, and a foreclosure suit and sale will not lie, since St. 1897, p. 138, providing that a trust deed in the nature of a mortgage shall be deemed to be a mortgage, and subject to the same rules as a mortgage, has been superseded by St. 1915, p. 1932, which has no such provision.

Appeal from Superior Court, Los Angeles County; John M. York, Judge.

Action by Elon G. Galusha against Cora D. Meserve and another. Judgment for defendants, and plaintiff appeals. Affirmed.

Alpheus G. Relley, of Los Angeles, for appellant.

E. W. Sargent and Edward J. Vaughn, both of Los Angeles, and G. B. Colby, for respondents.

CONREY, P. J. Action to obtain a decree declaring void a purported sale of real property by a trustee under a trust deed, to set aside the sale, and permit the plaintiff to redeem. Judgment in favor of the defendants. The plaintiff appeals.

The deed of trust was made by the plaintiff to Title Guarantee & Trust Company, a corporation, to secure the payment of a stated indebtedness to the defendant Cora D. Meserve. It was provided therein that on default in payment, the trustee was empowered to sell the property—

"in order to accomplish the objects of these trusts, in the manner following, namely: The party of the second part, or its successors or assigns, shall first publish notice of the time and place of such sale, with a description of the property to be sold, at least once a week for eight successive weeks in some newspaper published in the city of and county of Los Angeles, Cal., and may from time to time, for one day or several days, postpone such sale by publication, by republishing the notice of sale in the same newspaper, with date of the postponement attached thereto, in one issue only, prior to the day of the postponed sale."

Default having been made by the plaintiff on a payment due from him, the trustee published notice of sale to be made on December 1, 1917. This publication was made at regular weekly intervals beginning with the 6th day of October. On the 1st day of December, at the time and place stated in the notice of sale, the sale was, upon request of the plaintiff, postponed to the 8th day of the same month, and notice thereof was published in the manner provided for in the trust deed. On December 8th, in accordance with said postponement and notice thereof, the trustee made sale of the property to the defendant Cora D. Meserve, which sale was followed by a deed of conveyance in due form.

[1] The first point relied upon by appellant is based upon his claim that the publication of notice was not made for fully eight weeks before the advertised date of sale. Therefore he contends that no right of sale existed on the 1st day of December, that the continuance to December 8th was void, and that the sale was void as in excess of the powers conferred by the deed of trust. It is provided by section 12 of the Code of Civil Procedure and by section 10 of the Civil Code:

"The time in which any act provided by law is to be done is computed by excluding the first day and including the last, unless the last day is a holiday, and then it is also excluded."

Appellant contends that, under this rule for the computation of time, there was no jurisdiction to sell until 56 days (8 weeks) had elapsed between the first day of publication and the day of sale, excluding both of those days. There is no merit in this contention. It is not supported by the decision in *Secombe v. Roe*, 22 Cal. App. 139, 133 Pac. 507, to which he refers. The trustee's sale in that case took place on the twenty-second day after the day of first publication of the notice of sale, whereas the trust deed required publication at least once a week for four consecutive weeks. This court held that—

"When the stipulation in the deed of trust was that the publication was to be once a week for four weeks, it meant four weeks of seven days each, or that twenty-eight days shall elapse from the date of the first publication to the date when authority was given to make the sale, and that a sale made within less than twenty-eight days from the first publication was without authority upon the part of the trustee."

But in the present case the sale was not made within less than 56 days from the first publication. This is made very clear by the Supreme Court in *Cosgriff v. Election Commissioners*, 151 Cal. 407, 91 Pac. 98, where the rule of computation of a given period of time which must elapse before the date of a stated event to occur is plainly set forth. Having first observed that, under the statute there in question, fractions of days were not to be considered, and that by consequence "every day, and every part of that day is, by this rule, one day before every part of the succeeding day," the court said:

"Manifestly, on that theory, the 5th day of November would be one day before the 6th day of that month, and not less than one day before, since the number 5 is one less than 6. So, by counting the consecutive days backward from November 6th, it will be found that October 17th was twenty days, and if twenty days, then not less than twenty days, before November 6th. This is what is contemplated by section 12 of the Political Code, declaring that in computing time by days, the first day is to be excluded and the last day included. Excluding November 6th, the first day, we find October 17th to be the twentieth day, or the last day of the period, and as it is to be included in the count, it must be counted as part of the period. Thus, it makes the full number of twenty days before the day of the election, and it cannot be 'less than twenty days before' that day."

So in the case at bar the trust deed requires that before making the sale the trustee shall first publish notice "at least once a week for eight consecutive weeks." Since the sale was noticed for December 1st, that day must be excluded from the computation. November 30th was the first day before December 1st, and October 6th was the fifty-sixth day, which last-mentioned day must be

included. There was a publication for 8 complete weeks before the day of sale.

[2, 3] We find no merit in the objections to the validity of the deed of conveyance by the trustee, wherein appellant suggests that the published notice of postponement of the sale does not show the corporate seal of the trustee or any resolution of the board of directors of the trustee authorizing such postponement. Assuming, without deciding, that corporate action through the board of directors was necessary to authorize the sale, such action is implied by the recitals contained in the original notice and the corporate seal affixed thereto. The postponement of the sale was a routine matter appropriately conducted by the officer of the corporation through whom the sale was made.

"It is no longer held to be necessary that the ordinary everyday transactions of a corporation be evidenced by a writing attested with the corporate seal." *Smith v. Jaccard*, 20 Cal. App. 280, 286, 128 Pac. 1023, 1025.

[4] The fact that at the time of the sale appellant informed the trustee that he was making arrangements to obtain money with which to pay the debt did not obligate the trustee to grant a further postponement of the sale. The creditor having become entitled to enforce payment of the note, the debtor has no valid ground on which to attack the validity of the sale merely because he was not allowed further time in which to pay his debt.

[5] The court did not err in receiving in evidence the trust deed, thereby overruling the plaintiff's objection that the beneficiary of the trust had not recorded in the office of the county recorder a notice of her election to cause the property to be sold to satisfy the obligation. The amended section 2924, Civil Code (St. 1917, p. 300), by its terms applies only to instruments made after the amendment became effective; that is to say, after July 27, 1917. The trust deed in this case was made by the plaintiff on March 15, 1917.

[6] Prior to the commencement of the trustee's publication of notice of sale, the creditor had elected to declare the whole sum of principal and interest due and payable by reason of nonpayment of interest due on September 15, 1917. At least, it is so recited in the trustee's notice of sale, and in the trustee's deed to the purchaser; and the deed of trust made by the plaintiff provided for such election to be declared "without notice." The fact that on September 5, 1917, the bank in which the note was placed for collection notified the plaintiff that the stated amount of interest would be due and payable at the bank on September 15th was not a waiver of the right to elect to declare the whole sum of principal and interest due and payable on default in the payment of that interest. Appellant makes this claim upon

the ground that the interest demanded "overlapped the time of the date first stated for the attempted sale of the property by about 15 days." Nevertheless, since the payment was not made, the right of election followed as a consequence of the default.

[7] Appellant claims that the deed should have been rejected because at the time of the sale he was within the protection of a moratorium act. As he has not given us a reference to any moratorium act in force at that time, and does not direct our attention to anything in the record showing the contents of the "moratorium affidavit" referred to in his brief, we assume that the point is without merit.

[8] We are unable to agree with the contention of appellant that the trust deed was a mortgage, under which there could be no sale without foreclosure. The instrument is a typical trust deed, running not to the creditor, but to a third party as trustee. "It has no feature in common with a mortgage except that it was executed to secure an indebtedness." On such an instrument a suit for foreclosure and sale will not lie, for the contract of the parties is that upon default the trustees shall sell, and there is no equity of redemption to foreclose. *Koch v. Briggs*, 14 Cal. 256, 73 Am. Dec. 651; *Herbert Kraft Co. v. Bryan*, 140 Cal. 73, 80, 73 Pac. 745. Appellant argues that his contention is sustained by section 60 of the act for the certification of land titles, enacted in 1897. Stats. 1897, p. 138. That section reads as follows:

"A trust deed in the nature of a mortgage shall be deemed to be a mortgage, and be subject to the same rules as a mortgage."

But, under the decision just cited, the trust deed in question was not an instrument in the nature of a mortgage. Moreover, that act appears to have been superseded by the initiative act covering the same subject, adopted November 3, 1914. Stats. 1915, p. 1932; *Deering's Gen. Laws* (1915 Ed.) Act 1049; *Sackett v. Morse* (Cal. App.) 200 Pac. 742, 744; *Cooper v. Buxton* (Cal. Sup.) 199 Pac. 6. The section above quoted was omitted from the present law. Sections 67 to 69 of the two acts, which are identical in their terms in these sections, apply only to instruments filed in the registrar's office concerning registered lands.

Numerous other points presented by appellant are omitted from discussion because they depend upon appellant's theory that the notice of sale was insufficient, and that the trust deed was a mortgage. The record does not sustain the claim of appellant that the amount due from him was less than the amount stated in the notice of sale, or his further claim that the judgment in this action was entered in a name other than the

name of the plaintiff. It is true that the clerk's certificate to the judgment roll is entitled "*Meserve v. Meserve*." But it identifies the judgment by the judgment book number and page. This judgment as contained in the judgment roll bears the correct title.

The judgment is affirmed.

We concur: SHAW, J.; JAMES, J.

(58 Cal. App. 295)

SAN JOAQUIN BRICK CO. v. MULCAHY.
(Civ. 2355.)

(District Court of Appeal, Third District, California. June 23, 1922. Hearing Denied by Supreme Court Aug. 21, 1922.)

1. Pleading $\S$ 148—Cross-complaint held insufficient as not based on transaction involved in plaintiff's pleading.

In an action for merchandise sold and delivered and for services performed, a cross-complaint, merely alleging that plaintiff was indebted to defendant in a specified sum "on an open and current account for moneys advanced to cross-defendant at its special instance and request," was insufficient under Code Civ. Proc. $\S$ 442, in that it did not show on its face that the items involved related to the transaction upon which the action was brought.

2. Pleading $\S$ 411—Pleading by defendant held to be treated as a cross-complaint in view of evidence not objected to.

Though a pleading filed by defendant and designated as a cross-complaint was insufficient, under Code Civ. Proc. $\S$ 442, for the reason that it did not show on its face that it was based on the transaction involved in plaintiff's complaint, it would be treated as a cross-complaint or counterclaim where plaintiff interposed no objection to it at the trial, and defendant's evidence, received without objection, showed that most of the items set forth in the alleged cross-complaint referred to the transactions on which the suit was brought.

3. Pleading $\S$ 412—Failure to deny cross-complaint waived, where judgment not demanded until after trial.

Though plaintiff did not file a denial to defendant's cross-complaint or counterclaim, and the parties went to trial without objection as to the state of the pleadings, defendant was not entitled, after the completion of the trial, to a judgment on the cross-complaint on the ground that allegations of the cross-complaint were not denied, since defendant's pleading must be treated as setting up a counterclaim, which would be deemed to be denied under Code Civ. Proc. $\S$ 462.

4. Judgment $\S$ 256(1)—Findings which fail to dispose of defendant's cross-complaint or counterclaim will not support a judgment for plaintiff.

Where in an action for goods sold and delivered and for services plaintiff filed a bill of

particulars and defendant filed a cross-complaint or counterclaim, findings of the court which clearly disposed of the items in the bill of particulars, but which make no specific reference to the matter set up in defendant's pleading, will not support a judgment for plaintiff.

5. Trial — 404(2)—Finding of court held not a finding of fact, but a conclusion of law.

In an action for goods sold and services in which plaintiff filed a bill of particulars and defendant filed a cross-complaint or counterclaim for an amount greater than the plaintiff's claim, a finding by the court that, "Upon the aforesaid amount said defendant is entitled to a credit, by way of cash paid, and goods returned, as shown by the said bill of particulars," in a specified amount, was not a finding of fact, but a conclusion of law.

6. Trial — 395(2)—Finding by court held not sufficient as allowance of credits to defendant.

In an action for goods sold and for services in which plaintiff filed a bill of particulars and defendant filed a cross-complaint or counterclaim, a finding by the court that, "Upon the aforesaid amount said defendant is entitled to a credit, by way of cash paid and goods returned, as shown by the said bill of particulars," in a specified sum, was insufficient to dispose of defendant's claim, as it fails to actually allow defendant any credits.

Appeal from Superior Court, San Joaquin County; George F. Buck, Judge.

Action by the San Joaquin Brick Company, against James Mulcahy. From a judgment for plaintiff, defendant appeals. Reversed, and remanded with directions.

A. H. Carpenter, of Stockton, for appellant.

Lafayette J. Smallpage and Smallpage & Rex, all of Stockton, for respondent.

HART, J. The plaintiff brought this action to recover from the defendant the total sum of \$1,078, alleged to be the balance due to the plaintiff from defendant for merchandise sold and delivered to and services performed for the latter by the former.

The complaint is in four counts, in the first of which it is alleged that the plaintiff sold and delivered to and performed certain services for the defendant, and in each of the remaining counts it is alleged that, on the day named therein, the plaintiff sold and delivered to the defendant certain merchandise.

The defendant filed an answer, in which he specifically denied each of the material allegations of the complaint, and also at the opening of the trial, and by leave of the court, filed what is termed by the document itself a cross-complaint, in which, after the formal averments, it is alleged:

"That, within four years last past, said cross-defendant became, and still is, indebted to cross-plaintiff in the sum of \$2,053 on an open and current account for moneys advanced to cross-defendant at its special instance and request."

That cross-defendant has not paid to cross-plaintiff said sum of \$2,053, or any part thereof, and that "the whole thereof is now unpaid and due and owing to cross-plaintiff from said cross-defendant." The prayer is that plaintiff take nothing by reason of this action, and that cross-plaintiff have judgment against cross-defendant for the sum sued for in his cross-complaint.

The plaintiff made no objection to the filing of the cross-complaint, but reserved the right, with the consent of counsel for the defendant, to ask the court for and to be granted a reasonable time within which to answer said pleading and "a reasonable continuance," if necessary for that purpose. But the plaintiff did not ask for time to file an answer to the cross-complaint, and neither answered the same nor demurred thereto, nor was there any suggestion by the court or counsel that the averments of the cross-complaint should be deemed denied.

Ordinarily, failure to answer a cross-complaint which states a cause of action for affirmative relief entitles the cross-complainant, upon demand therefor, to a judgment by default for the relief so prayed for. In this case the trial was had in the month of February, 1921, and judgment entered for the plaintiff on the issues made by its complaint and the answer of defendant thereto on the 4th day of April, 1921. Written demand by defendant to the clerk of the court for the entry of default on his cross-complaint was filed and so made on the 9th day of May, 1921, and the clerk refused to enter the default.

Upon demand of the defendant, made prior to the trial, the plaintiff delivered to the former a bill of particulars, showing the several items of which the account upon which the action is based was made up. The bill contained, in addition to the debits, certain items of credit on account of payments made by the defendant.

At the trial the defendant was the first witness called by the plaintiff, and his examination was founded entirely on the bill of particulars; counsel for the plaintiff taking up each item in said bill, calling the attention of defendant thereto, and asking him, in effect, whether it was or was not correct. The correctness of some of the items was verified by the defendant, while there were others which he disputed. The assistant manager of plaintiff was also put on the stand, and gave testimony in support of the correctness of the account. Then defendant, in his own behalf, and in support of the al-

leged cross-complaint, testified that he had returned or sold to the plaintiff the following articles: 45,000 bricks at \$10 per thousand; 200 sacks of cement at 60 cents per sack; 100 yards of sand at \$1 per yard; 3,000 sacks at 5 cents each; 4,000 pressed brick at \$40 per thousand. The defendant further testified that he performed two days' work with truck at \$15 per day, and that he made a cash payment of \$753 on July 3, 1918, and a cash payment of \$1,000, the same having been made by check, dated September 7, 1918. These items totaled, approximately, the sum claimed by defendant in his purported cross-complaint. The 4,000 pressed bricks referred to by defendant were purchased by him from a person other than plaintiff, and never sold to the latter by defendant. None of these items was, so defendant testified, included in the bill of particulars, nor, so he further stated, was he allowed any credit by plaintiff therefor in its account with him, as indicated by the bill of particulars.

The court, in its findings, took up each item set out in the bill of particulars, and found in accordance therewith, referring in each instance to the part of the bill where the particular item was noted, for illustration, as follows:

"That on the 20th day of September, 1918, plaintiff, at the request of defendant, sold and delivered to him 7,000 common brick (set forth on page 3, line 8, of said bill of particulars)"

—and, as stated, so proceed the findings to the end. The court then made this finding (No. 5):

"That within four years last past plaintiff, at the request of said defendant, sold and delivered merchandise unto said defendant and performed services therefor, to the reasonable value of \$7,716.20; that the items of merchandise so sold and delivered are correctly set forth in the bill of particulars filed herein by plaintiff, and the reasonable value of said articles so delivered is as set forth in said bill of particulars. *That upon the aforesaid amount said defendant is entitled to a credit*, by way of cash paid, or goods returned, as shown by said bill of particulars, in the sum of \$7,509.25, leaving a net amount due and unpaid of \$206.95. That in addition, there should be allowed a credit of \$30 for the services of defendant rendered plaintiff, at the latter's request, in the hauling of certain brick."

No specific finding was made as to any of the items of credit embraced (in general language) within the averments of the purported cross-complaint, and which defendant testified that he was entitled to be allowed, and which he further stated were not included or noted in the bill of particulars.

Judgment for the sum of \$1,070 was awarded plaintiff, and from this judgment the defendant appeals under the alternative method.

[1] Upon its face the so-called cross-com-

plaint filed by the defendant does not appear to be a cross-complaint, since it is not thereby shown that the relief therein asked relates to or depends upon "the contract or transaction upon which the action is brought." Code Civ. Proc. § 442. It will be noted, however, that the defendant's testimony disclosed that the larger portion of the claim declared upon in said pleading involved items relating to the transaction upon which the action was brought. The only item in his claim which might be said not to relate to the said transaction was that involving the sale of the 4,000 bricks to the plaintiff by the defendant at \$10 per thousand.

While it has often and very properly been held that a cross-complaint is wholly unnecessary, and that it is not error to strike it from the files on motion, where the relief demanded can be had upon the denials and averments of the answer, it has never been held, so far as we are advised, that in such case it is improper for the defendant to file such a pleading where he seeks affirmative relief. *Martin v. Molera*, 4 Cal. App. 298, 301, 87 Pac. 1104; *Nelson v. O'Brien*, 139 Cal. 629, 73 Pac. 469; *Miller v. Luco*, 80 Cal. 261, 22 Pac. 195; *Wilson v. Madison*, 55 Cal. 8.

[2, 3] In this case we think that, in view of the evidence, the so-called cross-complaint, in so far as its averments refer to the transaction upon which the action is brought, may properly be treated as a cross-complaint, or, in view of all of its averments or the several claims referred to by said pleading, may be treated as a counterclaim. Viewed as a cross-complaint, it was, of course, the duty of the defendant to answer it or suffer the consequences of a default for failure to do so. But, the default having been demanded after the case had been tried, the claim of the defendant that he was entitled to a default is wholly untenable, inasmuch as counsel for the defendant evidently tried the issue made by said pleading upon the theory that such an issue had regularly been tendered by the pleadings in the case. In other words, counsel offered and the court received evidence in support of the claims to which said pleading referred, and counsel for the plaintiff cross-examined the witness (the defendant), giving such testimony without objection from counsel for the latter. We may therefore assume that the court and the attorneys treated the pleading in question as one involving nothing more than the setting up of a counterclaim, and in this view the new matter so stated was, of course, deemed to be denied. Code Civ. Proc. § 462; *Melander v. Western Nat. Bank*, 21 Cal. App. 462, 467, 132 Pac. 265, and cases cited therein.

[4] But, whether the pleading referred to is a cross-complaint or amounted only to the setting up of a counterclaim, the defendant was entitled to have the claim thus set forth disposed of by the court. It will be observed

that, if the court had accepted the testimony of the defendant given in support of the allegations of the so-called cross-complaint, he would be entitled to a judgment in the sum, approximately, of \$1,000, or a trifle more than the amount of the judgment awarded to plaintiff.

As above explained, the court specifically made its findings with reference to the items contained in the bill of particulars furnished by the plaintiff to the defendant. While this was wholly unnecessary, and, ordinarily, the reference thus made to the items contained in said bill would carry with it no legal significance, and, indeed, could be treated as surplusage and properly as entitled to no notice, yet it becomes significant here because it is thus clearly disclosed that the court made no allowance of credits to the defendant and considered none except such as were included or noted in the bill of particulars. The defendant testified, as seen, that the several items of credit to which he claimed to be entitled were not noted in or embraced within the bill of particulars. But, even if it be admitted that the findings should not be considered by the light of the court's reference therein to the bill of particulars, it still remains true that the court should have specially found on the several items constituting the claim set up by the defendant, whether they were set up by way of a cross-complaint or as a counterclaim. In other words, the decision as evidenced by the findings should be so clear as to leave no ground for doubt that it embraced a consideration and disposition of said claim.

As stated, the findings are not only not clear upon that proposition, but it is quite manifest, from the findings, that the court did not find on the items of credit or claims referred to. These, of course, constituted material issues in the case.

"It is, of course, well settled that if any material issue is left unfound, it is a ground for a reversal of the judgment." Hayne on New Trial and Appeal (Rev. Ed.) p. 1317; *Math v. Crescent Hill Gold Mines Co.*, 31 Cal. App. 636, 641, 161 Pac. 140.

[5, 6] Furthermore, an examination of the findings will readily show that the purported finding made by the court as to credits to which the defendant was entitled is not a finding of fact, but a conclusion of law. The only instance in which the court in its findings refers to credits which should be allowed the defendant is to be found in finding V, above quoted herein. Thus it will be noted that the court merely stated, after finding that the plaintiff furnished certain materials and performed certain services, totaling a certain specified amount:

"* * * That, upon the aforesaid amount said defendant is entitled to a credit, by way of cash paid, or goods returned, as shown by

the said bill of particulars, in the sum of \$7,509.25."

It will thus be perceived that, while the court states that the defendant is entitled to certain credits upon the account, it does not actually allow the defendant any credits.

But the important objection to the decision is, as first above shown, that the court failed to find on a material issue.

The judgment is reversed and the cause remanded, with direction to the court below to allow the plaintiff, if it be so advised, to answer the so-called cross-complaint, and the defendant, if he be so advised, so to amend his answer as to include therein any counterclaim he may be able to set up, including those as to which he filed the so-called cross-complaint.

We concur: FINCH, P. J.; BURNETT, J.

(58 Cal. App. 312)

MANASSE et al. v. FORD et al. (Civ. 2477.)

(District Court of Appeal, Third District, California. June 26, 1922.)

Landlord and tenant §92(1)—Purchaser from lessor not required to sell premises to lessee, under provision of lease giving lessee option to purchase.

Where a three-year lease dated May 6, 1919, contained a provision giving lessee the option to purchase during the term, but provided that, unless this option was exercised by November 6, 1919, after giving lessee 30 days within which to purchase at the offered price, lessor could sell the premises subject to the lease and all its covenants, and where subsequent to November 6th, but prior to the end of the term, lessor gave the required notice, and, lessee having failed to purchase, sold the premises, purchaser was under no obligation to convey to lessee on payment of the stated price in view of the general rules for the construction of contracts in Civ. Code, §§ 1641, 1643, 1648, 1650, 1652.

Appeal from Superior Court, Madera County; Stanley Murray, Judge.

Action by A. J. Manasse and another against F. F. Ford and another. Judgment for defendants, and plaintiffs appeal. Reversed, with directions to render judgment for plaintiffs.

Fee & Ring, of Madera, for appellants.

John W. Maloy, of Madera, for respondents.

PREWETT, Justice pro tem. The facts of this controversy may be very briefly stated. The predecessor in interest of the plaintiffs, on May 6, 1919, leased to respondent Ford for a term ending May 5, 1922, certain real property situated in the city of Madera. The terms of the lease itself are not in con-

trovery, but, in addition to the proper provisions for demising the premises, there is contained in the lease an option in favor of said Ford to purchase the property at any time during the term at a price of \$9,500. The trouble arises over the following proviso modifying said option:

"Provided, however, that if, at any time after November 6, 1919, the lessee not having theretofore elected to purchase the same, the lessor shall receive a bona fide offer from any other person and shall be minded to accept the same, the lessor shall then serve personally on the lessee a notice in writing of the price and terms of such offer from such other person and of the intention of the lessor to accept the same; and the lessee shall have the right for thirty days thereafter to purchase the said real property at and for the price and on the terms specified in said notice and at a price not exceeding said above mentioned \$9,500; and provided further that if the lessee shall not within said period of thirty days elect to purchase the said property, the lessor may then sell the same to such other purchaser subject to this lease and this lease, the conditions, restrictions and covenants thereof shall then be in full force and effect and binding upon the lessee and the purchaser of the said property."

The lessor found a bona fide purchaser for the sum of \$9,500 and he thereupon gave to respondents the written notice required by the terms of said proviso. They failed for more than thirty days to purchase the property, and thereupon and on April 9, 1921, the lessor sold the entire property to appellants for said sum of \$9,500 and they now hold the title thereto. Notwithstanding the plain provisions contained in said proviso, the respondents claim the right to purchase the property from the appellants. They base this contention upon that clause of the proviso which reads as follows:

"The lessor may sell the same subject to this lease and this lease, the conditions, restrictions and covenants thereof shall then be in full force and effect and binding upon the lessee and the purchaser of the said property."

The trial court rendered judgment in favor of the respondents and found, in effect, that they continued after the sale to have the same rights of purchase of the property as though the proviso had never been incorporated in the lease. The court, in so doing, however, disregarded one of the leading statutory canons of interpretation. This is that some effect must be given to each and every provision of a contract, if this can be done without doing violence to the language used by the parties.

"The whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other." Civ. Code, § 1641.

"A contract must receive such an interpretation as will make it lawful, operative, definite, reasonable, and capable of being carried into

effect, if it can be done without violating the intention of the parties." Civ. Code, § 1643.

"However broad may be the terms of a contract, it extends only to those things concerning which it appears that the parties intended to contract." Civ. Code, § 1648.

"Particular clauses of a contract are subordinate to its general intent." Civ. Code, § 1650.

"Repugnancy in a contract must be reconciled, if possible, by such an interpretation as will give some effect to the repugnant clauses, subordinate to the general intent and purpose of the whole contract." Civ. Code, § 1652.

There is no repugnancy in the terms of the contract, but if there were an effort should be made to give some effect to every part of it. Moreover, it must receive such an interpretation as will avoid absurdities and particularly such an interpretation as will not serve to excise any of its provisions.

The lease in question consists of two very distinct parts. One of these is the lease proper. This portion demises the leasehold estate and deals with the terms, method of use, rentals, etc. The other portion consists solely of an option to the respondents to purchase the property and modifications thereof. Confusion will be avoided in construing the terms of the option if this distinction is kept well in mind.

The option portion of the lease gives and reserves the following rights:

(a) An indefeasible option to the respondents to purchase the property at any time up to November 6, 1919, for the sum of \$9,500.

(b) A right in the lessor, at any time after said November 6, 1919, to receive a bona fide offer for the property from a third person and at any price—notice of such offer to be given to the respondents.

(c) An option in the respondents to purchase the property within the next ensuing thirty days at the price stated in such offer, but not exceeding \$9,500.

(d) If not accepted by the respondents within said period of thirty days, then a right in the lessor to sell to such third person at the stated price.

(e) If no such sale be made to a third person, then the option to purchase for \$9,500 remains with the respondents to May 5, 1922, the end of the term.

Respondents contend, however, that there should be added another to the foregoing options, to wit:

(f) An option in the respondents, notwithstanding such sale to a third person, to come in at any time during the term of the lease and purchase the property from such third person for \$9,500 without interest.

Such construction does violence to the manifest intent of the parties. If the contract had the meaning ascribed to it by the respondents, then there would follow the extraordinary result that the entire proviso would be stricken from it. This is so, for

the reason that without any notice to or conference with the respondents, the lessor had at all times the unqualified right to sell the property at any time during the term, whether before or after November 6, 1919, and at any price—subject, of course, to the terms of the option and lease.

Confessedly, he could do this, and if he could do it, then the proviso conferred upon him or reserved to him not the slightest additional right, if we are to believe the theories of the respondents. This point is demonstrated when we recall that the lessor gave the 30-day notice in the spring of 1921 and thereafter sold the property for \$9,500. According to the respondents, he sold it subject to the terms of the continuing option. But he could have done all this without reference to the terms of the option. It is thus seen that, if the 30-day notice had no effect, the proviso is bodily excised from the lease. It will be noted, too, that the lessor could have sold it for any price, great or small.

It is not to be believed that the lessor reserved to himself the right to entertain a bona fide offer from a third person, when at all times he had such right without any reservation. Had the respondents' view been correct they would not have reserved to themselves the right during the 30 days to purchase the property at a price not exceeding \$9,500, since, at all times, they had that right, without any reservation.

Should it be asked why the proviso should contain a provision that, notwithstanding a sale to the third person, the sale should be subject to the terms of the lease for the balance of the term, the answer is found in the fact that the main option to the respondents to purchase for \$9,500 provides that a sale to them under the option shall terminate the lease; hence the wisdom of the affirmative declaration in the proviso that a sale thereunder did not terminate it. The obvious intent being that the respondents should not be deprived of the possession during the entire term of the lease. But, viewed from a wider angle, it is seen that the parties cannot have contemplated that the respondents should still have the right of purchase after a sale under the terms of the proviso. Such view would lead to some results that verge closely upon the absurd. The property was sold on the 9th day of April, 1921, for a price of \$9,500. The lease itself expired on May 5, 1922. The rental was fixed at \$240 per annum. In that view, the parties must have contemplated that the purchaser would pay out \$9,500 to reap about \$250 as rent, lose about \$700 in interest, carry the property for over a year with the chance of depreciation, and then, in the event of appreciation, be under the duty of selling it to the respondents for \$9,500 without interest. People do not ordinarily do business in that way. It cannot be understood from the contract that

the parties had in mind such a farcical procedure.

The provision for an offer to the respondents and a subsequent sale to a third party meant, in truth and in fact, an actual and indefeasible sale.

The confusion that has arisen between those terms of the contract which demise the leasehold estate and those which relate to an option to buy and receive title to real property constitute the entire foundation for the defense of the respondents in this action. Said defense is based upon the following clause in said proviso:

"Subject to this lease and this lease, the conditions, restrictions and covenants thereof shall be in full force and effect and binding upon the lessee and the purchaser of said property."

It is clear that the parties had no thought that this provision continued in force the very options that the proviso itself had extinguished. To say that this provision was necessary because the other parts of the proviso had provided for a sale and then that such sale was in effect invalid because of this provision is but to reason in a circle.

The intent was to reserve to the lessor the unqualified right after November 6, 1919, to make an absolute sale of the property. This he did, and the resultant conveyance conveyed to the appellants an indefeasible title to the property.

The judgment is reversed and the trial court is directed to render judgment on the findings in favor of the appellants in conformity with their prayer for relief.

We concur: FINCH, P. J.; BURNETT, J.

(58 Cal. App. 189)

HORTON v. WHIPPLE, County Auditor.
(Civ. 2491.)

(District Court of Appeal, Third District,
California. June 19, 1922.)

Schools and school districts — 53(1)—County superintendent held to have no power to appoint board of enlarged district.

Where the county board of supervisors annexed 17 elementary school districts to the high school district of a city of the fifth class, as authorized by Pol. Code, § 1734b, as added by St. 1921, p. 722, such enlarged district became a union high school district, and under Pol. Code, §§ 1730, 1731, it was the duty of the county superintendent to call an election to elect a board of education of five members from the district at large, and under section 1731 the county superintendent had no power to appoint the members of the board except to fill vacancies.

Petition for writ of mandate by A. W. Horton against T. F. Whipple, Auditor of the County of Butte. Writ denied.

W. E. Duncan, of Oroville, for petitioner.
G. H. Harlan, of San Rafael, as amicus curiæ.

J. R. Robinson, Dist. Atty., and J. Oscar Goldstein, both of Chico, for respondent.

FINCH, P. J. This is an original application for a writ of mandate requiring respondent to issue a warrant on the county treasurer of Butte county for the amount of petitioner's claim against Chico high school district; the claim having been duly approved by certain persons alleged to constitute the high school board of such district and the county superintendent of schools of said county having regularly issued his requisition in favor of petitioner for the amount of such claim.

Prior to August 24, 1921, Chico high school district was a city high school district embracing all the territory within the city of Chico, a municipal corporation of the fifth class, and also certain additional territory annexed thereto for high school purposes. While it is not directly alleged, it may be inferred from the pleadings and the statements of counsel for the respective parties that the high school and elementary school districts were coextensive, and both were governed by the city board of education, elected by the electors of the district. August 24, 1921, the board of supervisors of Butte county, pursuant to the provisions of section 1734b of the Political Code, as added by St. 1921, p. 722, adopted a resolution annexing 17 elementary school districts to Chico high school district. No election was thereafter held in the high school district for members of a high school board, but the city board of education of Chico continued to act as the high school board of the enlarged district. April 24, 1922, the county superintendent of schools appointed the persons who approved petitioner's claim, as stated, members of the high school board of the enlarged district. The board so appointed and the city board of education are both attempting to act as the high school board. The question for determination is which board is authorized to conduct the affairs of the district.

At the outset it may be observed that any attempt to apply literally all the various provisions of the school law would lead to hopeless confusion. As said in *Chico H. S. Board v. Supervisors*, 118 Cal. 115, 122, 50 Pac. 275, 277:

"We have found it difficult to harmonize all the different clauses relating to the school system so as to give effect to the whole, and were we inclined to cavil, abundant cause might be found therefor in some of our school legislation."

Many laws, general in character, seem to have been designed to govern high school districts of a particular kind without refer-

ence to the relation of such laws to other laws covering the same subject-matter. Other provisions which, from the nature of the subject-matter thereof, ought to have been general in their application are limited to proceedings under the particular laws in which they are embraced.

Petitioner relies on sections 1731 and 1732 of the Political Code. Section 1732 provides:

"Whenever the number of school districts in a high school district is increased from one to two or more, the superintendent of schools having jurisdiction of such high school district shall, within fifteen days thereafter, call an election as provided in section seventeen hundred thirty, and thereafter the high school board shall be elected and organized as provided in sections seventeen hundred thirty and seventeen hundred thirty-one."

Sections 1730 and 1731 provide for the election at large of five trustees in union and joint union high school districts. If petitioner's contention thus far stated be correct, then it follows that, upon the annexation of the several elementary school districts to the Chico high school district, the latter ceased to be a city high school district, governed by the city board of education, and became a union high school district, under the control of a high school board of five trustees to be elected at large. The next step in petitioner's argument is that, after the annexation, the enlarged district was without a governing board, and that therefore the county superintendent was authorized under the following provision of section 731 to appoint the new board:

"Vacancies on the board shall be filled by appointment by the superintendent of schools having jurisdiction over the high school district, the appointee to hold office for the remainder of the unexpired term."

The primary question for determination then is whether the provision of section 1732 authorizing the county superintendent to call an election is applicable to the enlarged district. If he was not authorized to call such election he had no power to appoint. If it be conceded, however, that it was his duty to call the election, it does not necessarily follow that he had authority to appoint.

In all school legislation, unless section 1732 be an exception, there is a manifest purpose to place schools in municipalities, up to and including those of the fifth class, under the control of the school officers thereof, even though the school district may include territory outside of the municipality. Section 795 of the Municipal Corporation Act (St. 1883, p. 93, as amended St. 1891, p. 28) relating to elementary schools in cities of the fifth class, provides:

"From and after the organization of each of such cities, the same shall constitute a separate school district, which shall be governed

by the board of education of such city; provided the board of supervisors may include more territory in such school district than that included in such city, and in that case such outside territory shall be deemed a part of such city for the purpose of holding the general municipal election, and shall be an election precinct by itself, and its qualified electors shall vote only for the board of education, and said outside territory shall be deemed to be a part of said city for all matters connected with the school department, and the annual levying and collecting of the property tax for the school fund."

Section 1576 of the Political Code contains similar provisions, and further provides that—

Such outside territory "shall form one or more election precincts, as may be determined by the legislative authority of said city or incorporated town."

Section 1726 provides:

"In every high school district formed and existing in an incorporated city or town * * * the board of education * * * of such incorporated city or town * * * shall constitute the high school board."

Section 1729 provides:

"A union high school district which lies contiguous to or adjoining a high school district of an incorporated city or town in any county, may be annexed to, consolidated and merged with said high school district of such incorporated city or town; * * * and such merged, consolidated and combined district shall take the name and thereafter be known by and under the same name as the high school district of such incorporated city or town. * * * Whenever a union high school district shall be annexed to, consolidated and merged with a high school district of an incorporated city or town as hereinabove provided, the governing power and control of such union high school district shall thereafter be merged and vested in the board of education or board of school trustees of such incorporated city or town."

Section 1734a, as added by St. 1919, p. 396, relating to the annexation of elementary school districts to high school districts, provides:

"Whenever an elementary school district is annexed under the provisions of this section to any high school district having the same boundaries as a single elementary school district, except a city high school district, such high school district shall thereafter constitute a union high school district, and shall be governed by a high school board elected according to the provisions of sections one thousand seven hundred thirty and one thousand seven hundred thirty-one of the Political Code. * * * Whenever one or more elementary school districts are annexed under the provisions of this act to a city high school district, such annexation shall be for high school purposes only. Such territory shall be deemed a part of said city for the purpose of holding the general municipal election at which any

member of the board of education is to be elected, * * * the qualified electors of which shall vote only for the board of education, and such territory shall be deemed to be a part of said city * * * high school district for all matters connected with the high school thereof."

Under the provisions of sections 1729 and 1734a, large numbers of school districts might be annexed to a city high school district, and in such case the provisions of section 1732, authorizing the county superintendent to call an election, taken literally, would be applicable, but the Legislature, in sections 1729 and 1734a, was careful to provide that the city board of education should constitute the high school board, thus recognizing the value of unity of control in city school systems.

If section 1732 be held applicable in cases such as this, then great inconsistencies will result. Assuming the soundness of petitioner's contention, if a union high school district shall be hereafter annexed to the enlarged district under the provisions of section 1729, the school will continue to be a union high school, over which the city board of education will have no control; if, however, such union high school had been so annexed prior to the annexation here in question, the control thereof would continue to be vested in the city board, for in that case the high school district having been already composed of more than one elementary district, the latter annexation would not have increased the number of districts from "one to two or more." Composed of the same identical elementary districts, in the instances mentioned, the management of the high school would be vested in the one board or the other, depending upon the order of annexation. Upon the annexation under section 1734b of a single small elementary district to a populous city high school district, to which no elementary district had theretofore been annexed, the control of the high school would pass to another board, composed, perhaps, of different persons, while, upon the annexation, under the same section, of any number of school districts to a small city high school district, to which an elementary district had theretofore been annexed, the city board of education would retain control. Without questioning the power of the Legislature to provide for such inconsistent results, an intention to so provide should not be imputed unless imperatively necessary. It may be that under the provisions of section 1727, upon the petition of "a majority of the heads of families, or a majority of the electors residing in each of two or more contiguous school districts," one of them being a city school district, such districts can be formed into a union high school district, over which the city board of education will have no control. Such high school district, however, can be formed only by af-

firmative action of a majority of the heads of families or a majority of the electors of the city school district, whereas such heads of families or electors have no voice in the annexation provided for by section 1734b.

Petitioner urges that the provisions of sections 1729 and 1734a, which place a city high school district, enlarged by the annexation thereto of a school district or a union high school district, under the control of the city board of education, are not general in their application, but limited to the cases therein mentioned. Those sections, however, are indicative of the general legislative policy to place every high school district of which a city, except one of the sixth class, forms a part under the control of the city board of education. Prior to the enactment of section 1734b, it is clear that the provisions of section 1732 had no application to a city high school district where enlarged by the annexation of outside school districts thereto. It is not to be presumed that by the enactment of section 1734b, which is silent as to the governing board of the enlarged district for which provision is made, the Legislature intended to depart from the uniform course theretofore pursued of placing the control of city high school districts in the boards of education thereof.

While those provisions of section 1732 hereinbefore quoted, taken literally, are sufficiently comprehensive to include city high school districts, the other parts of the section indicate that such was not the intention. That section provides for three contingencies: (1) An increase in the number of school districts in a union high school district; (2) a change from a district high school to a union high school; (3) a change from a union high school to a district high school. In the first contingency, no change is made in the governing board. In the second, a new high school board must be elected. In the third, the management of the high school is vested in the trustees of the elementary school district. The changes provided for may be brought about by annexation of elementary school districts to or their exclusion from high school districts or by the division or consolidation of elementary districts included in high school districts. It is thus seen that there may be a full application of all the provisions of section 1732 without reference to city high school districts. Manifestly the first provision can have no application to such a district. Throughout the school law the governing board of a city school district is designated as either the "board of education" or the "board of education or board of school trustees of such incorporated city or town." The omission to employ such designation in section 1732 and the use of the term "school trustees" therein indicate that it was not intended to make that section applicable to city high school districts.

Neither the term "city school district" nor "city high school district" is mentioned in that section, the words "school district" and "union or joint union high school district" being used.

It is contended that, since the city board of education has control of the elementary schools of the city, with which schools the outside districts have no concern, it would be violative of sections 11 and 21 of article 1, section 25, of article 4, and section 12 of article 11, of the state Constitution to permit electors of such outside districts to vote for members of the city board of education. While it is not necessary to decide the question thus raised, the only question involved here being whether the county superintendent was authorized to call an election for or to appoint members of the high school board, it may be remarked in passing that elsewhere in our laws electors are permitted to vote for officers, with a part of whose duties such electors have no direct concern. Thus boards of supervisors have control of roads outside of municipalities and levy taxes on such outside territory for the construction and maintenance of such roads. Electors within municipalities vote at elections for supervisors and, in many counties, they may elect a majority of the members of the board, though property inside of the municipality is not taxed for such road purposes. It is also contended that section 1734b is unconstitutional. If so, the county superintendent was without authority to appoint the high school board. If the section is constitutional and the views herein expressed are sound, then equally he was without authority to appoint. Others who are not represented in this proceeding are interested in and entitled to be heard on the question of the validity of the law, and such question ought not to be passed on here, when not necessary to a decision of the issues presented.

If it be conceded that, by the annexation, Chico high school district was transformed into a union high school district, and that the provisions of section 1732 thereupon became applicable, it does not appear by what authority the appointment of a high school board was made. Section 1730 provides that when a union high school district has been established the county superintendent shall call an election for the "purpose of electing a high school board," and that at such election "one member shall be elected to hold office from the day of receiving his certificate of election until the first day of May, next succeeding; two members shall be elected to hold office from the day of receiving their certificate of election until the first day of the second succeeding May; and two members shall be elected to hold office from the day of receiving their certificates of election until the first day of the third succeeding

May." By section 1732 the county superintendent is authorized, upon an increase in the number of school districts in a high school district from one to two or more, to call an election for a high school board as provided in section 1730. The duty of the superintendent, in a proper case, is plain, to call an election as the law provides. It does not appear by what authority he may appoint members of the high school board instead of calling an election as the law requires.

The petition is denied.

We concur: BURNETT, J.; HART, J.

58 Cal. App. 366

CORMAC et al. v. MURPHY. (Civ. 4066.)

(District Court of Appeal, First District, Division 1, California. June 30, 1922.)

1. Attorney and client ⚖️166(2)—Evidence held to show that solicitor had no authority to employ assistants at client's expense.

In an action for legal services rendered defendant at request of defendant's solicitor, evidence held to show that the solicitor had no authority to employ plaintiffs at the expense of defendant.

2. Attorney and client ⚖️78—Attorney has no power to employ assistants at expense of client without previous authority.

An attorney has no general authority by virtue of his retainer to employ counsel or assistants at the expense of his client without previous authority or assent of the client.

3. Attorney and client ⚖️166(2)—Attorney has burden of proving authority of solicitor to employ assistants at client's expense.

In an action for legal services rendered at the request of defendant's attorney, the burden was on plaintiff to prove that the attorney had authority to employ assistants at the expense of the defendant.

4. Attorney and client ⚖️103—Rule that acceptance of benefits of transaction is an assumption of obligations does not apply where an attorney employs assistants without his client's consent.

Where plaintiffs were employed by defendant's attorney, and defendant had no knowledge nor was in a position to know of the employment or the services being rendered, Civ. Code, § 1589, providing that one who voluntarily accepts the benefits of a transaction assumes the obligations, did not apply.

5. Attorney and client ⚖️166(2)—Attorney's contract of employment must be proved like any other contract.

An attorney's contract of employment must be proved like any other contract of employment, and if there is shown a lack of authority on the part of one of the contracting parties, there is no valid contract.

Appeal from Superior Court, City and County of San Francisco; T. I. Fitzpatrick, Judge.

Action by T. E. K. Cormac and another against Margaret Murphy. Judgment for defendant, and plaintiffs appeal. Affirmed.

Wal J. Tuska, of San Francisco, for appellants.

Sapiro and Levy, of San Francisco, for respondent.

KNIGHT, Justice pro tem. This is an appeal by plaintiffs from a judgment rendered in favor of the defendant in an action brought to recover the sum of \$500, alleged to be due plaintiffs for legal services rendered by them in connection with the settlement of the estate of the deceased son of defendant.

On September 10, 1920, plaintiffs, who are practicing attorneys at law, with offices located in San Francisco, received a letter dated August 19, 1920, from Patrick O'Leary, a solicitor residing at Bantry, county of Cork, Ireland, concerning the estate of Jeremiah J. Murphy, deceased, which estate was then pending probate in the superior court of the city and county of San Francisco. In that letter it was, among other things, stated that Murphy died in San Francisco, leaving an estate, consisting of money and shares of stock of undetermined value; that Murphy was survived by a mother and brother residing in Ireland, for whom O'Leary was acting, and a sister residing in the United States; that the public administrator had taken charge of the assets of said estate. Continuing the letter said:

"What the money and shares amount to I do not know, but I want you to make inquiries and let me know, and if you are open to act in the matter for the deceased's next of kin in this country, you are hereby empowered to do so, and in case you require a power of attorney from them you can let me have form and I will have it executed by them. In the meantime, I will be pleased to hear from you as to what you think the estate is worth," etc.

Plaintiffs replied to that letter on the day on which it was received to the effect that the matters referred to in said letter would receive their immediate attention. They also sent inclosed in their reply a form of power of attorney, with the request that it be executed pursuant to the printed instructions inclosed; also forms of interrogatories for the purpose of establishing heirship.

On September 11, 1920, the day following the receipt of the O'Leary letter, plaintiffs served and filed in the estate of Murphy a notice of appearance in accordance with the provisions of section 1380 of the Code of Civil Procedure. They had, in the meantime, investigated the record and files of said estate, and had made report thereof to

O'Leary. Later they sought for and located in Oakland a cousin of the deceased, by whom they expected to establish heirship. This witness was produced and examined by plaintiffs on October 28, 1920, at the time the petition for the final distribution of said estate was heard and granted. During the course of the administration of said estate the public administrator recognized and dealt with plaintiffs as the attorneys representing the heirs residing in Ireland. Other than the letters above mentioned the record does not disclose that there was any further correspondence between the parties. The form for the execution of the power of attorney and the printed interrogatories which were mailed by plaintiffs to O'Leary as above stated were never used, nor were they returned to plaintiffs. However, on October 29, 1920, the defendant Margaret Murphy, as sole heir to the residue of said estate, which consisted of approximately \$1,300 in cash, executed a power of attorney, appointing Eugene W. Levy as her attorney in fact. Said power of attorney was mailed to Levy from Dublin, Ireland, on November 6, 1920, and was later filed as a part of the record of said estate. The public administrator refused to pay the distributive share of the defendant to Levy, however, unless plaintiffs were paid for their services. Levy declined to approve such payment, and plaintiffs thereupon commenced this action, and levied upon the distributive share of Margaret Murphy remaining in the hands of the public administrator.

Plaintiffs claim that they are entitled to compensation for their services, first upon the ground that the O'Leary letter, dated August 19, 1920, constituted a valid contract of employment, and that "coming from one solicitor to another—especially from a distant country—justifies the solicitor appealed to to enter upon the performance of all duties in connection with the case his services are sought in."

[1-3] There is an entire absence of proof, however, showing that O'Leary had any authority from Margaret Murphy to employ plaintiffs or that she expressly or impliedly assented thereto. Under such circumstances the defendant is not bound, we think, by the contents of the O'Leary letter. It has been repeatedly and consistently held that an attorney has no general authority by virtue of his retainer to employ counsel or assistants at the expense of his client without previous authority or assent of the client. *Porter v. Elizalde*, 125 Cal. 204, 57 Pac. 899; *Davis v. Mackay* (Cal. App.) 194 Pac. 738; *Northern Pac. Ry. Co. v. Clarke*, 106 Fed. 794, 45 C. C. A. 635; *Paddock v. Colby*, 18 Vt. 485; *Young v. Crawford*, 23 Mo. App. 432; *Mechem on Agency*, § 813; *Weeks on Attorneys*, § 246. The evidence on that point, although somewhat meager, shows, we believe, quite the contrary. From a letter

written on February 21, 1921, by one MacGrath, solicitor and land agent of Dublin, Ireland, to Levy, and read into the record at the request of plaintiffs, it would appear that a son of Margaret Murphy merely requested O'Leary to obtain information concerning his brother's estate, for which service O'Leary was paid a nominal fee. Such was apparently the extent of O'Leary's authority. It was not incumbent upon the defendant, as contended by plaintiffs, to show affirmatively that such authority was not in fact given. The burden was upon the plaintiffs to show that it was, which, as above stated, they failed to do.

Respondent contends that the letter itself did not constitute a contract for the employment of plaintiffs as attorneys to represent defendant in the settlement of said estate, but that it was merely a request for certain information concerning said estate, and that the employment of plaintiffs was necessarily incomplete until the power of attorney mentioned in the letter was executed and returned to plaintiffs, which as we have already seen was not done. Whether or not the effect of the O'Leary letter and the reply thereto by plaintiffs was sufficient in law to constitute a valid contract of employment makes little difference here, for the reason that O'Leary is not the party sought to be charged. Margaret Murphy is the party sued, and, as has already been pointed out, there is no evidence in the record to show that she ever authorized the employment of plaintiffs. Therefore upon that ground she is not liable for the payment of plaintiffs' services.

[4] The second point urged by plaintiffs is that defendant is liable upon the theory that—

"A voluntary acceptance of the benefits of a transaction is equivalent to a consent to all the obligations arising from it, so far as the facts are known, or ought to be known to the person accepting." Section 1589, Civ. Code.

It is clear to us, however, that this rule is not available to plaintiffs for the simple reason that there was no evidence offered or received showing that Margaret Murphy ever knew or was in a position to know of the employment of plaintiffs or of the services they were performing in the matter of the settlement of said estate.

In the case of *Porter v. Elizalde*, supra, it is said:

"It is undoubtedly in general the rule that when one knows that another is rendering him services, and tacitly assents thereto, if nothing more appears the law will imply a provision on his part to pay for such services. The rule is not uniform or absolute, however, but will be recognized or refused according to the circumstances of the particular case in which it is invoked (see *Moulin v. Coulumbet*, 22 Cal. 508), and when it appears that the services were rendered under an expressed employ-

ment by an agent, or by a third person who assumed to act in the interest of the one in whose behalf they were rendered, the authority of that person and the terms of the employment become important factors in determining the liability or the right of recovery. The mere silence of the party will not be held to constitute such assent or acquiescence in the acts of the agent as to amount to a ratification or adoption of these acts, without also considering the circumstances under which the silence existed."

The evidence here shows that it took three weeks for the letter from O'Leary to plaintiffs to reach San Francisco. Within six weeks after the letter arrived final distribution of the estate was granted. Mrs. Murphy was a very old lady, living 80 miles inland, in a disturbed part of Ireland, into which the railroads were not operating, and it appears that it was a matter of risking one's life to make a trip into that part of the country. It is quite evident, we think, from these, and other circumstances appearing from the record, that Mrs. Murphy was in total ignorance of the transactions that were taking place in the settlement of her son's estate. That being so, she cannot be held liable for the payment of plaintiffs' services under the rule contended for.

Appellants seem to lay stress upon the fact that the defendant failed to show a revocation of the proposition of employment made in O'Leary's letter, and it is argued that, in the absence of such revocation, a presumption arises that O'Leary was authorized to employ the plaintiffs. The answer to these contentions is that there was no evidence showing that Mrs. Murphy ever knew of the contents of the O'Leary letter or that he had in fact written any letter at all. Even conceding that such presumption as appellants contend for might arise, it would at best, in view of the other evidence to the contrary in the record, merely raise a conflict, in which event the conclusions of the trial court must prevail. *Rice v. Carey*, 170 Cal. 748, 151 Pac. 135.

[5] Neither is there any presumption of employment, such as to bind the defendant, arising, as plaintiffs contend, from the fact that plaintiffs are licensed attorneys and as such appeared in this proceeding for the defendant.

An attorney's contract of employment must be proved like any other contract of employment, and if there is shown a lack of authority on the part of one of the contracting parties there is no valid contract. We are satisfied that the conclusions reached by the trial court are correct and are fully supported by the evidence, and the judgment appealed from is therefore affirmed.

We concur: TYLER, P. J.; KERRIGAN, J.

57 Cal. App. 685

FOUCHT et al. v. HIRNI, County Auditor.
(Civ. 3836.)

(District Court of Appeal, Second District, Division 2, California. May 18, 1922.)

1. Counties ⇐61—Act allowing additional assistant to county officer in emergency did not create public office.

Pol. Code, § 4041c, as added by St. 1921, p. 220, providing for the employment of an employee by the board of supervisors to assist a county officer in an emergency, did not contemplate the creation of a public office.

2. Officers ⇐1—"Office" and "employment" distinguished.

An "office" is based upon some law which defines the duties appertaining to it, and which fixes the tenure, while an "employment," as distinguished from an office, is based upon a contract with the employee defining his duties, fixing his compensation, and determining the period of employment, and a duty or employment which arises out of contract, and which is dependent for its duration and extent upon the contract, is not an office, and one so employed is not an agent, but a servant, of the person employing him, although the employers may be public officers, and the employment in and about a public work.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Employment; Office.]

3. Counties ⇐63 — Emergency assistant to county treasurer not a deputy.

A deputy has power to do any act which his principal may do, and to do the act in his principal's name, while an employee appointed by the supervisors under Pol. Code, § 4041c, as added by St. 1921, p. 220, as an assistant to the county treasurer, not being authorized to act in the name of the officer whom he was employed to assist, nor having power to exercise the duties of the office in the name of its incumbent, was not a deputy.

4. Constitutional law ⇐48—When reasonably possible, construed to be valid.

Statutes should when reasonably possible be so construed as to render them valid and give them force and effect.

5. Officers ⇐100(1)—Payment of wages to one employed by supervisors to assist county treasurer in counties where lump salary not paid did not increase treasurer's compensation.

Pol. Code, § 4240, subd. 5, provides that the salary of county treasurers in counties of the eleventh class shall be \$2,800, and one deputy's at \$1,800, and section 4290 provides that the salary shall be in full compensation, and section 4024 that every county officer may appoint as many deputies as may be necessary, and where under section 4041c, as added by St. 1921, p. 220, an assistant was appointed to a county treasurer of the eleventh class, such appointment did not increase the treasurer's compensation in violation of Const. art. 11, § 9, providing that compensation should not be

increased after the treasurer's election, or during his term of office; such treasurer's compensation not being in a "lump sum" from which his deputies' and assistants' salaries were to be paid.

6. Statutes 72—Act allowing assistants to county officers not invalid for want of uniformity.

Pol. Code, § 4041c, as added by St. 1921, p. 220, providing that supervisors may provide for and allow assistants to county officers in emergency, did not lack uniformity of operation as required by Const. art. 1, § 11, in that it was immediately effective as to the appointment of assistants to county officers whose salaries and the salaries of whose deputies were fixed, while not effective as to county officers whose salaries were fixed in a lump sum from which all deputies' and assistants' salaries were to be paid.

7. Statutes 71—Law applying to persons or things within a class "uniform" if applied to all of class alike.

A law which applies equally to all persons or things within a legitimate class does not violate Const. art. 1, § 11, which requires laws of a general nature to have a uniform operation.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Uniform.]

8. Statutes 89—Act not commencing operation synchronously in all counties not invalid.

Notwithstanding Pol. Code, § 4041c, as added by St. 1921, p. 220, relating to the appointment of assistants to county officers in emergency did not, by reason of two different systems for compensating county officers, go into effect synchronously in all counties, such fact did not violate Const. art. 11, § 4, declaring that the Legislature should establish a system of uniform county governments; it being intended only that the several county governments throughout the state should be of a similar political structure, that is, that each should be governed by the same class of officers, etc.

9. Statutes 100(2)—Act relating to appointment of assistant to county officer, held not in conflict with constitutional provision for general and uniform laws as to county officers.

Pol. Code, § 4041c, as added by St. 1921, p. 220, relating to the appointment of an assistant to a county officer in an emergency, did not create a public office, and so is not in conflict with Const. art. 11, § 5, providing that the Legislature by general and uniform laws shall prescribe the duties and fix the terms of office of all county officers and regulate their compensation in proportion to duties, etc.

10. Statutes 100(2)—Act providing for assistant to county officer in emergency not local or special.

Pol. Code, § 4041c, as added by St. 1921, p. 220, providing for the appointment of an assistant to a county officer in an emergency, being uniform in operation, was not invalid

within Const. art. 4, § 25, subd. 28, providing that the Legislature shall not pass local or special laws creating offices or prescribing the powers or duties of officers in counties, cities, etc.

11. Counties 24—Act providing for assistants to county officers in emergency not invalid as delegating to supervisors power to control and appropriate county funds.

Pol. Code, § 4041c, as added by St. 1921, p. 220, authorizing the boards of supervisors to provide for emergency assistants to county officers and fix their compensation, does not give boards power to control and appropriate county funds, and so violate Const. art. 11, § 13, providing that the Legislature shall not delegate to any special commission, etc., power to make, appropriate, etc., or in any way interfere with any county money, property, or effects, etc., or perform municipal functions.

Mandamus by W. A. Foucht and another against W. J. Hirni, County Auditor, to require respondent to issue a warrant to petitioner for services. Writ granted.

W. W. Middlecoff, of Visalia, for petitioners.

Bradley & Bradley, of Visalia, for respondent.

FINLAYSON, P. J. This is an application for a writ of mandate to compel respondent, as auditor of Tulare county, to issue to the petitioner Foucht a warrant for \$182, claimed to be due the latter as compensation for certain work done by him in assisting the county treasurer under a contract of employment made by him with the board of supervisors pursuant to section 4041c of the Political Code—a new section added in 1921. Stats. 1921, p. 220. Respondent, who has demurred to the petition, attacks the constitutionality of this Code section upon a number of grounds; and whether this new law is constitutional or not is the sole question presented for our consideration. Though the petition is presented by Foucht and the county, the two appearing as joint petitioners, in our discussion of the case we shall treat the matter, for the sake of brevity, as though Foucht were the sole petitioner.

Section 4041c reads:

"Whenever in the judgment of the board of supervisors of any county it is necessary for the expeditious transaction of the business of any county office, the board by unanimous vote may provide for and allow additional assistance to any county officer. In any such case the board of supervisors shall fix the amount of compensation of such additional employees and shall limit in advance the period of time for which assistance is allowed. The powers granted to the supervisors under the provisions hereof shall not be so exercised as to result in increasing the compensation of any county officer after his election or during his term of office."

Prior to the adoption of this section, one Henry Newman had been elected treasurer of Tulare county, then and now a county of the eleventh class. At the time of Newman's election the law respecting the compensation of the county treasurer in counties of the class to which Tulare county belongs and the treasurer's power to appoint deputies was as follows: By subdivision 5 of section 4240 of the Political Code it was and is provided:

"In counties of the eleventh class, the officers shall receive as compensation for the services required of them by law, or by virtue of their office, the following salaries: * * * The county treasurer, two thousand eight hundred dollars per annum, and one deputy at one thousand eight hundred dollars per annum."

Section 4290 of the Political Code declared then, as it still does, that—

"The salaries and fees provided in this title shall be in full compensation for all services of every kind and description rendered by the officers named in this title either as officers or ex officio officers, their deputies and assistants, unless in this title otherwise provided, and all deputies employed shall be paid by their principals out of the salaries provided in this title, unless in this title otherwise provided."

Ever since 1907 section 4024 has provided that—

"Every county * * * officer * * * may appoint as many deputies as may be necessary for the prompt and faithful discharge of the duties of his office."

The circumstances of petitioner's employment are as follows: Prior to November 8, 1921, the date of his employment, valid county warrants were presented to the treasurer, but, for want of funds, were not paid. From the time of their presentation these warrants bore interest at the rate of 5 per cent. per annum, payable by the county. Pol. Code, § 4105. On November 8, 1921, there remained unpaid of such warrants a large number, the total sum due thereon amounting to something like \$400,000. At the date of petitioner's employment there was sufficient money in the county treasury to pay all of these interest-bearing warrants. Accordingly the county treasurer, pursuant to section 4106 of the Political Code, gave notice in a newspaper that he was ready to pay the warrants. Thereupon it became necessary for the treasurer to estimate the accrued interest on all of these unpaid warrants before payments could be made. At that time the county treasurer had in his office but one deputy—the only deputy for whom a salary was provided by law. Pol. Code, § 4240, subd. 5. Under these circumstances, the expeditious transaction of the business of the county treasurer's office and the convenience of the public necessitated, in the judgment of the board of supervisors, that additional assistance should be provided and allowed the treasurer for the purpose of estimating the

interest on these warrants. Thereupon the board, on November 8, 1921, provided for and allowed additional assistance to the county treasurer for the purpose of estimating the interest on these unpaid warrants. This it did by adopting unanimously a resolution whereby the petitioner here was employed by the board to assist the county treasurer in estimating the accrued interest on the interest-bearing warrants. The resolution fixed petitioner's compensation at \$7 per day for the period of 26 days. Petitioner accepted the employment and performed the services for the period mentioned. In due time he presented to the board of supervisors his claim for such services. The claim, which was in proper form, was allowed by the board. Respondent, who, as we have said, is the county auditor, refuses to draw a warrant on the county treasurer authorizing payment of petitioner's claim, although there has at all times been ample money in the proper fund for that purpose. Hence this proceeding.

In support of his claim that section 4041c is unconstitutional and the employment of petitioner unauthorized, respondent contends: (1) That the employment of petitioner to assist the county treasurer worked an increase in the latter's compensation subsequent to his election and during his term of office, in violation of section 9 of article 11 of the Constitution; (2) that this Code section is inconsistent with that uniformity which is required by section 11 of article 1 and by section 4 of article 11; (3) that it contravenes section 5 of article 11, which requires the Legislature to regulate the compensation of county officers in proportion to duties; (4) that it is a local or special law, and hence violative of subdivision 28 of section 25 of article 4; and (5) that it involves an unlawful delegation of power, in contravention of section 13 of article 11.

It is not possible for any Legislature, however farsighted it may be in anticipating future conditions, to foresee and provide against those occasional and extraordinary conditions of public business which inevitably must arise in many of the counties of the state from time to time between legislative sessions. Such emergencies, when they do arise, cannot be successfully taken care of by inflexible strait-jacket legislation, rigidly fitted to those conditions which are known to and can be perceived by the Legislature when the law is passed. To meet such unforeseen, abnormal situations as they present themselves, a law possessing the requisite elasticity and conformability, such as section 4041c, for example, is necessary. The section in question seems to be the result of an honest and enlightened endeavor on the part of the Legislature to deal equitably and fairly with a vital problem; and in any consideration of respondent's attacks upon this law we must never lose sight of the fact that, to justify

the judiciary in declaring invalid such a statute, passed by a co-ordinate branch of the government, its conflict with the Constitution should be clear and positive.

[1] The solution of some of the questions presented by respondent's argument against the constitutionality of section 4041c depends upon whether the section contemplates the creation of an office or the mere employment of an employee or servant of the board of supervisors. At the outset, therefore, it is essential to consider whether, in employing assistance under this new Code section, the supervisors create a county office. We are satisfied that they do not.

"A public office," says our Supreme Court in *Coulter v. Pool*, 201 Pac. 120, "is ordinarily and generally defined to be the right, authority, and duty created and conferred by law, the tenure of which is not transient, occasional, or incidental, by which for a given period an individual is invested with power to perform a public function for the benefit of the public."

* * * The most general characteristic of a public officer, which distinguishes him from a mere employee, is that a public duty is delegated and intrusted to him, as agent, the performance of which is an exercise of a part of the governmental functions of the particular political unit for which he, as agent, is acting. There are other incidents which ordinarily distinguish a public officer, such, for instance, as a fixed tenure of position, the exaction of a public oath of office, and, perhaps, an official bond, the liability to be called to account as a public offender for misfeasance or nonfeasance in office and the payment of his salary from the general county treasury."

Measuring the provisions of this Code section by the foregoing definition, it seems evident that it does not contemplate the creation of a public office, but provides only for the employment of a mere employee or servant of the board of supervisors to assist a county officer whenever an emergency arises—such an emergency as, in the judgment of the board of supervisors, makes it necessary in the expeditious transaction of the county's business that additional assistance be provided. The instant case affords a good illustration of the nature of the employment under the power vested in the several boards of supervisors by this Code section. Here petitioner was temporarily employed, under contract, at a fixed per diem, to assist in expediting a part of the business of a county office by making certain interest calculations.

No oath of office or official bond is exacted from the person who is employed by the board of supervisors under section 4041c. There is no fixed tenure of office. On the contrary, the period of employment contemplated by the section is temporary and transient. The employment is but incidental and occasional. It begins and ends with the emergency which furnishes its reason and justification.

[2] An office, as a general rule, is based up-

on some law which defines the duties appertaining to it and which fixes the tenure. The county engineer act which was before the court in *Coulter v. Pool*, supra, was such a law. There the Legislature attempted to create an office; for the statute purported to define the duties of a county engineer and to fix his term at four years. An employment, as distinguished from an office, is, as a rule, based upon a contract with the employee, defining his duties, fixing his compensation, and determining the period of his employment. As a general rule, a duty or employment which arises out of a contract, and which is dependent for its duration and extent upon the terms of the contract, is not an office. One so employed is not an agent of the state; he is the servant or employee of the person or persons employing him, although the latter may be public officers and the employment may be in and about a public work or position. *McDaniel v. Yuba County*, 14 Cal. 444; *White v. Alameda*, 124 Cal. 95, 56 Pac. 795; *Patton v. Board of Health*, 127 Cal. 388, 59 Pac. 702, 78 Am. St. Rep. 66; *People v. Wheeler*, 136 Cal. 652, 69 Pac. 435; *City of Tampa v. Kaunitz*, 39 Fla. 683, 23 South. 416, 63 Am. St. Rep. 202; 29 Cyc. 1366. In *City of Tampa v. Kaunitz*, supra, the Supreme Court of Florida held that a person employed by a city council under a contract to assist the assessor in making an assessment is not a public officer, but merely an employee of the council.

[3, 4] Nor can the person employed under this new section be regarded as a deputy by reason of such employment. His employment by the supervisors does not authorize him to act in the name of the county officer whom he is employed to assist. He has no power to exercise the duties of an office in the name of its incumbent. A deputy, by the very act and authority which constitutes him such, has power to do any act which his principal may do, and to do the act in his principal's name. Not so, however, as to an assistant employed by a board of supervisors under this section of the Political Code. Take the present case, for instance. The petitioner here was employed to assist the county treasurer by making and tabulating certain arithmetical calculations. That is, he was employed to compute certain interest charges against the county. But this did not interfere with the county treasurer's right to exercise sole control of his office. All the political functions of that office remained vested in the county treasurer, who would continue to exercise them himself, when present, and in his absence they would be exercised by the deputy treasurer in the name of and as the act of his principal. In accordance with the maxim, "Ut res magis valeat quam pereat," statutes should, when reasonably possible, be so construed as to render them valid and give them force and effect. Section 4041c is readily susceptible of such a

construction that an assistant employed thereunder shall not be deemed to be vested with any power the due exercise whereof can, by any possibility, displace any of the authority or power of the county officer whom he is employed to assist, or interfere with the performance by such officer of the functions with which the law has clothed him. The county officer and his deputy or deputies will continue to exercise all the discretionary power that appertains to the office, the assistant employed by the supervisors simply standing by and doing what he is told to do in helping or aiding the county officer or his deputies. The county officer continues as before to exercise and in his own person to represent the sovereign power of the state. The servant of the board, temporarily employed under a contract to assist the county officer in performing certain of the duties appertaining to the office, does not in his own person represent any sovereign power. *Ventura County v. Clay*, 112 Cal. 65, 44 Pac. 488, a case cited by respondent, is not in point. There the person who was employed by the supervisors was not employed to assist the tax collector; he was employed to perform the functions of the tax collector. He entirely supplanted that county officer in the performance of a part of the duties appertaining to the office of tax collector. Instead of assisting him, he actually displaced the county tax collector, with the result that in that case the board of supervisors, contrary to law, undertook to create a county office. That is not the case here.

Nor is there any substantial ground for respondent's fear that the person employed to assist the county officer might be deputized by the latter, with the result that such officer might thus secure, in effect, one more salaried deputy than he is allowed by statute. If the assistant employed by the supervisors were made a deputy by the county officer, it would not be by reason of any authority therefor conferred by section 4041c. Nor would such deputy be entitled to receive, as deputy, any compensation under that section of the Political Code. Any wage paid him under his employment by the board of supervisors would be solely for the work done by him as an employee of the board employed temporarily to assist the county officer during an emergency when the expeditious transaction of the business of such county office necessitates such extra assistance. We may not assume that the supervisors will continue the employment longer than the emergency which makes it necessary, nor that they otherwise will abuse the power vested in them by this Code section.

[5] Concluding, as we do, that plaintiff was but an employee, and not an officer, and that section 4041c, under which he was employed, contemplates, not the creation of a public office, but a temporary and occasional employment under contract in times when the

county is confronted with emergent situations, we now approach the questions suggested by counsel's attacks upon the constitutionality of this Code section.

There is no merit in the claim that plaintiff's employment to assist the county treasurer increased the latter's compensation in violation of section 9 of article 11 of the Constitution, which provides that the compensation of a county officer "shall not be increased after his election or during his term of office." The Legislature, by appropriate legislation and for the purpose of regulating the compensation of all county officers in this state in proportion to duties, has classified the counties by population, as is required by section 5 of article 11 of the Constitution. In thus regulating their compensation, the Legislature has adopted a twofold plan or scheme for compensating county officers. That is to say, some county officers are allowed a gross sum out of which to compensate themselves for their own personal services and likewise to pay the expenses of their offices, such, for example, as clerk hire and the salaries of their deputies. This method we shall designate as the "lump sum" system of compensation. Other county officers, the county treasurer of Tulare county, for instance, are allowed fixed amounts for their own personal salaries and separate and distinct amounts for deputy hire or other expenses. Thus in Tulare county it is provided that the county treasurer shall receive as compensation for his own services \$2,800 per annum, and, in addition, is allowed one deputy at a fixed salary of \$1,800 per annum, both payable out of the county treasury. The result is that, in addition, to the 58 classes of counties which have been classified by population for the purpose of regulating compensations in proportion to duties, we have the county officers throughout the state divided into a twofold classification based upon the method whereby they receive their compensations, those in one class receiving their compensation under the "lump sum" system, and those in the other class receiving as compensation for their personal services fixed and definite salaries. In thus classifying county officers by these two methods of compensation, the Legislature has kept within the limits of its constitutional powers, because "under either rule a compensation proportionate to duties may be secured." *Tulare County v. May*, 118 Cal. 303, 308, 50 Pac. 427, 429.

In counties where the "lump sum" system prevails, any increase after the election of a county officer of the gross amount allowed him for the compensation of himself and deputies necessarily would work an increase in his compensation during his term of office, in violation of section 9 of article 11 of the Constitution. Such increase in the gross amount allowed for the compensation of the

principal and his deputies would indirectly add to the sum allowed the principal as compensation for his own personal services, as is clearly pointed out by the Supreme Court in *Dougherty v. Austin*, 94 Cal. 601, 28 Pac. 834, 29 Pac. 1092, 16 L. R. A. 161, particularly in the concurring opinion of Mr. Chief Justice Beatty. But where, as in the instant case, the principal is allowed a fixed salary for his own services, and his deputies or assistants are likewise allowed fixed salaries, the principal's compensation is not augmented by any increase in the number of his deputies or assistants or by any increase in the salaries of such deputies or assistants.

"* * * Where the statute provides a fixed salary for the officer and a separate allowance for expenses of his office, * * * and a fixed salary for a certain number of deputies or clerks, all payable out of the county treasury, an increase of such separate allowance for expenses or for deputies, whether in the number of deputies or the amount paid to each, is not a violation of the constitutional provision that 'the compensation of any county, city, town, or municipal officer shall not be increased after his election or during his term of office.'" *Newman v. Lester*, 11 Cal. App. 581, 105 Pac. 785.

From this it follows that the payment of wages to an employee employed by the board of supervisors of Tulare county under section 4041c of the Political Code to assist the county treasurer of that county does not increase the latter's compensation, since his salary—\$2,800—will remain the same.

In those counties where the "lump sum" system obtains, section 4041c will not be available for the employment of an assistant to assist a county officer who was elected prior to the adoption of this new law. In such counties the operation of the law will be postponed until the expiration of the terms of those officers who were elected before this Code section went into effect. This is not because the section expressly exempts any county or any county officer from its operation, but solely because the constitutional inhibition against increasing the compensation of a county officer after his election or during his term of office effects a temporary abatement in the operation of the section within those counties where the county officers are compensated by the "lump sum" method. This want of present universality of operation throughout the entire state, due to the fact that the section is not immediately operative in the "lump sum" counties, seems to be respondent's principal ground of attack. We pass, therefore, to a consideration of this objection.

[6] Our Constitution provides that "all laws of a general nature shall have a uniform operation." Section 11, art. 1. As we understand respondent's argument, he does not claim that section 4041c is not uniform in

its operation throughout the state in so far as the power conferred thereby may be exercised without violating the constitutional inhibition against increasing the compensation of a county officer after his election or during his term of office. Respondent's argument, as we understand it, runs substantially as follows: If the power to employ additional assistance under section 4041c be exercised in the "lump sum" counties prior to the expiration of the terms of the present officeholders in those counties, there inevitably must ensue a violation of the constitutional interdiction against increasing a county officer's compensation after his election or during his term of office; if we endeavor to shun this Scylla, we necessarily shall fall into the Charybdis of nonuniformity of operation, for the reason that, though this Code section is immediately operative in one class of counties, its operation in the other class—the "lump sum" class—must be postponed until the expiration of the terms of the present officeholders, thus producing a condition of nonuniformity as to the time of operation in the several counties of the state. This, in substance, is the argument for respondent, as we understand it. We think it more plausible than sound.

Without doubt, section 4041c is a law of a general nature. Its subject-matter—the power to employ additional assistance in any county of the state whenever necessary to expedite the business of a county officer—is a subject of a general nature. It relates to a matter of equal interest in every part of the state, and is general in its aims and in the object which it has in view. In form, it is a general law. It purports to apply equally to all the counties of the state. It is therefore without doubt, a law of a general nature, and as such must have that uniformity of operation which is contemplated by section 11 of article 1 of the Constitution.

If this Code section were a clear and unequivocal attempt to evade the constitutional mandate as to uniformity of operation by expressly and intentionally confining its operation to a limited class of counties, as was the case in *Miller v. Kister*, 68 Cal. 142, 8 Pac. 813, we would unhesitatingly declare it to be unconstitutional. Such legislation, though the purpose be disguised by the use of general language, is not to be tolerated. But we can discover no such attempted evasion here. We look in vain for any evidence of an intention to limit the law's operation to any particular class of counties. If it does not become operative at the same time in all the counties of the state, it is because the Constitution itself has temporarily abated its operation in a certain class of counties—the counties where the "lump sum" system prevails. Upon the expiration of the terms of the incumbents in the "lump sum" counties the section will be equally operative in

all parts of the state, if not repealed in the meantime.

The whole question, then, resolves itself into this: Does this law, on its face applicable alike and immediately to every county in the state, lack the constitutional requisite of uniformity of operation because it is immediately operative in one class of counties while in the other class its operation is temporarily deferred by the Constitution itself by reason of the inhibition against any increase of a county officer's compensation after his election or during his term of office? This question must, we think, be answered in favor of the constitutionality of the law.

[7] "The word 'uniform' in the Constitution does not mean universal. The section [section 11, art. 1, of the Const.] intends simply that the effect of general laws shall be the same to and upon all persons who stand in the same relation to the law—that is, all the facts of whose cases are substantially the same." *Hellman v. Shoulters*, 114 Cal. 147, 44 Pac. 915, 45 Pac. 1057. A law which applies equally to all persons or things within a legitimate class does not violate the provision requiring laws of a general nature to have a uniform operation. *Ex parte Sohneke*, 148 Cal. 266, 82 Pac. 956. 2 L. R. A. (N. S.) 813, 113 Am. St. Rep. 236, 7 Ann. Cas. 475; *Johnson v. Gunn*, 148 Cal. 749, 84 Pac. 665. "It has been uniformly held that a law is general which applies to all of a class—the classification being a proper one—and that the requirement of uniformity is satisfied if it applies to all of the class alike." *Hellman v. Shoulters*, *supra*. The classification is a proper one if it is founded upon some natural or intrinsic or constitutional distinction. *City of Pasadena v. Stimson*, 91 Cal. 238, 251, 27 Pac. 604; *Johnson v. Gunn*, *supra*.

In the present case we have a classification founded upon a constitutional distinction; in other words, a legitimate classification. Section 4041c has not created the classification. It makes no attempt to classify counties or county officers. It is the Constitution which, indirectly, has made the classification. The new law is simply confronted by a situation growing out of the existence of previous valid legislation and the effect thereon of section 9 of article 11 of our Constitution. That is, the only reason why this Code section becomes operative in different counties at different times is because the Constitution itself works that result by making the law inapplicable during the present term of those county officers who are compensated by the "lump sum" method. The Constitution itself creates the class, and section 4041c operates uniformly upon all persons standing within that class. In order to constitute the uniformity of operation specified in the Constitution, it is not necessary that the general law shall operate alike upon all the sub-

jects or persons to which it applies independent of all other considerations. It is enough that it operates uniformly upon all persons standing in the same category and upon rights and things in the same relation. *People v. Henshaw*, 76 Cal. 442, 18 Pac. 413.

In *People v. Henshaw*, *supra*, it was held that the term "uniform operation," as used in the Constitution, does not involve, as a necessary essential, an identity of time of operation, so as to make it necessary that the act shall take effect at the same time upon all the subjects to be governed by it. The court in that case says:

"This argument [the argument that the act lacks uniformity of operation because it is to take effect in different cities at different times] involves the consideration of what is meant by the term 'uniform operation,' as used in the Constitution. Does it involve, as an essential, identity of time, so as to make it necessary that it take effect at the same time upon all subjects to be governed by it? * * * If the law operates equally upon all the objects embraced within it, *when they come within the circle or scope of its authority*, the uniformity of operation contemplated by the Constitution is attained. * * * If it meets every contingency when it arises and treats all the contingencies of like character in like manner, it is uniform in its operation. We do not think identity as to the time of operation essential, except where it is coupled with identity of facts or circumstances. *Under the same circumstances*, existing at the same period of time, the law must apply equally at the same time, or uniformity of operation is not attained. Beyond that, identity as to time of application is not necessary." 76 Cal. 444, 18 Pac. 416. (Italics ours.)

Tested by these principles, it must be held that section 4041c is uniform in its operation. It operates equally upon all objects embraced within it the very moment that they come within the scope and circle of its authority. When the circumstances existing in any number of counties in any given period of time are alike, the section affects in like manner and at the same time all of the counties as to which there exists such identity of circumstances. For these reasons we conclude that the section is in no sense opposed to the uniformity of operation required by section 11 of article 1 of the Constitution.

[8] The next question presented is this: Is section 4041c inconsistent with the uniformity required by that mandatory provision of the Constitution which declares that "the Legislature shall establish a system of county governments which shall be uniform throughout the state"? Article 11, § 4. If by this no more is intended than that the several county governments throughout the state shall be of similar political structure—that is, that each shall be governed by the same class of offices—so that each shall have a board of supervisors, a district at-

torney, a sheriff, a treasurer, auditor, etc., then it cannot be said that section 4041c impairs that uniformity in the established system of county governments which is contemplated by this section of the Constitution, for the reason that an assistant employed by the board of supervisors under this Code section is in no sense an officer of the county.

The decision of our Supreme Court in *Coulter v. Pool*, supra, lends some support to the view that the uniformity in the system of county governments which the Constitution contemplates means no more than uniformity in the political structure of the several counties; that is, that each shall be governed by the same kind of officers. In that case the court differentiated the county engineer act—the act which it held to be unconstitutional—from the law library act considered in the case of *Board of Law Library Trustees v. Board of Supervisors*, 99 Cal. 571, 34 Pac. 244, upon the ground that, though the latter act left to the option of the different counties the matter of the establishment of a law library, nevertheless “such institutions are not part of the system of county government, at least so far as the execution of ‘political functions’ is concerned.” (Italics ours.) But, be this as it may, even if the uniformity contemplated by this constitutional requirement does mean more than a uniformity of political structure—even if it means, as it probably does, that the same powers shall be vested in each and every board of supervisors throughout the entire state—nevertheless it cannot be held that section 4041c subverts the necessary uniformity in the general plan or scheme of county governments. In *Coulter v. Pool*, supra, it is said that—

“The Constitution contemplates and commands that the system of county governments shall be uniform throughout the state, *except in those special instances where the Constitution itself sanctions a departure from uniformity.*” (Italics ours.)

Since the sole ground for claiming that section 4041c is inconsistent with a uniform system of county governments is that its operation does not commence synchronously in all of the counties of the state, and since this want of identity in the time of operation is a result worked by the Constitution itself by reason of the existence of the two different systems for compensating county officers, it follows that this is a case where the Constitution, *ex proprio vigore*, sanctions a departure from uniformity in the system of county governments.

[9] It next is claimed that section 4041c conflicts with that provision of section 5 of article 11 of the Constitution whereby it is provided that the Legislature, by general and uniform laws, shall prescribe the duties and fix the terms of office of all county “officers,” and shall regulate their compensation in

proportion to duties, and, for that purpose, shall classify the counties by population. The obvious answer to this objection is that an assistant employed under this new Code section has no term of office and is not a county officer, but a mere servant or employee of the board of supervisors, employed temporarily to meet an emergent situation. For this reason section 5 of article 11 is inapplicable. The case is within the principle of those decisions which hold that the board of supervisors of any county may, by contract, employ the services of a physician, attorney, etc., fix his compensation, and prescribe his duties. The power of the board to make such contracts has often been upheld. *People v. Wheeler*, supra; *Lassen County v. Shinn*, 88 Cal. 510, 26 Pac. 365; *Power v. May*, 123 Cal. 147, 55 Pac. 796. There is no merit in the objection.

[10] Equally devoid of merit is the contention that section 4041c is a local and special law, and as such violative of subdivision 28 of section 25 of article 4 of the Constitution, which provides that—

“The Legislature shall not pass local or special laws * * * creating offices, or prescribing the powers or duties of officers in counties, cities, city and counties, townships, election or school districts.”

This section of the Political Code does not attempt to create an office; and what has been said is a sufficient answer to this objection. Moreover, the section is not a local or special law. By its terms it operates throughout the state, in each and every county thereof. If it does not immediately become operative in some counties, the reason is extrinsic, not intrinsic, it is a result due solely to the fact that, by virtue of an express provision of the Constitution itself—that which forbids any increase of a county officer's compensation after his election or during his term of office—the operation of this Code section is temporarily held in abeyance in certain counties. Such a law is neither local nor special.

[11] Finally, it is contended that this Code section violates that provision of the Constitution (article 11, § 13) which provides that—

“The Legislature shall not delegate to any special commission, private corporation, company, association or individual any power to make, control, appropriate, supervise or in any way interfere with any county, city, town or municipal improvement, money, property, or effects, whether held in trust or otherwise, or to levy taxes or assessments or to perform any municipal functions whatever.”

The claim that section 4041c conflicts with this clause of the Constitution is based upon the contention that it gives to boards of supervisors the power to control and appropriate county funds. There is no force in the objection. The supervisors do not con-

trol or appropriate any county moneys. They are merely vested with a discretionary power to incur the expense incident to the employment of assistants employed to help in the transaction of the business of the county, just as they do when they contract for the services of a physician to attend upon the indigent sick and dependent poor of the county (*People v. Wheeler*, supra), or when they employ special counsel to defend or prosecute suits to which the county is a party or to collect moneys due it (*Lassen County v. Shinn*, supra; *Power v. May*, supra). Such discretionary power is frequently reposed in county legislative bodies, and the expense resulting from an exercise thereof does not involve the control or appropriation of county moneys or property by any "special commission," "private corporation," "company," "association," or "individual." See *Tulare County v. May*, supra, 118 Cal. 308, 50 Pac. 427. Of course, boards of supervisors have no right to waste or give away moneys belonging to the county, or to expend them otherwise than in the interest of the public. Power, however, must be reposed somewhere. We may not assume that it will be abused. And for the purpose of affording, temporarily, such additional assistance as may be necessary to meet those unexpected situations in the transaction of the county's business which inevitably must arise between sessions of the Legislature, we know of no more suitable repository of the power to employ the needed assistants than the board of supervisors—the local legislative body the members whereof are chosen by the electors of the county.

In none of his assaults upon the section of the Political Code here under attack has respondent shown any clear and positive conflict with the state's organic law. Wherefore it is ordered that the peremptory writ of mandate issue as prayed.

We concur: WORKS, J.; CRAIG, J.

53 Cal. App. 233

CHAPMAN v. RUDOLPH, City Treasurer,
et al. (Civ. 4200.)

(District Court of Appeal, First District, Division 1, California. June 20, 1922.)

1. Municipal corporations ⚡488, 489(5)—Assessment for street improvements not objected to at proper time not subject to collateral attack.

An assessment for street improvements, occurring after the city council had regularly acquired jurisdiction to order the work done, no protest having been made, nor appeal taken under *Vrooman Act*, § 5½, as added by St. 1909, p. 31, and section 11, and no notice having been given to the city treasurer of any ob-

jection to the issuance of the bond as authorized by *Bond Act*, § 4, cannot be collaterally attacked.

2. Municipal corporations ⚡488, 489(5)—Failure to appeal from assessment waived objection that contractor had offered rebates.

Property owner's failure to appeal from an assessment for street benefits waived an objection that contractor, in violation of city charter, offered to make rebates to property owners paying without litigation.

3. Municipal corporations ⚡519(5)—Defective sale by city held not to affect validity of assessment.

The fact that city made a defective sale of property against which assessments for benefits had been made does not affect the contractor's lien on the property.

4. Constitutional law ⚡290(6)—Municipal corporations ⚡407(1)—Bond act provides for due process of law.

The *Bond Act*, providing for issuance of bonds for the cost of street improvements, provides for due process of law.

5. Municipal corporations ⚡488, 489(5)—Property owner making no attempt to prevent bond issue held in no position to complain.

Where property owner made no attempt to prevent bond issue for street improvements, she was in no position to complain.

6. Municipal corporations ⚡567(2)—Allegations as to jurisdictional requirements for street assessments sufficient.

A statement in an answer setting up a claim under a street assessment that the council "duly gave, made, and passed the said resolution ordering the work" was a sufficient allegation of all jurisdictional requirements.

Appeal from Superior Court, Santa Clara County; P. F. Gosbey, Judge.

Action by Ella J. Chapman against Paul Rudolph, as Treasurer of the City of San Jose, and the Elliott & Horne Company. Judgment for plaintiff, and defendant Elliott & Horne Company appeals. Reversed.

Kirkbride & Gordon, of San Mateo, for appellant.

Ralph C. McComish and C. C. Coolidge, both of San Jose, for respondent.

TYLER, P. J. This is an action to quiet title to certain real property. The complaint is in the usual form. It is alleged therein that defendant Rudolph is the duly appointed and acting treasurer of the city of San Jose, and that the defendant Elliott & Horne Company is a corporation; that both defendants assert an interest in, or lien upon, the land described in the complaint, adverse to the claim and ownership of plaintiff, and that such claim is asserted wholly without right.

The city treasurer filed a general denial. Defendant Elliott & Horne Company also denied ownership in plaintiff, and, as an affirmative defense, set up an interest in the land arising under a sale for nonpayment of a bond issued for street improvements.

The work for which the bond was issued was alleged to have been performed pursuant to the provisions of the city charter of San Jose, of the so-called Vrooman Act (St. 1885, p. 147, as amended), and of the Street Improvement Bond Act approved in 1893 (St. 1893, p. 33). The contract called for the grading of the street, the installation of a concrete base thereon, and an asphalt top. The issues in the case involve the validity of the award of the contract and certain subsequent proceedings. No objection was made to the jurisdiction originally acquired by the city council to order the work performed. Trial was had and judgment went for plaintiff. Defendant Elliott & Horne Company has appealed from the judgment, after denial of its motion for a new trial. Defendant Rudolph has no further interest in the result of the litigation, and has not appealed.

Plaintiff claimed below, and does here, that the assessment upon which defendant relied to prove his interest in the land was void for the reasons: (1) That the award was not made to the lowest bidder; (2) that the work was not done "after the award"; and, (3) that a defective sale was made by the city treasurer.

With reference to the first and second objections, it appears in evidence that there were two bids presented for the doing of the work, one by Ira T. Bridges, for 8 cents per square foot; the other by the Raisch Improvement Company for 40 cents. By a unanimous vote of the council the bid of Bridges was rejected and the contract was awarded to the Raisch Improvement Company, it being determined by the council that this company was the lowest regular responsible bidder. At the session of the council when the contract was let, it appeared that Bridges was a plasterer, and had no asphalt plant or roller. It also appeared that the Raisch Improvement Company had, prior to this time, done work upon the street, in front of the lot in question, under a private contract. This work was performed at the request of the owner of the lot, and consisted in the grading and putting in of a concrete base upon the assurance and with the understanding that the owner would sign a contract for the same. It further appeared that when the asphalt surface was ready for placement the owner refused to sign, and indicated that he would not pay for the improvement. Bridges, in presenting his bid, intended to avail himself of this work which was performed by the Raisch Improvement Company, and merely intended under his bid to furnish the asphalt surface.

These facts were before the city council at the time the contract was let, and, whether the board concluded that by its action it would assist the Raisch Improvement Company in this irregular manner to obtain its pay for the work it had performed, or whether it determined that the Raisch Improvement Company was the lowest responsible bidder, as the minutes show, it is impossible for us to say.

The question of what discretionary powers public authorities are vested with in determining who is the lowest responsible bidder, and when and under what circumstances their decision will be interfered with, are considerations which, in view of the conclusion we have reached, we do not think we are here called upon to discuss or decide.

[1] The defects in the assessment here claimed relate to questions of procedure occurring after the council had regularly acquired jurisdiction to order the work done. No protest against the work was made under section 5½ of the Vrooman Act, as added by St. 1909, p. 31, as therein provided for, nor was any appeal taken therefrom under section 11 of that statute; and no notice to the city treasurer was filed against the issuance of the bond as permitted by the Bond Act.

Under these circumstances it is the claim of appellant that, these provisions having afforded respondent ample opportunity to remedy the alleged irregularities, and she having failed to avail herself thereof, she is estopped for urging the same to her benefit. It is further claimed that, as the record shows that this was the only parcel of land affected by the assessment, the owner thereof had it within her power to take over the entire contract, and thus recoup herself by any profit arising therefrom, and, having failed to do so, she waived the objection to the price at which the award was made, and that such failure also operated as an estoppel against her.

We are of the opinion that counsel is correct in these contentions. The purpose and effect of the provisions of section 4 of the Bond Act and the other curative provisions hereinabove referred to have been fully considered and discussed by the Supreme Court in numerous cases, and the conclusion reached that they remedy any procedural irregularities such as are here claimed, provided only that the resolution of intention of the council to do the work has been actually published, and the notice of improvement posted as provided by the street law. No useful purpose would be subserved by a review of these authorities. See *Chase v. Trout*, 146 Cal. 350, 80 Pac. 81; *Watkinson v. Vaughn*, 182 Cal. 55, 186 Pac. 753, and cases cited; *Empire Securities Co. v. Matthews*, 179 Cal. 239, 176 Pac. 160.

Here it is not questioned that the council

had jurisdiction to make the improvements. No protest or objection having been made to the proceedings, and no appeal having been taken therefrom, and the assessment for the work having been levied, the assessment cannot be collaterally attacked in a suit to quiet title for irregularities such as are here claimed.

[2] For the same reasons the further claim that the contract of the Raisch Improvement Company was violated in consequence of an agreement on its part to make certain rebates or deductions to those who would pay without litigation in the event that it was awarded the contract is without merit. Failure to appeal is a waiver of this defect, as this provision of the charter is not jurisdictional. *Smith v. Lightston*, 182 Cal. 41, 45, 186 Pac. 769. Aside from this, the charter of the city of San Jose only voids contracts other than those of the property owners who were parties to the agreement. Here the parties never entered into any such agreement. True, there was an offer to rebate, but it was never accepted by the then owners of the lot, and they were the only parties concerned with the assessment. The proceedings were therefore in no manner affected by this charter provision.

[3-5] Nor does the fact, as claimed, that the sale was invalid destroy defendant's lien. Assuming this to be a fact, and it seems to be conceded, it in no manner affected the validity of the bond or the lien of defendant. *Faxon v. All Persons*, 166 Cal. 707, 137 Pac. 919, L. R. A. 1916B, 1209; *Burns v. Hiatt*, 149 Cal. 617, 87 Pac. 196, 117 Am. St. Rep. 157; *Klumpke v. Henley*, 24 Cal. App. 35, 140 Pac. 289, 313. The assessment and bond being valid, plaintiff is not entitled to quiet title against defendants' lien except upon making payment. *Ellis v. Witmer*, 134 Cal. 249, 66 Pac. 301; *Hayne v. San Francisco*, 174 Cal. 185, 162 Pac. 625; nor is there any merit in the further contention that the Bond Act itself is invalid as not providing for "due process of law." *German Savings & Loan Society v. Ramish*, 138 Cal. 120, 69 Pac. 89, 70 Pac. 1067; *Hellman v. Shoulters*, 114 Cal. 136, 44 Pac. 915, 45 Pac. 1057. Aside from this, a lot owner is in no position to complain of the issuance of a bond where he has made no attempt to prevent such issue. *Ahlman v. Barber Asphalt Paving Co.*, 40 Cal. App. 395, 181 Pac. 238.

[6] And, finally, it is contended that defendant's pleadings are defective. Assuming the denial of plaintiff's title to have been insufficient, this did not affect the affirmative defense set forth which alleged the performance of the work. The objection that this defense is also defectively pleaded for the reason that it fails to contain recitals of the complete proceedings of the council leading up to the assessment is without merit. After

the recital of certain proceedings, the answer alleges that the council "duly gave, made, and passed their certain resolution ordering work," etc. Such recital is a sufficient allegation of all the jurisdictional requirements. *Pacific Paving Co. v. Bolton*, 97 Cal. 8, 31 Pac. 625, *Los Angeles Paving Co. v. Los Angeles Foundry Co.*, 181 Cal. 685, 186 Pac. 593.

For the reasons given, the judgment declaring plaintiff to be the owner of the land in question free and clear of the claim of defendant is erroneous, and the same should be, and it is hereby, reversed.

We concur: KERRIGAN, J.; KNIGHT, Justice pro tem.

58 Cal. App. 318

LONG BEACH FISHERIES CO. v. CURTIS CORPORATION. (Civ. 3851.)

(District Court of Appeal, Second District, Division 2, California. June 26, 1922.)

1. Evidence — 471(2)—Question calling for conclusion of witness held objectionable.

In an action on a contract in which defendant agreed to purchase tuna fish during season and furnish certain quantities daily to plaintiff, a question asked witness for plaintiff as to whether there were fish available in the markets during season, which could have been purchased by any one, to supply the quantities required by the contract, was objectionable as calling for a conclusion, where the witness did not qualify as an expert.

2. Sales — 416(2)—Evidence of buyer's possible profits held admissible on question of damages.

Under Civ. Code, §§ 3308, 3354, in buyer's action for a seller's breach of contract to furnish certain quantities of tuna fish daily during season, evidence of profits which would reasonably have accrued to the buyer had the fish been delivered was admissible on question of damages.

3. Sales — 181(11)—Evidence held not to support finding that seller refused to deliver part of goods.

In buyer's action for seller's breach of contract, in which the buyer agreed to assign all its interest in certain barge equipment, and the seller agreed to accept on account of and deliver to the buyer at a charge of \$10 per ton all fish that might be delivered to the seller's barge from certain named boats, evidence held insufficient to support a finding that the seller failed and refused to deliver to the buyer certain quantities of fish.

4. Sales — 71(2)—Provision for delivery of 20 tons of fish a day average held to mean average of the days of the week.

Under a contract clause providing that the seller was to purchase a sufficient amount of tuna fish during season to furnish the buyer with an approximate delivery of 20 tons per

day "average," held, that the parties intended the average to be made of the days of each week, and not of all the days of the season.

5. Sales 101—Buyer's default not ground for rescission by seller himself in default.

Where the seller was in default in delivering the quantity of fish provided by the contract, he could not make the buyer's failure to pay a shrinkage charge the basis for a rescission of the contract.

6. Appeal and error 959(1)—Pleading 236(1)—Allowance of amendments to pleadings is discretionary with the trial court.

The allowance of amendments to pleadings is largely discretionary with the trial court, and an order of that character will not be disturbed on appeal, unless prejudice has resulted.

Appeal from Superior Court, Los Angeles County; Chas. Wellborn, Judge.

Action by the Long Beach Fisheries Company against the Curtis Corporation. Judgment for plaintiff, and defendant appeals. Reversed.

Daly & Daly, of Long Beach, for appellant.

P. E. Keeler, of Long Beach, for respondent.

CRAIG, J. This action is one for an accounting and for damages alleged to have resulted from the breach of a contract. For convenience the plaintiff and respondent will be referred to as the company, and the defendant and appellant as the corporation. Both are engaged in the business of canning fish. The agreement in question constituted a joint fishing arrangement. One of the principal objects intended to be accomplished was to make such provision that both would be able to run their fish canning operations continuously. The writing reads as follows:

"This agreement entered into this first day of August, 1919, the consideration of which is the mutual advantages enjoyed by both parties thereto by and between the Curtis Corporation, party of the first part, and Long Beach Fisheries Company, party of the second part; both parties hereto agree as follows:

"First. The second party agrees to assign all their right, title and interest to the first party in certain boats and barge equipment which they may have heretofore arranged for during the tuna season of 1919.

"Second. Second party agrees to pay first party the sum of ten dollars per ton as the expense of barging and tendering upon fish purchased by first party and delivered to second party.

"Third. Second party agrees in addition to said ten dollars per ton barging and tendering charge to pay first party the sum of ninety-five dollars per ton for each and every ton of blue fin tuna delivered to second party's cannery by first party, provided, however, should the first party find it necessary or convenient to pay more or less than ninety-five dollars per

ton for said blue fin tuna that the price so paid by first party, more or less than ninety-five dollars per ton, should be paid by second party to first party, the second party having been first notified by first party of their intention to pay such different amount.

"Fourth. First party agrees to use their best ability to the purchase of sufficient blue fin tuna during the tuna season of 1919 to furnish the second party with an approximate delivery of twenty tons per day of blue fin tuna average, it being understood the first party retains the privilege of first supplying itself with a daily capacity of twenty tons from purchases made, with the exception, however, that the second party shall not be expected to take fish from the first party on either one of Friday, Saturday or Sunday nights of each week, at the first party's option.

"Fifth. Should the first party in endeavoring to fulfill this agreement purchase fish which shall become unfit for canning while same is in the possession of either party hereto to the financial loss upon said spoiled fish shall be borne by the two parties hereto in the same ratio as the amount of spoiled fish shall bear to the amounts of fish received by the respective parties hereto during that calendar month in which such spoiled fish shall have been obtained.

"Sixth. It is mutually agreed and understood that the first party in maintaining sufficient barge and tender service for the carrying out of this agreement shall, so far as possible, accept on account of the second party and deliver to the second party at a sole charge of ten dollars per ton all such fish as may be delivered to the barge of the first party from any one of the following boats: Washington, I. S. E. 1, I. S. E. 2, The Explorer and Protector, the risk of spoilage and transportation, however, being taken by second party hereto without recourse.

"Seventh. It is the intention of this contract that the fish canneries of the respective parties hereto shall, so far as possible, be kept supplied with such fish as may enable them to operate each working day of the week, provided, however, that all the other provisions of this contract are considered as paramount.

"Eighth. The fish in this contract are defined as being blue fin tuna solely and not referring in any way to albacore or other species of fish, with the exception of the fish caught by the five particular boats named.

"Ninth. In the event of spoiled fish being suffered by either parties hereto desiring to take advantage of the provisions in paragraph five hereof said party shall immediately notify the other party hereto and hold said spoiled fish for a minimum period of twenty-four hours for the inspection of the other party hereto.

"Tenth. The tuna season whenever mentioned herein is defined as ending October 1st, 1919.

"Eleventh. In the event that during any one of seven days starting from the first of September, 1919, during the period of this agreement, party of the first part is unable to purchase in the aggregate sixty tons of blue fin tuna for the use of either or both parties hereto said first party is authorized to thereupon, at its option cease said tender and barge serv-

ice and said second party is in the event of the discontinuance of said barge and tender service under said condition to reimburse said first party at the rate of twenty dollars per diem from date of discontinuance to October 1, 1919.

"The Curtis Corporation

"(Party of the First Part)

"By Alex B. Stewart, Pres.

"Long Beach Fisheries Company

"(Party of the Second Part),

"By. R. A. Nickell, Pres."

The trial court found that this agreement was modified by mutual consent of the parties by the following letter:

"Long Beach, Cal., August 1, 1919.

"The Curtis Corporation, Long Beach, California—Gentlemen: As provided in our agreement of this date you are to accept the delivery of fish from The Explorer and Protector two seine boats operating out of this port, until further notice from us in writing. You will therefore please consider this fish your own fish and purchase same as if it were such.

"You are also authorized not to make any charge against us of fifty cents per ton, or any other amount, for state tax for fish purchased as we hereby agree to take care of this matter ourselves with the State Fish and Game Commission and pay the tax, whatever it is, on all fish delivered to us by yourselves. Yours very truly, Long Beach Fisheries Company, by R. A. Nickell."

Several of appellant's contentions have merit, but the error committed in the admission of evidence upon the subject of damages under the second cause of action is of such a character as to require a new trial.

Assuming that the evidence showed the corporation to have broken its contract concerning the delivery of blue fin tuna, it was incumbent upon the company in order to make out a case for damages for such breach to prove by competent evidence its actual loss resulting therefrom. It might have proved the reasonable market value of other fish of the same character at the nearest market or that there were no fish of that character obtainable during the term of the contract. An attempt was made to prove that there were no fish to be had. The witness Nickell was asked the following question:

"Mr. Keeler: State whether or not there were fish available in markets of Los Angeles and Long Beach Harbors during the months of August and September, consisting of blue fin or albacore, which could have been purchased by any one desiring to do so, willing to pay the market price and having the money to pay for the same, to supply your cannery with the quantities of fish which were covered by this contract, and which you claim here were not delivered with the Curtis Corporation under the contract in question."

[1, 2] Counsel for the corporation objected on the ground that no proper foundation had been laid, and that the question called for a conclusion of the witness. Objection was overruled. It is apparent that the question

was objectionable upon the grounds stated. There was no showing that the witness had made any inquiry to discover whether or not the fish in question were available in the markets of Los Angeles or Long Beach during the months of August and September, and as to whether or not such fish were available is clearly a question which the witness would not be entitled to answer unless a foundation had been laid by proof of his being an expert upon the matter. In the matter of proof of actual damages it was proper to receive evidence of profits which would reasonably have accrued to the company from the fish had they been delivered according to the contract. *Pacific Steam Whaling Co. v. Alaska Packers' Association*, 138 Cal. 632, 72 Pac. 161. In this connection it was necessary for the company to show the value of the tuna to the buyer over the amount which would have been due to the seller under the contract if it had been fulfilled. Civ. Code, § 3308. Section 3354, Civil Code, provides the rule for determining such value. Unless the company could prove that no fish were to be had at that time in the market nearest to the place where the property should have been delivered, its only other course would have been to have introduced evidence to show the price at which it could have been purchased in such market at or about the time of the breach of the contract on the part of the corporation. As before stated, the company attempted to show that there were no fish on the market, but, as the objection should have been sustained to the testimony offered in that behalf, we must disregard it. Without the testimony of the witness Nickell on that point that part of finding 13 which concerns damages has no support in the evidence.

[3] One of the principal reasons advanced by appellant as ground for reversal is that the evidence is insufficient to support certain other findings. In this regard complaint is made concerning finding 3, which is as follows:

"3. That plaintiff delivered to defendant, pursuant to said contract, 16,907 lbs. of albacore which defendant agreed to deliver to plaintiff in consideration of a barging charge of \$10.00 per ton; that defendant delivered to plaintiff 9,996 lbs. of albacore and failed and refused to deliver to plaintiff the balance thereof, to wit, 6,911 lbs.; that the value of the albacore retained by defendant was, in the months of August, September and October, 1919, \$140.00 per ton, and there is due to plaintiff from defendant for said albacore retained by it as aforesaid the sum of \$483.77, less a barging charge on 4.99 tons at \$10.00 per ton, amounting to \$49.98 making the net charge against defendant in favor of plaintiff for albacore \$433.79."

The albacore referred to in this finding was stipulated to have been delivered by the company to the corporation under paragraph

6 of the contract. It appears that instead of immediately transporting this albacore, which was received by the corporation in small catches, to the company, the former used the fish thus turned over to it, and later delivered a large quantity of albacore at one time. According to the witness Stewart this was done at the request of Nickell, president of the Long Beach Fisheries Company, so that it would receive sufficient albacore at once for a day's run. On September 7, 1919, the corporation delivered to the company at Long Beach 16,114 pounds of albacore of which 6,118 pounds were admitted to be unfit for canning. The trial court by the finding here attacked in effect disallowed this amount as a credit on behalf of the corporation. The question thus presented is simply whether or not the 6,118 pounds of fish should be considered as having been delivered pursuant to paragraph 6 of the agreement. If so, even though unfit for canning, it could not be charged against the corporation. The contract provides:

"Sixth. It is mutually agreed and understood that the first party in maintaining sufficient barge and tender service for the carrying out of this agreement shall, so far as possible, accept on account of the second party and deliver to the second party at a sole charge of ten dollars per ton all such fish as may be delivered to the barge of the first party from any one of the following boats: Washington, I. S. E. 1, I. S. E. 2, The Explorer and Protector, the risk of spoilage and transportation, however, being taken by second party hereto without recourse."

The testimony of the witness Stewart concerning the receipt and delivery of this albacore was:

"I asked Nickell if he desired us to make delivery on these little odd lots of albacore that were being delivered by the Ise 1, and Ise 2, and Washington, as they were delivered, and he said 'No.' He said it was only a small quantity, and at that time he wasn't running on any hundred lots. He said he did not want to receive a few hundred pounds and start the factory up just to handle that much. He said, 'You take it and use it, and when you get enough to my credit so that I can make a run on it, make a day's run, why, then, you can pay me back in fish.'"

This evidence was uncontradicted. Surely the defendant cannot now be heard to say that the change from the course of business contemplated by the contract, to wit, immediate redelivery of the specific albacore delivered by the company to the corporation, to a subsequent delivery of other albacore, which change was made at the request and for the benefit of the company, should be regarded as adding a burden upon the corporation which would not have existed had the original plan been carried out. The company is clearly estopped from successfully making the assertion that the rede-

livery which was made is not in accordance with the plan and intention of section 6 of the contract. There is no charge or showing that the corporation acted in bad faith in the matter of the delivery of the fish and particularly that which it appears was unfit for canning purposes. The corporation unloaded fish from the same cargo at the same time for its own use, each party taking albacore in the same condition without selection or discrimination. When Nickell told Stewart that the company did not wish the corporation to make delivery of the little odd lots of albacore as they were caught and delivered to the corporation's barges he knew that the identical fish delivered to such barges would never be returned to the company. He must have been aware of the fact that the corporation would follow the course which it did, and that it would eventually buy other albacore to return to the company. It cannot be said that the parties intended to conduct this transaction apart from any reference to the contract which they had executed. It seems plain that they both intended that the procedure they followed should be regarded as carrying out their contract and as coming within the provisions of section 6 thereof. Under finding 3 the court charged defendant \$433.79. This we think was error, and that that part of the finding which states that the corporation refused to deliver the 6,118 pounds to the company is not supported by the evidence.

By finding 4 the trial court determined that the plaintiff's profits on the albacore, found by finding 3 to have been wrongfully withheld from delivery would have been \$100 per ton. It follows from what has been said that this amount was improperly charged against the corporation.

[4] The second count of the second amended complaint has to do with the blue fin tuna. By finding 13 the court found the principal allegations of this count to be true. Paragraph 4 of the contract is the one controlling the matter determined by the finding having to do with this count. In this behalf the court found that on certain dates, to wit, the 12th and 18th days of August and the 2d, 13th, 16th, and 17th days of September, the corporation failed to deliver various amounts of blue fin tuna to the company, and to the delivery of which the company was entitled under paragraph 4 of the contract. In arriving at this conclusion the trial court construed paragraph 4 of the contract as permitting the corporation to retain the first 20 tons of blue fin tuna purchased and as requiring it to deliver all over said 20 tons to the company, not exceeding 20 tons per day. The trial court held that this provision applied to the daily purchases, and that each day's purchase of the corporation was to be adjusted without regard to the other days in the tuna season, and without regard to the

season as a whole. Appellant contends that the contract should be construed as giving the right to it to retain as much of any day's purchase as it might desire, provided that its daily average capacity for the entire season did not exceed 20 tons. We think that the latter claim is untenable. The matter is not free from difficulty. Paragraph 4 of the contract is somewhat ambiguous. Therefore the circumstances surrounding the making of the contract, as well as the construction placed upon it by the parties, must be taken into account.

Mr. Nickell, president of the company, testified as follows:

"Mr. Stewart stated that he was quite positive he could purchase 40 tons of blue fin tuna quite constantly each day, and that they, because of having the equipment, expected to receive the first 20 tons of fish which was purchased, and that we would receive the balance of the fish which was purchased up to an average delivery of 20 tons per day this specified time, and that was all we desired."

Mr. Stewart of the corporation gave this version of the same conversation:

"* * * I stated to Mr. Nickell that it would not be right for the Curtis Corporation to turn over to the Long Beach Fisheries Company all of the fish of the Explorer and Protector as their fish until the Curtis Corporation had first secured their daily capacity, average daily capacity—we, of course, talked that way, 120 tons a week, is the terms that I used in talking to him—until we have first our 120 tons a week."

From this it appears that the period which the parties had in mind was a weekly period. This idea is supported also by the language of the contract itself. The concluding provision of paragraph 4 gives the corporation the right to retain all of the purchases of one of the days of the week—that is of Friday, Saturday, or Sunday at its option. Paragraph 11 carries out the idea of a weekly computation and reckoning by using this language:

"Eleventh. In the event that during any one of seven days starting from the first of September, 1919, during the period of this agreement, party of the first part is unable to purchase in the aggregate sixty tons of blue fin tuna for the use of either or both parties hereto said first party is authorized to thereupon, at its option, cease said tender and barge service and said second party is in the event of the discontinuance of said barge and tender service under said condition to reimburse said first party at the rate of twenty dollars per diem from date of discontinuance to October 1, 1919."

Joint Exhibit No. 2 is a statement of albacore delivered to the corporation by boat Ise II, and it is rendered in the form of a weekly statement. By the language of paragraph 4 of the contract the corporation agrees to use its best ability to furnish the

company with 20 tons a day of blue fin tuna, but this is qualified by the use of the word "average." It is only an average of 20 tons per day that the corporation attempts to furnish. The parties do not clearly state what day's deliveries are to be averaged. The corporation contends that the intention was to average all of the days of the season. Such a construction would place the company at a very great disadvantage. The contract was drawn by the corporation, and should not be construed to give it any undue advantage. If all of the days of the season must be averaged together, the company would not know what its rights were until the end of the season. It might be that the corporation would take all of the fish purchased, for during some weeks, but little or no purchases might be made. From all of these considerations we think the parties intended the average to be made of the days of the week beginning with the first day on which purchases were made. Joint Exhibit No. 1 contains a statement showing the fish purchased each day. The first purchases were made on August 1st. The calculation should therefore begin with that date.

[5] Another contention of appellant which should receive notice is that the corporation ceased deliveries of blue fin tuna because the company had failed to pay shrinkage charges on a delivery of September 10th. It appears that it was in default prior to that time. At least as early as the week ending August 25, even though retaining to itself an average of 20 tons per day, it should have delivered about 43,000 pounds of tuna to the company more than was delivered by it. Being thus in default, it could not make the company's failure to pay a shrinkage charge the basis for a rescission of the contract. *Cal. Sugar, etc., Agency v. Penoyer*, 167 Cal. 274, 139 Pac. 671.

[6] Complaint is made that the court allowed an amendment to the complaint after the taking of the evidence. This amendment was permitted to make the pleading conform to the proof. The complaint was one for an accounting, and contains allegations of the breach of the contract involved. A part of the evidence introduced in connection with the accounting established the contract and a breach of some of its provisions. The allowance of an amendment is largely discretionary with the trial court, and an order of that character will not be disturbed unless prejudice has resulted. In this case it does not appear that the corporation's substantial rights were in any way compromised, or that it was prevented from securing or introducing evidence because of having been surprised. In view of our decision requiring a retrial of the case no other points raised by appellant will require discussion.

The judgment appealed from is reversed.

We concur: FINLAYSON, P. J.; WORKS, J.

58 Cal. App. 181

COX v. ROSENBERG et al. (Civ. 3902.)

(District Court of Appeal, Second District, Division 1, California. June 19, 1922.)

1. Sales ⚡52(6)—Evidence held to support finding that agent contracted for individual and not partnership.

Evidence held to support finding that agent made contract of sale for an individual principal and not for a partnership.

2. Assignments ⚡137—Evidence held not to sustain finding of assignment.

Evidence held not to sustain a finding of an assignment of a claim of one of the defendants against plaintiff to another defendant.

3. Pleading ⚡236(3)—Allowing amendment of answers during trial not abuse of discretion.

The trial court did not abuse its discretion in allowing defendants to file separate amended answers during the trial, denying the existence of facts admitted in the original answer, plaintiff being offered a continuance, and it not appearing that the evidence was any different from what it would have been if the new issues had been raised by the original answer.

4. New trial ⚡102(1)—Not granted where due diligence not used in discovering new evidence.

A new trial will not be granted on the grounds of newly discovered evidence, where the alleged new evidence might have been discovered by the exercise of due diligence in time for use at the trial.

Appeal from Superior Court, Los Angeles County; L. H. Valentine, Judge.

Action by F. B. Cox against H. Rosenberg, X. H. Hollar, and others. From a judgment against defendant X. H. Hollar only, plaintiff appeals. Affirmed as modified.

Tipton & Cailor, of Los Angeles, for appellant.

Joe Crail and Julius V. Patrosso, both of Los Angeles, for respondents Greenberg, Kleinberger, and Rosenberg.

CONREY, P. J. Appeal from the judgment in an action to recover damages arising from breach of contract. The contract was in writing, dated February 3, 1919. By its terms it purported to be a contract between F. B. Cox and H. Rosenberg. It was stated therein:

"That for and in consideration of the sum of \$1,850 and 1,150 tons of salt f. o. b. cars Saltus, California, to be delivered to the said F. B. Cox f. o. b. Saltus in quantities not less than 200 tons per month beginning in the month of March, 1919, the whole 1,150 tons to be delivered in six months; the said F. B. Cox does hereby sell one F. C. Austin, type D, Dragline excavator complete, as per description hereto attached, * * * said machine to be delivered to the said H. Rosenberg f. o. b. cars at Saltus, California."

Claiming that the individual defendants were copartners in the salt business at Saltus, the plaintiff brought this action against them and against the alleged partnership, and alleged that his contract of February 3, 1919, was made with them. In the complaint it is alleged that pursuant to said contract the plaintiff delivered the excavator to the defendants, who accepted and used the same in their business. Nevertheless the defendants have neglected and refused to deliver to the plaintiff any of said 1,150 tons of salt.

Upon this complaint, and the answers of the defendants Rosenberg, Kleinberger, Greenberg, Schwartz, and Hollar, and upon a cross-complaint of Rosenberg, Greenberg, and Kleinberger, the action was tried. There was no service of summons on defendants C. Z. Salling and John Doe, or appearance by them. The court, by its findings of fact, determined that the defendants never were copartners, and that the Hollar Rock Salt Company and Pacific Rock Salt Company consisted only of the defendant Hollar, who was doing business under those fictitious names; that the Rosenberg contract was a contract between the plaintiff and the defendant Hollar; that in executing the written contract, Rosenberg was acting solely as agent for Hollar; that the plaintiff at that time knew that Rosenberg was acting for and on behalf of defendant Hollar, and not for or on behalf of himself or any of the defendants other than the defendant Hollar.

On account of the nondelivery to plaintiff of said 1,150 tons of salt, the court decided that plaintiff was entitled to judgment against the defendant Hollar for damages for breach of the contract, and that the value of the salt which was to have been delivered was \$10 per ton. The court further found:

"That on said 3d day of February, 1919, and at the time of the execution of said contract by plaintiff and defendant X. H. Hollar, the defendant A. L. Greenberg loaned to plaintiff the sum of \$2,750, and that plaintiff agreed to repay said sum to the said defendant from the proceeds to be derived from the sale of the salt agreed to be delivered to plaintiff by the defendant X. H. Hollar, and the court finds that said sum of \$2,750 has never been repaid to said defendant A. L. Greenberg by plaintiff, and that prior to the commencement of this action said defendant A. L. Greenberg transferred said claim to the defendant X. H. Hollar."

Thereupon the court rendered judgment against the defendant Hollar in the sum of \$8,750. The plaintiff being dissatisfied with the amount of the judgment, and also because he failed to obtain any judgment against the defendants other than Hollar, appeals from the judgment.

The relations existing between the defend-

ants resulted from certain transactions between them prior to the sale of the excavator by the plaintiff. By an instrument dated September 27, 1918, the Consumers' Salt Company had made a lease of its property at Saltus to the defendant Hollar. Hollar arranged with Greenberg and Kleinberger to advance to him the sum of \$20,000 to enable him to engage in the production and sale of salt from his leased property. On the 27th day of January, 1919, Hollar executed an "assignment and sale of lease," whereby he assigned to Greenberg and Kleinberger all of his right, title, and interest in and to the lease. Thereupon, and on the same day, Greenberg and Kleinberger, as parties of the first part, executed to Hollar and Schwartz, parties of the second part, a so-called "purchase lease," whereby the parties of the first part leased to the parties of the second part for a term of two years all of the property this date purchased by the parties of the first part from Hollar. The parties of the second part agreed to pay the sum of \$20,000 together with a royalty on salt produced from the leased property. From further terms of this contract, it appears to have been contemplated that a corporation would be formed for the conduct of the proposed business, and that all of the parties to this contract would become stockholders thereof. Apart from that arrangement, Kleinberger and Greenberg agreed that upon payment of said sum of \$20,000 and the additional royalty referred to they would transfer to Hollar and Schwartz the property described, being the property which the parties of the first part had that day purchased from Hollar. The sum of \$20,000 was advanced by Kleinberger and Greenberg from time to time, beginning on the 28th day of January, 1919, so that on April 4, 1919, that entire sum had been paid out by them on requisitions made by Hollar.

Late in January, 1919, and at about the time when Hollar had completed the financial arrangements mentioned above, he also entered into negotiations with the plaintiff Cox for the purchase of the excavator owned by Cox. The proposition as finally accepted by Cox was made by Schwartz and Hollar, although the plaintiff says that Greenberg and Kleinberger also were present. As has been seen, Cox received a cash payment of \$1,850 as part of the consideration for his sale of the excavator, but because he needed a larger sum to enable him to deliver the excavator, a loan of \$2,750 was made by Greenberg to Cox. This transaction was arranged by Schwartz, who, on behalf of Cox, made application to Greenberg for the loan. An agreement in writing was made, dated February 3, 1919, between Cox and Greenberg, providing for repayment of the \$2,750; such repayment to be made through the Los Angeles Trust & Savings Bank out of the

moneys to be collected for account of Cox on sales of the salt which Cox was to receive as part of the consideration for the sale of his excavator. It was agreed that "the Hollar Rock Salt Company shall forward the bills of lading for salt shipped at the request or order of F. B. Cox or assignees" to the bank. On the same day, February 3, 1919, escrow instructions were deposited with the Los Angeles Trust & Savings Bank, providing for the delivery of the bill of sale by Cox, and for carrying into effect the terms of the loan agreement between Cox and Greenberg. These instructions were signed by F. B. Cox, "Hollar Rock Salt Company, by X. Hollar," H. Rosenberg, and A. L. Greenberg. Rosenberg was not present during any of the negotiations until he appeared and signed the excavator purchase agreement and the escrow instructions. The plaintiff testified that it was represented to him that the excavator was put in Rosenberg's name in order to secure Greenberg and Kleinberger, and also in order to transfer it to the corporation which they intended to organize.

[1] There seems to be no doubt that Rosenberg was only a nominal purchaser, and that this was understood by all parties concerned. The only question is whether, as such nominal purchaser, he represented Hollar alone or represented a group of persons consisting of Hollar and one or more of the other defendants.

Appellant contends that the evidence is insufficient to sustain the findings that the Hollar Rock Salt Company and Pacific Rock Salt Company were composed only of the defendant Hollar; or that in executing the Rosenberg contract, Rosenberg was acting solely as agent for Hollar or that this was known to the plaintiff; or that prior to the commencement of this action Greenberg transferred to the defendant Hollar his claim for said sum of \$2,750. Appellant directs our attention to the evidence that Hollar and Salling issued a certificate that they were doing business under the fictitious firm name of Pacific Rock Salt Company; that the Pacific Rock Salt Company had a bank account, and that Schwartz testified that he and Hollar were authorized to draw checks thereon, the checks being signed by Hollar and countersigned by Schwartz; that Schwartz said that he was "secretary" for the Pacific Rock Salt Company; that Rosenberg signed the contract of purchase of the excavator in his own name, and testified that the contract had been put in his name "to protect, I believe, the \$2,750 that Mr. Greenberg had coming"; that there is no evidence of any instrument or act of transfer by Greenberg to Hollar, of Greenberg's right to repayment of the said \$2,750 loan. The record shows, however, that the certificate of fictitious firm name made by Hollar and Salling bears date more than eight months

later than the Rosenberg contract. Schwartz came into these transactions as the agency whereby Kleinberger and Greenberg were induced to advance money to Hollar as a secured loan, but contemplating that a corporation would be formed in which they all would become stockholders. Schwartz testified that the organization of the company was never consummated "because of differences and demands of parties who put up the money," and that his own interest in the corporation was to have been a promotion interest. The evidence indicates most strongly that Schwartz and Rosenberg never obtained any substantial interest in the business, and never invested anything therein; and that Kleinberger and Greenberg never changed their status from that of creditors of Hollar. We think that the evidence was sufficient to justify the court in finding that the Rosenberg contract was in fact a contract with Hollar, and not with a partnership composed of Hollar and all or any of the other defendants.

[2] According to the value of the salt as found by the court, the judgment against Hollar should have been for the sum of \$11,500, unless the \$2,750 demand of Greenberg against the plaintiff had been by him assigned to Hollar. As we have seen, the court found that this \$2,750 was loaned by Greenberg to the plaintiff. Therefore it was not a payment by Hollar, nor a loan by him. There is no evidence of any assignment by Greenberg of his demand against the plaintiff. Hollar is not entitled to credit therefor. The finding that such assignment was made is not sustained by the evidence.

It should be noted also, that the reduction above noted in the amount of the judgment is not justified in the pleadings; that, in his amended answer, Greenberg did not claim the benefit of this credit; and that Hollar made the same omission in his answer. There being no issue, by way of counterclaim or otherwise, relating to this matter, there is no basis for allowance of the credit of \$2,750.

[3] Appellant contends that the court erred in permitting the defendants Rosenberg, Greenberg, and Kleinberger to file separate amended answers at the time of the trial. These three defendants had filed a joint answer, verified by the affidavit of Kleinberger, wherein they admitted that they were parties to the agreement of sale by the plaintiff of the said excavator, and that plaintiff shipped the excavator to them. By way of cross-complaint incorporated in the same instrument with said answer, these same facts were affirmed by these defendants. Shortly before the time of trial of the action, application was made to the court by Rosenberg to file a separate answer, and by Kleinberger and Greenberg together to answer apart from the other defendants. That ap-

plication was denied, but was renewed when the case was called for trial. It was stated to the court by counsel for the defendants, and not denied by the opposing counsel, that the former admission of fact had been made by inadvertence. The only objection then suggested on behalf of the plaintiff was that the plaintiff had not come into court prepared to prove facts which had been admitted in the pleadings on file. The court replied that if the plaintiff insisted upon this objection, a continuance would be granted at the cost of the defendants. The plaintiff declined a continuance, whereupon the judge stated that he would admit the evidence, and if the evidence would justify it, he would permit the answers to be amended accordingly. Thereupon the trial proceeded, and at the close thereof the court permitted the defendants to file the said separate amended answers. Appellant now insists that the court abused its discretion in permitting defendants to file these amended answers, and thereby deny the existence of facts which in their previous verified pleadings they had admitted and affirmed. It is not claimed that by reason of these amendments the plaintiff suffered any disadvantage in the presentation of the evidence, or that the evidence is any different from what it would have been if the issues newly suggested thereby had been raised by the original answer. We think that there was no abuse of discretion in the allowance of these amended pleadings.

We are not unmindful of the fact that it has been declared to be the rule that a party will not be permitted on the trial to amend by denying a fact admitted in the answer. *Bank of Woodland v. Heron*, 122 Cal. 107, 110, 54 Pac. 537. But this is not an absolute rule which must be applied without use of discretion. We only hold that in this case the discretionary power of the court has not been abused, even though it may be that the court would have been justified in making a contrary ruling.

[4] Finally, appellant contends that the court erred in refusing to grant a new trial upon the ground of newly discovered evidence. We have examined the affidavits presented to the court on the hearing of that motion. They relate to facts bearing upon the question of existence of a partnership between Hollar and some of the other defendants. Most of them relate to conditions existing subsequent to the date of the plaintiff's contract, and refer to facts which were known, or by the use of reasonable diligence might have been known, by the plaintiff at the time of the trial of this action. We think that the court was justified in denying the motion.

It is ordered that the judgment in favor of the defendants, other than the defendant X. H. Hollar, Hollar Rock Salt Company,

and Pacific Rock Salt Company be and the same hereby is affirmed. The judgment against the defendants X. H. Hollar, Hollar Rock Salt Company, and Pacific Rock Salt Company (the latter two being fictitious names used by X. H. Hollar in the transaction of business) is reversed, with the instruction that the superior court enter judgment against the said X. H. Hollar, Hollar Rock Salt Company, and Pacific Rock Salt Company in the sum of \$11,500, with interest computed as in the original judgment, together with costs.

We concur: SHAW, J.; JAMES, J.

(58 Cal. App. 197)

PEOPLE v. SPENCER. (Cr. 599.)

(District Court of Appeal, Third District, California. June 20, 1922. Hearing Denied by Supreme Court Aug. 17, 1922.)

1. Criminal law §563—Corpus delicti may be proved by facts connecting defendant with crime.

The corpus delicti may be proved by facts connecting the defendant with commission of the crime.

2. Homicide §228(1)—“Corpus delicti” defined.

The basis of the “corpus delicti” in homicide cases is the finding of the remains of a dead human body identified as the person charged to have been slain, with a showing that death was caused by criminal agency.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Corpus delicti.]

3. Criminal law §563—Not necessary to prove corpus delicti by direct or independent evidence.

It is not necessary that the corpus delicti be proved by direct and positive evidence, nor by evidence independent of that connecting the accused with perpetration of the crime.

4. Homicide §248—Evidence held to support conviction against defense of accidental drowning.

In a prosecution for murder, circumstantial evidence held to support a verdict of guilty, the defense being that deceased was accidentally drowned.

5. Criminal law §747—Conflict of evidence from inconsistencies of single witness is for jury.

The rule that conflict of evidence is for the jury to solve includes conflicts arising from inconsistencies in the testimony of a single witness.

6. Witnesses §380(5)—Party's right to impeach his own witness by showing inconsistent statements stated.

Code Civ. Proc. § 2049, providing that a party may contradict his witness by showing

inconsistent statements, is invocable only where the party is actually surprised by the testimony of the witness, and where such testimony is prejudicial to him, and he cannot resort to the statute for the sole purpose of getting before the jury statements of the witness made out of court which would otherwise be inadmissible as hearsay.

7. Witnesses §414(2)—Testimony cannot be bolstered by showing similar statements made prior to trial.

Testimony cannot be bolstered by showing witness' similar statements made prior to trial.

8. Criminal law §1186(4)—Admission of former statements held harmless where witness' testimony on trial warranted same conclusion.

In a prosecution for murder of a woman, in which a witness for the state testified that he heard a scream, but could not say whether it was that of a woman or a man, defendant held not harmed by admission of impeaching testimony that the witness, prior to trial, had stated that he heard “her” scream, in view of further testimony given on trial that a “light voice” produced the scream, as the jury could in either case infer that the scream proceeded from a woman, and, even if there was a slight variance between the statements it was not such as to work a miscarriage of justice contemplated by Const. art. 6, § 4½.

9. Criminal law §388—Experiments admissible where made under conditions substantially like those of original occurrence.

Experiments made to contradict witnesses are admissible where made under conditions substantially like those of the original occurrences, since it is impossible to exactly reproduce former circumstances; and the jury may make allowances for slight differences, which affect weight, but not competency.

Appeal from Superior Court, Lake County; M. S. Sayre, Judge.

John A. Spencer was convicted of murder in the first degree, and he appeals. Affirmed.

Sidney P. Robertson, of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

HART, J. Convicted of murder of the first degree, with the penalty fixed by the jury at imprisonment for life (Pen. Code, § 190), the defendant has appealed to this court from the judgment of conviction. The defendant did not move for a new trial.

The assault upon the verdict is predicated upon the following grounds, generally stated: First, that the evidence wholly failed to establish the corpus delicti; second, that hearsay evidence prejudicial to the rights of the accused was, over objection by the latter, admitted; third, that “a certain demonstration was carried out by the prosecuting officers during the trial” to the manifest detriment of the rights of the defendant; fourth, that the people were allowed to impeach one

of their own witnesses "without having first laid the foundation for the same."

The conviction of the defendant was obtained entirely by means of circumstantial evidence, and the circumstances brought before the jury for the purpose of bringing home to the defendant the commission of the alleged crime were multifarious. A consideration of the errors assigned by the defendant will require an extended examination and review of the evidence herein for the purpose of determining: First, whether the corpus delicti has been sufficiently shown; and, if so, second, whether, assuming that the other points urged as in impeachment of the validity of the result reached by the jury are sound as legal propositions, we are required to declare that a miscarriage of justice has followed from the errors thus assigned.

As above suggested, the evidence consisted of a concatenation of varying facts and circumstances which, it is vigorously claimed by the people, irresistibly led to the conclusion that the accused was guilty of the crime charged beyond all reasonable doubt, and therefore, in stating the facts and the circumstances adduced before the jury, we shall assume, as we are authorized to do, that the jury, having evidently accepted as verity the evidence by which they were shown, by their verdict found said facts and circumstances, or such of them as are indispensably essential to the support of the verdict, if the same be supportable at all, to be true.

The defendant, although an ordained minister of the gospel, was, for many years immediately prior to the date of the commission of the crime with which he was charged actively engaged in the business of a real estate dealer or broker in the city of Santa Rosa, this state. The person whose life he is alleged in the indictment to have taken was Mrs. Emma Spencer, the wife of the accused. It being alleged in the accusatory pleading that on the 26th day of July, 1921, in the county of Lake, he killed and murdered his said wife. The defendant owned a small tract of land situated and bordering upon what is known as Knocti Bay, an arm of Clear Lake, in the said county of Lake. On this land there was a cabin which he and the deceased had used for a number of years prior to the death of Mrs. Spencer as a summer home. This cabin was situated near a wharf, known as the "Holt & Gray" wharf, and also, at some time, as the "Jimmy Ford" wharf, but for convenience it will hereafter be referred to as the "Holt wharf." At this wharf the small boats owned by persons living on that side of the bay or lake, and which were used for pleasure, and perhaps business purposes, were customarily moored when not in use. A short distance from the Holt wharf there was an Indian camp, which, as we understand the record, was located on what is known as the "Wheeler Ranch." On prac-

tically the opposite side of Knocti Bay from the Spencer cabin and Holt wharf there resided a number of families, among whom were Mr. and Mrs. Robert Siddell. A wharf, known as the "Siddell" wharf, which was about five feet by one hundred and eighty feet in dimensions, was maintained in Knocti Bay on the Siddell side thereof. This wharf was situated a little less than 200 feet from the dwelling house of the Siddells, but the distance between the water line and the sleeping porch connected with the Siddell house was approximately 120 feet. A "well-beaten" path extended from the Siddell wharf to the Siddell residence. The approximate distance between the Holt wharf and the Siddell wharf was 2,500 feet.

The defendant was the owner of a small boat in which he and the deceased frequently made pleasure cruises on the lake, and in which they also now and then visited friends living on the opposite side of the bay from their home.

On the night of July 26, 1921, near the hour of half past 9 o'clock, the Siddells, who had retired for the night on their sleeping porch (the husband at approximately half past 8 and his wife at an hour later), were awakened by loud calls addressed to Mr. Siddell by some man whose identity was then unknown to the Siddells. Mrs. Siddell had hardly passed into sleep, or, as she described it, she was "just dozing," when she heard a man call twice in quick succession for her husband. She immediately awakened her husband, who was at the time in "a sound sleep," and told him that "some one wants you." Siddell, on thus being aroused from his sleep, asked in a loud voice who it was that wanted him, to which the defendant replied: "Siddell, Siddell, a rope! My wife is in the lake! This is Mr. Spencer calling." Both Siddell and his wife hastily arose from their bed and started toward the front door. They saw the defendant standing inside the house a short distance from the front door near where the piano stood in the front room, it being their custom to leave the door of the house open at night during the summer season. Spencer, who was drenched with water, then started hastily toward the Siddell wharf, Mr. and Mrs. Siddell, the latter with a lighted lantern, rapidly following. Mrs. Siddell, as they were proceeding towards the wharf, passed the lantern to her husband, and then ran to the home of Mr. and Mrs. Renfro, near neighbors, and told them of the occurrence. Mr. Renfro immediately rushed to the wharf, followed by his wife and Mrs. Siddell.

The defendant reached the wharf a little ahead of Mr. Siddell, and, just as the latter got there, the defendant, pointing to the water near where his boat was fastened to the wharf, exclaimed: "There she is now!" Siddell then observed the body, face downward, floating on the surface of the water between the defendant's boat and the wharf, the boat

lying almost at a right angle with the wharf. There was considerable of the body exposed above the surface of the water, and which, with the aid of the lantern, was plainly visible. The deceased had no hat on her head, and her hair was "down or torn loose." The defendant jumped into the boat, and, reaching out, got hold of the body and steered it towards and near enough to the wharf to enable Siddell, in a kneeling position, to get hold of it and draw it from the water to the wharf. While all this was going on the defendant exhibited no signs of emotion. Indeed, his manner was rather that of complacency of mind than an indicium of excitement or sorrow or grief, as he gazed into the face of the deceased and remarked to Siddell: "She does not look as though she suffered any."

The body having been brought to the wharf, although it must have been manifest from the fact that the face and part of the head were submerged that life had already passed out, efforts at resuscitation were vigorously made by Mr. Siddell, assisted by the defendant. Siddell told the defendant to place "his hands under and lift at the shoulder." "Lift her up; bend her up," Siddell instructed the defendant, and the latter did as so requested, Siddell, at the same time, placing his hand under the forehead, and holding the head above the floor of the wharf. The result was that a large quantity of water came out of the mouth of Mrs. Spencer. After being satisfied that all the water that could be expelled had thus been removed from the body, Mrs. Spencer was turned upon her back and an effort made to superinduce respiration by working the arms back and forth. But all efforts at resuscitation were futile. It was obvious that life was extinct, as undoubtedly was the fact before the body was removed from the water. There were no visible marks of violence upon the face or head of the deceased, and the body, according to one of the parties present, was still a trifle warm. The defendant, after the unavailing attempt at resuscitation, knelt down, and, looking into the immobile countenance of his dead wife, and without the slightest betrayal of excitement or perturbation of mind or heart, remarked to Mr. Siddell: "It is a peaceful face, Bob." Siddell asked the defendant: "Why, man, why didn't you call? Why didn't you holler (halloo)? I would have been there instantly"—to which the defendant replied: "My only thought was I must get her myself."

The body of the deceased was removed to the home of the Renfros, and a doctor and the coroner immediately telephoned and apprised of the disaster.

The story told by the defendant to the Siddells and the Renfros as to how he came to essay a visit to the Siddells at that hour of the night, and the circumstance of his wife falling into the lake, was in substance

this: That the deceased was making for herself a khaki skirt; that she required some thread which would match the material from which the skirt was to be made; that, knowing that Mrs. Siddell was having some dentistry work done at Lakeport, to which place she made trips two or three times a week for that purpose, usually starting very early in the morning, and believing that she intended going to Lakeport the following morning, she (deceased) persuaded the defendant, against his wish or desire, to take her in their boat to the Siddells on the night of the unfortunate occurrence, so that she could request Mrs. Siddell to purchase at Lakeport the thread needed by her, the deceased insisting, while importuning the defendant to take her to the Siddells, that Mrs. Siddell would probably leave her home for Lakeport the following morning before the deceased could get to the Siddell residence. The defendant and the deceased left the Holt wharf in their boat, so the defendant explained, at some time prior to 9 o'clock. On reaching the Siddell wharf the defendant, so he continued to state, stepped out of the boat and onto the wharf, and was in the act of fastening the "painter" or the rope attached to the bow of the boat to the wharf when he heard a "splash." On looking into the boat, and in the direction of where his wife sat while they were going to the Siddell wharf, he discovered that she was not in the boat; that (so he expressed his belief) she must have made an attempt to leave the boat without his assistance, made a misstep, lost her balance, and so fell into the water. He thereupon, so he stated, immediately dived into the lake in an attempt to rescue her, and repeated the act three different times, but without avail. It was then that he hastened to the home of the Siddells, gave the alarm, and called for assistance. At no time on this occasion did the defendant appear to be grieved over the loss of his wife. His manner, so far as external appearances disclosed, was no different from what it usually was.

The coroner, with a jury of six persons, held an inquest into the cause of the death of the deceased the day following. At this hearing Robert Siddell and the defendant were the only witnesses examined, and the verdict was that Mrs. Spencer had come to her death by "accidental drowning." During the progress of the inquest some person suggested that the deceased might have been suffering from an affection of the heart, which either directly caused her death or caused her to suffer a sudden fainting spell or an attack of dizziness just as she was in the act of leaving the boat, and thus she fell into the lake. The defendant was thereupon asked if his wife was afflicted with heart trouble, to which he replied that prior and down to the time of her death she had been afflicted with "serious heart trouble." In this connection it should

be stated that on the night Mrs. Spencer lost her life, and at the time her body was taken from the water, as above described, the defendant made no suggestion that the deceased had suffered from a heart affection of any character.

It appears that it was only a few days after the deceased had been laid away in the grave that there arose in the minds of the public authorities of Lake county a feeling of suspicion that the death of Mrs. Spencer had not been truly accounted for or explained by the defendant. There were other significant circumstances than those immediately attending the death of Mrs. Spencer and above recited which imparted additional strength to the suspicion that the death of the deceased was neither accidental nor brought about by a natural cause. The circumstance that the body of the deceased remained on the surface of the water after, as defendant explained, she had fallen into the bay, appeared to have taken on a more serious aspect after the remains of the deceased had been deposited in the grave than it seemed to bear in the minds of the authorities on the night Mrs. Spencer met her death, and for a day or two succeeding that deplorable event. Upon reflection it occurred to the authorities, probably after consultation with physicians and other persons having experience in cases of death by drowning, some of whom, as will presently be seen, so testified at the trial, that the body of a human being meeting death in that manner in a body of fresh water would invariably sink beneath the surface and remain entirely submerged from 5 to 6 or perhaps from 8 to 10 days before returning to the surface, but that a dead body thrown or falling into a body of water would remain on the surface. Then it developed that the defendant, on the day succeeding that of the death of his wife, addressed a letter to a friend, a Mrs. Charmley, of Santa Rosa, and on the 29th day of July, 1921, addressed a letter to Rev. Dr. Ingram, also of Santa Rosa, in each of which he apprised the addressee of the death of Mrs. Spencer, and in the first-mentioned of which he stated, among other things, that—

"While visiting an old friend, Mrs. Spencer, in stepping from the boat to the wharf, lost her footing and fell in the Lake. I at once dived overboard; the water was very deep, and I dove down four times. I could not find her. Our kind host and wife, together with other friends that gathered on the wharf, assisted in the rescue. It was not until some moments later that we saw her body floating on the far side of the boat—the very place that we had not thought to look. * * * Hard as this misfortune is to me, for I had, in common with herself, many nice plans for the future, yet I am grateful to think that it took place in the presence of witnesses, and at the public wharf. The evil tongues that have done

so much mischief in the past can find nothing here."

In the letter to Dr. Ingram he stated:

That the "accident" occurred while they were visiting friends, and were guests "at the beautiful home of Mr. and Mrs. Robert Siddell, and it was at his private wharf where the occurrence took place"; that, assisted by said friends and others, an effort was made to revive Mrs. Spencer, and that, in thus working at resuscitation, "water came from her lungs and stomach in streams, and yet, from the calm and cheerful expression of countenance that she wears in death, I and our friends are inclined to think that she suffered no pain—that the suddenness of the thing might have gone to her weak heart. * * * The verdict of the coroner's jury is 'accidental drowning.' If such a misfortune had to be, I have at least cause to be thankful that it took place where it did, at the home of a prominent and much respected family, with they and other friends present. This I believe to be a fortunate circumstance, in view of the evil tongue and its uses of that woman who seemed to make it an object in her life to do me and my wife no good."

It was further learned that, at approximately the hour of half past 8 o'clock on the night of the death of Mrs. Spencer, Hudson Jack, an Indian boy of the age of 18 years, who was then at the Indian camp above referred to, which, as seen, was located not far distant from the Holt wharf, just after he had retired for the night, heard a scream from a human voice, the sound of which proceeded from the direction of said wharf. This lad could not say, so he protested at the trial, whether the scream was that of a male or a female, but did say that it was a light voice, meaning, as the jury could reasonably have inferred, that it was not the coarse voice characteristic of a male, but the voice of a female.

Being in possession of the above circumstances, all of which were later brought out at the trial, the authorities felt justified in indulging the suspicion that the death of the deceased had been brought about by some foul means. At any rate, positive dissatisfaction with the finding of the coroner's jury that the death of Mrs. Spencer was caused by "accidental drowning" followed, and a thorough and an immediate investigation of the case was determined upon. To that end, the first step taken was the exhumation of the body and the holding of an autoptical examination. This proceeding took place on the 13th day of August, 1921, 16 days after the burial of the body, the autopsy having been made by Dr. Craig of Lakeport. Nothing of importance was developed as the result of this examination, except that thus it was discovered that the deceased had suffered from what the doctors described as "involvement of the mitral valve" of the heart, or, in less technical language, the thickening of said valve, an affection which the autoptical phy-

sician declared, as did another doctor at the trial, was not of a serious nature. Indeed, the doctors declared that such heart affliction is common, and that seldom, if ever, does death result from that cause alone.

The facts and circumstances above narrated, including the commonly known fact that the body of a person drowned in a body of fresh water of any considerable depth (the bay at Siddell's wharf was 10 to 12 feet deep) would ordinarily sink below the surface, while a dead body thrown into such a body of water would remain on the surface, had the effect of transmuting suspicion into a conviction that the deceased had been deprived of her life by the act of her husband, and of giving birth to the theory that death in some manner had been produced at or near Holt wharf, and the body conveyed in the boat by the defendant to Siddell wharf, and there by him thrown into the bay. Acting upon this theory, the officers of the law turned their attention to Holt wharf, near which is situated the Spencer home, and from which proceeded the sound of the scream heard by the Indian boy.

By her more intimate friends it was known that the deceased always wore a hat and a certain shawl when visiting among her friends or sailing with her husband on the lake. As seen, when her body was first observed floating in the bay, and then taken from the water, the deceased wore neither a hat nor the shawl referred to. Having gone out upon the bay in the nighttime, the circumstance that she wore no hat or shawl on that occasion was so unusual that it excited the particular attention and comment of those who were familiar with her custom in that respect. Following out the theory as to the place and manner of Mrs. Spencer's death, upon which the officers were then working, it was conceived that the deceased, at the time of her death, probably wore upon her head a hat, and perhaps the shawl she was usually seen to wear about her shoulders, and the officers thereupon decided to and did cause the bay to be dragged in near proximity to the Holt wharf. This investigation was conducted in the month of August, 1921, and the result thereof was that a shawl was taken from the bottom of the bay at the point mentioned. When the grappling hook clutched the shawl and an effort made to draw the hook to the surface some resistance to the pull was experienced—such resistance as might reasonably be supposed to be caused either by the article attached to the hook being weighted down or being caught in some obstruction at the bottom of the bay. The resistance was overcome, however, before the article, or, as it proved to be, the shawl, was brought to the surface, it having been unloosened by the manipulation of the hook from the rocks or other obstruction at the bottom of the bay by which it was held down or with which it had become entangled. The shawl which the

deceased had often been seen to wear wrapped about her shoulders and head was an old one, it having been given to her, so she stated to her friends, by her mother. The shawl was red, with white threads running through it, but the shawl taken from the bay, as was plainly manifest from an inspection thereof, had faded, a change which had undoubtedly been wrought by its having been in the water for several weeks; yet the women who knew the shawl worn in her lifetime by Mrs. Spencer appeared to be quite positive at the trial (and probably so declared to the officers prior to the trial and while the investigation was on) that the shawl taken from the bay bore in all respects a pronounced similarity to the shawl owned and worn by the deceased.

The further discovery was made in the course of the preliminary investigation that in the months of May and June, 1921, the deceased, being the owner of certain real property, and interested in certain promissory notes and mortgages, executed to the defendant her deed to the real property and an assignment of her interest in the promissory notes and mortgages referred to, the first instrument having been executed on the 28th day of May and the other on the 4th day of June, 1921. It was also shown that the defendant at about the same time executed a deed conveying his interest in certain real property to the deceased. These documents were delivered into the possession of the real estate firm of Johnson & Temple at San Jose, with instructions that the instruments should be delivered to the survivor upon the death of the other, and their possession was so maintained until some time in the month of August, 1921, when the defendant appeared at the office of said Johnson & Temple and demanded and received the same.

The investigation now reached a stage where an inquiry into the domestic relations existing between the defendant and the deceased and the personal conduct of the former with respect to his marital obligations was involved. This phase of the investigation brought forth, as will be observed, disclosures of potent significance when considered with the other facts and circumstances already within the knowledge of the officers.

As seen, the defendant was for a considerable period prior to the death of Mrs. Spencer engaged in the real estate business at Santa Rosa, where he with Mrs. Spencer also resided. The defendant was the owner of improved property in a suburban part of the city of San Jose, which was at the time of the death of Mrs. Spencer, and had been for some months under lease to and occupied by a Mr. W. A. Miller and his wife.

It was discovered that for a number of months before the death of Mrs. Spencer the relations between the defendant and his wife were of the most unhappy character. It is not necessary to give herein the details of the violent quarrels and disagreements occurring

between them from time to time. It is enough to refer to them in a general way, as the circumstances thereof were minutely detailed at the trial by near neighbors who were in the immediate presence of the couple when the controversies referred to occurred, or who overheard them. Spencer had often been heard to abuse his wife by addressing to her opprobrious epithets of the most indecent character, and expressing himself when quarreling with her in the most offensive profanity. On one occasion he was heard to call his wife "a G—d d—n b—h," and, when asked why he thus addressed his wife, replied that she had accused him of maintaining illicit relations with a certain married woman in San Jose, the initial letter of whose married surname is D, as we shall, out of deference to her family, hereinafter refer to said married woman. On the same occasion Mrs. Spencer, during the quarrel then going on between them, excitedly stepped from his real estate office, where the trouble occurred, into an adjoining room, and likewise exclaimed to the lady occupying the latter room within the hearing of the defendant, "that man in the next room is killing me!" Mrs. Spencer was crying at the time, and described as being in a highly nervous condition. There were many other occasions on which the couple were heard in violent quarrels, during the course of which the defendant used abusive language towards his wife. During one of these outbursts the deceased, in effect, declared to the defendant that she knew enough about him to send him to prison.

It was learned and shown that the genesis of the dissensions and violent controversies which sporadically occurred between Spencer and his wife was in a suspicion entertained by Mrs. Spencer, and founded upon certain circumstances coming to her knowledge, that her husband was maintaining a liaison with the Mrs. D. above referred to. As to this, it transpired that Spencer had leased an apartment to Mrs. D. in an apartment house in Santa Rosa, and that for several months he paid much attention to that party, and was often seen to visit her apartment both in the day and in the night time. Mrs. Spencer, it was shown, was taken ill in the month of December, 1920, and the defendant, having occasion at that time to visit San Jose, requested a neighbor (a Mrs. Palmer) to take Mrs. Spencer to her home, and there give her the attention she required until his return a few days hence. It seems, though, that Mrs. Spencer, still ill, remained at Mrs. Palmer's, and was under her care from the 7th day of December, 1920, until the latter part of January, 1921, during which period of time Spencer would visit her twice a day—once early in the morning and once early in the evening, remaining each time from 5 to 10 minutes, and, particularly

in the evenings, excusing his brief visits upon the pretext that "he had another important appointment." It was during this time that Spencer was seen to visit the apartment of Mrs. D. For about two months after Mrs. D. took the apartment referred to, Mrs. Spencer on several different occasions accompanied her husband in his visits to Mrs. D., but after the expiration of that period Mrs. Spencer ceased such visits and, having evidently reached the conclusion that her husband had conceived an infatuation for that party, began interposing protests against his further attentions to the lady, and on one occasion was heard to beseech him with much fervor to cease his attentions to her. Spencer, however, continued to visit Mrs. D. as regularly as above stated, often remaining with her from two to three hours. "As time passed on," said the lady occupying the apartment adjoining that of Mrs. D., "up to the time Mrs. D. left the apartment Spencer's visits to the latter became more frequent."

A letter in an envelope addressed to the Mrs. D. at the apartment referred to above, and postmarked "Santa Rosa, Cal., Dec. 14, 1920, 7:30 A. M.," and in the handwriting of the defendant, according to the positive affirmation of a former associate of the latter in business, who was familiar with the defendant's handwriting, was found, and said letter was introduced in evidence at the trial. This letter was signed "J." (the defendant's name is John A. Spencer), and was written while Mrs. Spencer, still an invalid, was stopping at the home of Mrs. Palmer. Here we pause to suggest in this connection that, assuming, as we may, that the jury, considering the letter by the light of all the other facts and circumstances to which we have above referred, and those which are to follow, and which were brought to their attention, drew the inference, as well they might, that the defendant was its author, the letter constitutes a cogent circumstance among those introduced upon the question of motive, and motive, it may be added, while of no importance where the commission of a crime is directly brought home to an accused, is peculiarly of significant consequence in this case, in which the crime charged, if sufficiently proved at all, was established by circumstantial evidence pure and simple. The letter is here presented:

"11:30 P. M.

My Only Sweetheart: I am writing a late letter to you to-night, darling, for I have just returned from Mrs. P. and find Mrs. S. very poorly. Mrs. P. says it will not be best for you to come to see her for a few days, as her poor weak mind has been so poisoned by falsehood that she does not know who are her best friends. Of course, I know that Mrs P. has had her share in this, in spite of her statements to the contrary, and I accused her of

to-night, love, but dearest, in spite of this or anything else, there will be no change in our love. We will see each other and confess our love to each other, just the same, darling. My love, do not come before 7:30 to-morrow night, as I will have to wait, have to visit Mrs. S. until almost that time, dear, I will have the room warm for you, and we will have a lovely hour together, sweet love. Do not tell any one, dearest, that Mrs. S. is this way towards you, and they will not know. She will change in time. Your long letter did me much good, darling, and I will count the minutes 'till to-morrow evening. You can tell D. that you are going to Mrs. P. as you intended. I am a little anxious about the letter you gave Mrs. C. to mail for you. It will be"—several dashes—"if she read it. We won't never give a letter or write, dear, to any other again. They may mean our great loss to each other. Good night, my very own. Forever, J."

The "D." referred to in the letter as the person to whom it was therein suggested Mrs. D. could tell that she "was going to Mrs. P. as you intended" the jury could have well inferred was the husband of Mrs. D.

Mrs. D. occupied the apartment mentioned from October, 1920, until March, 1921, and to the last the defendant kept up his practice of visiting her as indicated above. As the attention paid to Mrs. D. by the defendant became the more intensive, dissensions between the latter and his wife became the more aggravated, and developed into a subject of common knowledge and like discussion among their immediate friends, and it is fairly and reasonably inferable, from the whole evidence upon this phase of the case, that the undue attentions of Spencer to Mrs. D. soon assumed the form and proportions of an ugly scandal—so much so, indeed, as to have prompted Mrs. D. to remove from the apartment occupied by her, and in fact abandon Santa Rosa as her place of residence. The last of February, 1921, Mrs. D., assisted by the defendant, packed her furniture and left said apartment, and she is next found in the city of San Jose, where she and the defendant, as husband and wife, and under the pseudonym of "Mr. and Mrs. Barber," secured an apartment first from a Mrs. Burchfiel, at 21 East Santa Clara street, which together they occupied from the 1st of March, 1921, until about the 12th day of May, 1921, when they removed therefrom and took an apartment in an apartment house conducted by Mr. and Mrs. Leroy A. Rodgers, at 128 North Tenth street, San Jose. They there also represented themselves as husband and wife, and as "Mr. and Mrs. Barber." Mrs. D., while living in San Jose under the circumstances as indicated, always, in speaking of Spencer to her landladies, referred to him as her husband. The defendant represented to these apartment house owners that he was a traveling salesman for a "book concern" and was therefore compelled

to be away from home a good part of the time. Thus he accounted for his absence "from his wife" (Mrs. D.) for several days or a week at different intervals of time. Mrs. Burchfiel and the Rodgers testified that, when the defendant was in San Jose, they saw him at the apartment with Mrs. D., and would observe him in the said apartment in the evenings and leaving there early in the mornings. There was but one bed in each of said apartments.

On either the 2d or the 3d day of June, 1921, having just returned from one of his "commercial trips," the defendant stepped into the apartment of the Rodgers and stated that he desired to pay his rent in advance, adding that, on the following day, he intended leaving "on a mission and a commission, and would probably be gone a month or a month and a half and maybe longer." The defendant then returned to Santa Rosa, leaving Mrs. D. in occupation of their apartment in the Rodgers' apartment house in San Jose, and, shortly thereafter, with the deceased, went to their summer home on Knoccti Bay.

On the 29th day of July, 1921—three days after the death of his wife—the defendant returned to San Jose and to the apartment at the Rodgers house, Mrs. D. being still in said apartment. He arrived at the apartment near the hour of 5 o'clock p. m., and at or near 8 o'clock of that evening he and Mrs. D. were overheard by Mr. and Mrs. Rodgers laughing heartily and joking together in their apartment.

Mr. and Mrs. W. A. Miller were tenants in possession of the premises owned by the defendant in the city of San Jose. Approximately a week subsequently to the death of Mrs. Spencer the defendant made his appearance at his San Jose place, and there saw Mr. and Mrs. Miller. "He came to the door," testified Mrs. Miller, "very smiling, and apparently very happy, and I could hardly believe that it was he whose wife had passed away. * * * I questioned him, 'Is it possible that it is you whose wife has recently been drowned?' He replied; 'It certainly was,' and asked Mrs. Miller "how she found it out." Mrs. Miller, having in her possession a Santa Rosa newspaper which contained an account of the "drowning," gave the article to the defendant, and, on reading it, he declared that the account so given was incorrect. He then proceeded to explain that he and his wife had been on a picnic with several friends, some of whom, at the conclusion of the picnic, preceded them to their side of the bay, others remained on the other side, and still others on the lake in their boats; that, just as they had reached the Holt wharf, on their side of the bay, and he was in the act of fastening the boat, Mrs. Spencer, who had been laughingly waving her hands and pass-

ing remarks to their friends standing on both sides of the bay, in some manner suddenly fell into the water; that he dived four times for her; that friends immediately came to his assistance, and that, while he stood greatly horrified and appalled over the accident, some one of his friends saw her body come to the surface from under the boat, and took the body from the bay, and placed it upon the wharf; that vigorous but futile efforts were made to resuscitate her. To W. A. Miller, husband of the preceding witness, the defendant told substantially the same story, positively stating to him, however, that the "drowning" occurred in the daytime, in the presence and within the sight of some of his "dearest friends." Miller suggested to the defendant that it was very peculiar that the body of his wife did not sink and remain submerged, but floated about on the surface of the lake "and he (defendant) didn't seem to want to say much after that." Miller further testified that, on an occasion prior to the 26th day of July, 1921, the defendant stated to him that his (defendant's) wife "was quite a burden to him" (defendant).

On the 23d day of August, 1921, Sheriff B. F. Shaul, of Lake county, accompanied by District Attorney Churchill of said county, arrived in San Jose, where the defendant was then stopping, and placed the latter under arrest upon a warrant charging him with the crime of murder. On the way from San Jose to Lakeport, by way of San Francisco, the district attorney held several conversations with the defendant. In one of these, being asked by the district attorney as to what had become of the shawl his wife was often observed to wear by her female friends, the defendant positively denied that she ever owned a shawl. Later, however, after the district attorney told him that the bay near Holt wharf was being dragged, he stated that he did recall that his wife had a red shawl, with white threads running through it, but that, when out fishing on the lake near Holt wharf one day, the wind blew the shawl and the hat she was then wearing from her and into the bay, and that the hat and shawl were never recovered. Arriving at the city hall, in San Francisco, where the defendant was temporarily placed preparatory to taking the boat for Sausalito and thence by train and other conveyances to Lakeport, the defendant was further questioned about the death of Mrs. Spencer, and after this interview was ended he called the district attorney aside, and said to him: "Mr. Churchill, I would like to see you privately a moment. I have something I would like to take up with you"—to which Churchill answered: "All right, Mr. Spencer; sometime—we will have plenty of time to talk about it." Subsequently the sheriff, with Spencer, and also accompanied by the dis-

trict attorney and the latter's son, took the Sausalito boat at San Francisco, on their way to Lakeport. The district attorney and his son took a seat on the lower deck of the ferry boat near the door at the front end of the boat. The sheriff and the defendant stepped outside at the front end of the boat, lower deck, and stood for a while in conversation, which the defendant started by asking the sheriff questions as to the legal procedure according to which the charge against him would be investigated by the authorities. The sheriff explained that a preliminary hearing could either be had before a magistrate, in which case, if the evidence warranted it, he would probably be held for trial in the superior court, or the charge could be inquired into by the county grand jury, in which case, if there was evidence to justify it, and an indictment could and certainly would be found charging him with murder. The sheriff further stated to him that he did not know which course would be taken up in his case—that it would largely depend upon the district attorney's judgment. The defendant then asked: "Who has the final say whether I shall be dismissed or not?" The sheriff replied: "Well, the magistrate always has the say, but he always acts upon the suggestion of the district attorney, so practically it is up to the district attorney; or," continued the sheriff, referring to the contingency that the matter might be taken before the grand jury instead of a magistrate, "of course, it would practically be the same proposition, as the grand jury would look to him (the district attorney) to produce the evidence." The defendant, thereupon asked the sheriff what salary the district attorney received and the reply was that the district attorney's salary in Lake county was \$1,500 per annum. "That is not enough," retorted the defendant. The latter then or immediately left the sheriff, and walked into the boat and took a seat by the side of the district attorney. He asked that officer whether or not he had interviewed all the witnesses; asked who would have the management of the case; whether District Attorney Hoyle, of Sonoma county, would be called in to assist in the prosecution. The district attorney assured the defendant that he had not interviewed all the witnesses; that he would perhaps alone handle the case, and that Hoyle would not be asked to assist him in the prosecution. This conversation then followed:

Defendant: "Upon your investigation, is it final, is your judgment final?"

Churchill: "Mr. Spencer, as a rule, when the district attorney goes into a case, and is satisfied that the evidence would not warrant a conviction, why, it would not be taken up by any other authorities, although the grand jury could take up the matter and investigate it regardless of what the district attorney would advise; but as a rule it is final."

No further conversation along this line was had until after the party boarded the train at Sausalito and were on their way to Santa Rosa. On the train the district attorney took a seat with the defendant. The latter immediately introduced the following conversation:

"Mr. Shaul (referring to the sheriff), is a fine gentleman; he has treated me nicely. Do you think it would be all right to hand him \$15 or \$20?" Churchill: "You would have to take that up with him, Mr. Spencer." Defendant: "Back in Ohio (or Iowa, the district attorney could not recall with certainty which), I know of a case where the district attorney was given \$200 for not prosecuting a case. Do you think that would be a proper thing to do?" Churchill: "It depends on the man, Mr. Spencer." Defendant: "Now, you must understand that I was the defendant in that action."

During this conversation, so testified Churchill, the defendant grew "as white as paper in the face, and panted like a running dog." The defendant, however, proceeding with the conversation, began to ply the officer with questions concerning the latter's financial condition, the district attorney finally telling him that he was poor, that there was a mortgage on his house, and that it was difficult for him to live on his salary. The defendant then asked the prosecutor if he would like to live on Knocti Bay, to which Churchill replied in the affirmative, saying that he had always wished to own a home on that part of the lake. The defendant then stated to the officer that he (defendant) owned 113 feet of land bordering on the bay, and that 50 feet were enough for his (the district attorney's) purposes, "and you can have that, Mr. Churchill." The defendant went on to say that by "going in together" he and the officer could buy lumber for building houses on the property on Knocti Bay much cheaper than it could otherwise be purchased for, adding:

"You needn't be out anything only for a man to help you lay the heavier lumber."

The proposition of the defendant to remunerate the district attorney on condition that he would cease the prosecution of the case, or, in plain language, the proposition to bribe the district attorney, was again taken up after the defendant had been placed in the county jail at Lakeport. The district attorney had called to see the defendant in response to a message carried from the defendant to that officer by the sheriff that defendant desired to see him. Upon entering the jail and into conversation with the defendant, the latter proposed to convey to the district attorney 50 feet of the 113-foot lot he owned on Knocti Bay, and in addition pay him \$200 in cash, upon condition that the district attorney would not prosecute the case. The district attorney suggested that

if the defendant conveyed said lot to him (district attorney) it would readily become known to the public, but the defendant stated that he could have the deed acknowledged in San Jose and that he would pay the district attorney the \$200 in greenbacks. A few days after this conversation, under an understanding between the district attorney and the sheriff, the latter officer took the defendant out for a ride in an automobile. While they were out on this trip a dictagraph was installed in the jail and connected with the sheriff's office and on the next day the district attorney again interviewed the defendant and caused him to renew his bribery proposition. While this conversation was going on the sheriff of Sonoma county and the sheriff of Lake county were at the end of the dictagraph in the sheriff's office, and heard a considerable portion of said conversation. They corroborated the district attorney in many vital particulars relative to the bribery proposition. It seems that, after this conversation had been concluded, and the district attorney had left the jail, the defendant, by some means, discovered the dictagraph in the stove pipe, near which the chairs stood on which the district attorney and the defendant sat while they were engaged in conversation, and on the following day, when the district attorney again called at the jail and saw the defendant, the latter told him of having discovered the dictagraph, and exclaimed:

"My God, man, don't you know they had a dictaphone in on us here; it has been here ever since I have been here! Didn't you know they heard what was said last night! * * * My God, didn't you know that was in here!"

The district attorney replied that he knew nothing of the existence of a dictagraph in the jail, and asked what it looked like, whereupon the defendant went to the stove pipe in which the instrument had been placed, took it out, and put it back face down. After some further conversation the district attorney asked defendant if he was not afraid to proceed with the matter of the proposed bribe "with this dictaphone down in there," to which the defendant replied: "No, it takes a direct wave to operate that thing. Let us move our chairs over here"—and thereupon the chairs were moved some distance from the stove pipe. The defendant then repeated his proposition to bribe the district attorney. The conversation on this occasion was thus concluded:

Question by Mr. Churchill: "Mr. Spencer, if I conclude to prosecute this case, what do you expect to be done with these moneys and this deed?" By defendant: "Why, what would you expect?" Churchill: "I would expect the money to be returned." Defendant: "Of course that would be the right thing, wouldn't it? Now, of course, Mr. Churchill, you know that this is not a bribe."

In addition to the facts and circumstances embraced in the foregoing statement, there was other significant testimony presented at the trial, some of which went to the impeachment of certain of the extrajudicial statements of the defendant. Doctors Yates and Bonar testified that they had professionally treated the deceased—the one on the 11th and 15th of February, 1921, and the other in the month of May, 1921—and that they had found, upon examination, that her lungs, heart, and kidneys were at those times perfectly normal.

Mrs. Laura Taylor, a neighbor of the Spencers on Knocti Bay, and who had had several years' experience as a professional seamstress, testified that a few days prior to the death of Mrs. Spencer the latter came to her as she was sitting in her car with her husband preparatory to going to Lakeport, and, handing to her a sample of a khaki skirt which the deceased was then making, and also a 10 cent piece, asked her to purchase for her (the deceased) a spool of thread which would match the skirt. The defendant accompanied the Taylors to Lakeport that morning, and on arriving at that place Mrs. Taylor went into a store and purchased thread which she said perfectly matched the skirt of which she had in her possession the sample given her by Mrs. Spencer, and for which she paid 5 cents, receiving 5 cents in change. She delivered the thread, together with the 5 cent piece, to Spencer and requested him to deliver them to his wife. At the trial the khaki skirt was exhibited to Mrs. Taylor, and upon an inspection of it she testified that the material was the same as the sample which Mrs. Spencer had given her, and that the thread used in making the skirt was the same as that she purchased for Mrs. Spencer on the occasion referred to.

As to the circumstance of the body of the deceased floating on the surface of the water, the testimony of Dr. Bonar, who had made a special study of cases of drowning, was that invariably, unless prevented by some external physical cause, the body of a drowned person would immediately sink to the bottom of the water in which the drowning took place. He stated, however, that, in the case of a woman entirely dressed, as was true in the present case, the buoyancy following from air getting underneath her clothing might, and probably would, cause the body to float on the water before sinking for possibly a period of half an hour. "It requires very little to buoy a body in water," he added. He further stated that a dead body thrown into water would not sink, and that this would be generally true even if the person had died from drowning and the body again put into the water. He was asked if a drowning person would not invariably take water into the lungs, to which question he replied in the negative, stating that out of 247 cases of

drowning occurring along the Atlantic Coast, and in which autopsies had been performed by the public health service, in only 48 per cent. thereof was there water found in the lungs. He stated, however, that in cases of drowning water would always be taken into the stomach. He stated that if the deceased had died from heart failure before her body went into the bay water would not have entered the stomach or lungs or passed out of her mouth after the body was retrieved from the bay. Asked as to approximately the length of time a body would retain its warmth after the death thereof, the doctor stated, considering all the conditions in this case as they were described by the witnesses, that the body would probably retain a temperature from three to four hours. And, lastly, basing his judgment upon the testimony as to the conditions under which the body was found and taken from the bay, the doctor expressed the opinion that the deceased was dead before the body reached the water at the Siddell wharf.

The defendant himself did not take the witness stand. A few witnesses, however, were introduced by him. This testimony, though, with the single exception, perhaps, of that of Dr. W. H. Fearn, of Lakeport, involved no material contradiction or variance from that produced by the people. It was stipulated that a number of Indians at the Indian camp on the night of the death of Mrs. Spencer would testify, and that such testimony might be deemed to be before the jury, that they heard no scream from a human voice, the sound of which came from the direction of the Holt wharf at the time mentioned by Hudson Jack, but that testimony is merely negligible, and it is obvious that it could have very slight, if any, tendency to disprove or impeach the truthfulness of the Indian boy's testimony.

Dr. Fearn testified that the body of a drowned person, if taken from the water immediately, or within a few minutes after the drowning occurred, and then again immediately put back into the water, would immediately sink. This, the doctor continued, was due to the fact that the chest of a person dying from drowning becomes "contracted on account of the terrific struggle to get air, the spasm of the epiglottis set up by water entering the throat, so a person drowning has no air, or very little air, in the lungs. That is the reason," continued the doctor, "that the body usually sinks." He did state, though, that a person, clothed as deceased was at the time of her death (with waist, skirt, underclothes, shoes, and a man's coat), where the surface of the clothing was wet—that is, not soaking, but merely damp—the air caught in such clothing would be held there as readily and for as long a time as it would be if the clothing were perfectly dry, and that the body would be likely to remain

floating on the surface for from 5 to 10 minutes.

While, as will be noted, there is apparently some conflict between the testimony of Dr. Bonar and that given by Dr. Fearn, viewing said testimony from the standpoint of the theory maintained by the people that the defendant took the life of the deceased by drowning her, and then, subsequently, again throwing her body into the bay at the Siddell wharf, such conflict involved a matter which it was entirely for the jury to solve and determine.

We have now presented herein rather an elaborate synoptical statement of the facts and circumstances from which the jury seemed to have felt justified in forming the conclusion that the defendant was guilty of the crime as charged against him, also referring to some of the testimony introduced on behalf of the defendant. This extended statement of the evidence seemed to us to be justified, since, as stated, and as a reading of the statement will readily show, the essential support of the theory of guilt upon which the people proceeded was necessarily dependent upon evidence of manifold and diversified circumstances. There are many minor circumstances to which it was thought that a reference herein was unnecessary, those comprehended within the above statement being the salient or vitally important circumstances and facts brought out at the trial.

[1] 1. The first question submitted by this appeal is: Was the corpus delicti proved? And this is the all-important question, for, obviously, failure to establish the corpus delicti is failure to prove that a crime has been committed. The solution of the problem thus propounded must rest upon the determination of the question whether the evidence, of which an extended and accurate conspectus has been reproduced herein, is such, when reasonably interpreted as a whole, as to afford a rational and just conclusion by intelligent minds, unfettered by passion or prejudice, that the deceased came to her death by violent means; and this question may best be answered by a reply to the following: Can a court of review justly declare, as a matter of law, after carefully considering the evidence exposed by this record, that the jury could not have been justly persuaded by said evidence, to a moral certainty, and beyond all reasonable doubt, that the defendant took the life of his wife by violent means, with the deliberate purpose of accomplishing that act? In other words, are we, as a reviewing court, compelled to hold that the innumerable inculpatory and strongly accusing circumstances developed by the evidence were by the public authorities and the jury aimed in the wrong direction, or were so misinterpreted or their probative significance so misunderstood as that an erroneous result was reached? If this court is not

legally authorized to answer these questions in the affirmative, the conclusion must necessarily be that, from the evidence as a whole, or considered in its entirety, the jury were legally convinced, to a moral certainty and beyond all reasonable doubt that the defendant committed the crime as charged in the indictment, and therefore we are required to hold that the corpus delicti was likewise established.

It cannot be doubted that the corpus delicti may be proved by the very facts that connect the defendant with the commission of the crime, and this, according to the verdict, which, we may as well say here, we feel that we are bound to accept, is precisely what was done in this case.

[2, 3] The basis of the corpus delicti is the finding of a dead human body, or its remains, and the identification thereof as that of a person charged to have been slain. The next essential step is to show that the death of the person has been occasioned by the criminal act or agency of another; and—

"It is not necessary that the corpus delicti should be proved by direct and positive evidence. Crimes, and especially those of the worst kinds, are naturally committed at chosen times, and in darkness and secrecy; and human society must act upon such indications as the circumstances of the case present or admit, or society must be broken up. Nor is it very often that adequate evidence is not afforded by the attendant and surrounding facts to remove all mystery, and to afford such a reasonable degree of certainty as men are daily accustomed to regard as sufficient in the most important concerns of life; to expect more would be equally needless and absurd." Rice on Evidence, p. 466.

Again, the same author (volume 3, p. 467) approvingly quotes the rule laid down by Burrill in his work on Circumstantial Evidence (page 682), wherein it is said that, the death and identity of the body of the person who it is charged has been slain having been shown, the fact that death was produced by a criminal act may be shown "by means of circumstantial evidence, including the presumptive kind; and, for this purpose, a much wider range of inquiry is allowed than in regard to the fundamental fact of death; and all the circumstances of the case, including facts of conduct on the part of the accused, may be taken into consideration."

"Nor," as is said in *Carroll v. People*, 136 Ill. 456, 463, 27 N. E. 18, 21, "is it essential that the corpus delicti should be established by evidence independent of that which tends to connect the accused with its perpetration. The same evidence which tends to prove one may also tend to prove the other, so that the existence of the crime and the guilt of the defendant may stand together inseparable on one foundation of circumstantial evidence."

The rules above stated are now so generally accepted in all the American states as

well as in England that they have become elementary in the law.

[4] The present case is replete with circumstances in their nature highly incriminatory, and tending strongly to the establishment of the proposition that the death of the deceased was the direct result of the criminal act of the defendant. And we cannot say that the jury were not warranted in reaching the conclusion that she was drowned by the defendant (perhaps by placing and holding her head under the water a sufficient length of time to produce death), the body then conveyed by him to the Siddell wharf, and there by him cast into the bay. The salient circumstances may be recapitulated: The motive to get rid of his wife, supported as it was by uncontradicted evidence that he was enamored of a married woman to the point of infatuation and the maintenance of illicit relations between him and said woman; the violent differences or quarrels occurring between the defendant and the deceased over the fact of his undue and unholy attentions to said woman, and the abusive language in which he addressed his wife on those occasions; the statement prior to her death that his wife was a great burden to him; the scream of the human voice, the sound of which came from the direction of Holt wharf; the floating of the body on the surface of the water after the drowning, it having been shown by not only the doctors who testified for the people, but the doctor who testified for the defendant, that the body of a person drowning would sink to the bottom and not remain floating upon the surface of the water and that this would probably occur in from 5 to 10 minutes even where a drowning person was a woman, and sufficient air had gotten underneath her clothing to operate as a buoy; the testimony of two doctors to the effect that they had had occasion professionally to examine the deceased about two months prior to her death and found that her kidneys, lungs, and heart were in perfect condition, which diagnosis was confirmed by the autoptical physician; the impeachment by Mrs. Taylor's testimony of the reason given by the defendant for the visit to the Siddells at so late an hour of the night, to wit, to have Mrs. Siddell procure for the deceased some thread to match the latter's skirt; the cold-blooded nonchalance with which he accepted the fact of his wife's sudden passing; the contradictory and untruthful stories he told of the circumstances of his wife's death and the time of day at which it occurred; the offer of a bribe to the district attorney as an inducement to dismiss the proceedings against him, a fact constituting well-nigh irrefragable evidence of the consciousness of guilt—these, and the many other circumstances above narrated herein, all of which stand in the record entirely unexplained, and uncontradicted,

and which, if true, and believed so to be by the jury (and it was entirely the function of the jury to determine whether they were or were not true), would seem to leave no other course open to a body of intelligent and fair-minded men and women to whom the question of the defendant's guilt or innocence was submitted, but to find him guilty as charged.

[5] Of course, any conflict arising in the testimony addressed to any particular vital-circumstance in the case was for the jury to solve and determine, and this is true as to any real or apparent inconsistencies which may have arisen in the testimony of any witness. If there is substantial evidence in the case warranting the conclusion at which the jury arrived, it becomes immaterial upon appeal whether there was or was not a conflict in the evidence or any inconsistency in the testimony of any particular witness. These rules are elementary, and their mere statement is conclusive of their correctness.

Upon this branch of the case, we hold it to be our duty, in view of the convincing circumstances of guilt brought out by the evidence, to leave the case where the jury left it, superadding, however, the expression of our conviction, following from a critical examination and consideration of said evidence, that the defendant was, indeed, fortunate that the verdict was of a character to relieve him of the requirement of suffering the extreme penalty annexed to the crime of murder by the law of this state.

[6] 2. It is next contended that error was committed by allowing the people to show that Hudson Jack, the Indian boy, had, prior to the trial, made a statement with reference to the scream that he testified to having heard which differed in a certain important particular from his testimony upon that subject. Hudson Jack was asked, on his examination by the district attorney, whether the scream that he heard was that of a man or a woman, to which he replied that he did not know. The district attorney thereafter called H. R. Taylor, and asked him about a conversation he had had with the Indian boy on the morning following the day of the death of Mrs. Spencer, in which, after telling him of the death of Mrs. Spencer, the Indian boy replied either that "I heard her holler" or "We heard her holler." This so-called impeaching testimony was offered by the district attorney and allowed by the court upon the theory that it came within the terms of section 2049 of the Code of Civil Procedure, which reads as follows:

"The party producing a witness is not allowed to impeach his credit by evidence of bad character, but he may contradict him by other evidence, and may also show that he has made at other times statements inconsistent with his present testimony, as provided in section two thousand and fifty-two."

The purpose of the above section is to permit a party who has, in good faith, placed a witness upon the stand, with the distinct understanding that he will give testimony in support of his side of the issue, but, instead of so doing, and to the surprise of the party presenting him as such witness, has given damaging testimony against said party, to show that, prior to giving his testimony, he made a statement which, if testified to, would be favorable to the party so making him his witness. When invoked on appropriate occasions, this section involves a most salutary rule of evidence. *Zipperlen v. Southern Pacific Co.*, 7 Cal. App. 206, 214, 217, 93 Pac. 1049. But, to entitle the party to contradict such a witness, it must appear that he was taken by surprise by the testimony of the witness, and that said testimony, as stated, was prejudicial to his case. A party has no right to invoke the aid of that section merely for the purpose of getting into the record testimony which otherwise could not be brought thereinto because of its incompetency.

"The mere failure of a witness to give favorable testimony for the party producing him does not entitle such party to prove that he has made contrary statements elsewhere." *People v. Creeks*, 141 Cal. 532, 75 Pac. 103; *People v. Cook*, 148 Cal. 334, 345, 83 Pac. 43; *Zipperlen v. Southern Pacific Co.*, *supra*.

[7] In the present instance, the testimony of Taylor was not admissible under the section above referred to. It does not appear from the record that the district attorney, when he put the Indian on the witness stand, expected any other testimony from him than that given by him, and, if there was a material difference between the testimony as given by that witness and the statement which Taylor testified that the Indian had previously made to him, then the effect of allowing the testimony of Taylor would be to admit into the record hearsay evidence. And, even if there was no material variance between the two statements, the testimony of Taylor would still be incompetent, as the testimony of a witness cannot be bolstered by showing that he had extrajudicially made, at some time prior to the giving of his testimony, the same statement that he has made as a witness.

[8] But, when scrutinizingly analyzed, and so considered, or as it may reasonably be interpreted, we cannot see that there is any material difference between the testimony as a whole of the Indian boy and the statement which the witness Taylor testified that the boy made on the occasion referred to. The district attorney, it will be recalled, after getting from the Indian boy a statement that he had heard a scream, but did not know whether the voice was that of a man or a woman, asked him if the scream was from a "light" or a "heavy" voice, to which the lad replied that it was a "light" voice. From

this the inference is reasonable, or would be so to any person of fair intelligence, and, in support of the verdict, we may assume that the jury drew that inference from said reply of the witness that, in thus using the terms "light" voice and "heavy" voice, the district attorney intended to convey to the Indian's mind the distinction between a female voice and a male voice, the term "light" voice being, naturally, intended as a description of a female voice and the term "heavy" voice likewise intended as a description of a male voice. Under this view, therefore, which we take to be well founded, the jury could, with good reason, have inferred, from the answer made by the Indian to that question, that what he meant to say was that, while he could not positively answer whether the voice was that of a male or a female, it, nevertheless, being a "light" voice, sounded more like that of a female. At any rate, the jury, it must be assumed, understood the question of the district attorney as involving, descriptively, the distinction between a male and a female voice, and could have accepted the statement of the Indian that the voice that screamed was a light voice as a circumstance tending strongly to show the scream was that of a female, and, therefore, the testimony of Taylor as to the statement made to him by the Indian could add but little, if any, force to the testimony which was competently before the jury, the purpose of which was to prove that the scream of a woman was heard at the time stated by the Indian. From this consideration, or even if there may be perceived some variance between the statement which Taylor testified the Indian made to him and the testimony of the Indian, it is apparent that the ruling admitting Taylor's testimony could not have materially contributed toward the crystallization of the result arrived at below. Indeed, even if it be conceded that there is some variance between the two statements, it will be admitted that it is so slight that we are justified in declaring that, in view of the entire record, the effect of the ruling allowing Taylor's testimony was not to produce a miscarriage of justice. Const., art. 6, § 4½.

[9] 3. The "demonstration" to which objection is here registered, and which it is claimed resulted in great prejudice to the accused at the trial, arose in the following manner: Pending the trial, and before the people had closed their case, a test was made by Sheriff Shaul and Mr. and Mrs. Siddell to ascertain whether the scream of a woman made at Holt wharf could be heard at the Indian camp where Hudson Jack was at the time that he said he heard the scream of some one on the night of the death of Mrs. Spencer. The sheriff went to the place where Jack said he was at the time and Mr. and Mrs. Siddell went to the Holt wharf. While thus they were stationed, Mrs. Siddell

screamed three times, the first time quite loud, and, at the request of the sheriff who called to her from where he was standing, she gave a second scream in "a softer voice" and then another scream "still softer." The sheriff was called to the stand and testified that he heard all three screams distinctly. Mr. and Mrs. Siddell corroborated his testimony as to the making of the test. The ground of the objection to the testimony as to the test so made was and is that the test was not made under precisely the same conditions as those which existed on the evening that Hudson Jack claimed to have heard the scream of a human voice coming from Holt wharf. The difference in the conditions appears to be this: That Hudson Jack said he was lying upon his bed when he heard the scream, whereas the sheriff was in a standing position, and out in the open when the test to which he testified was made; also Siddell testified that the night on which the drowning occurred was a calm, still, bright night, with no wind blowing or any disturbance from any source, while the night the test was made the wind was blowing and noises incident to disturbances of the waters of the lake by the wind were going on. We are of the opinion that the objection is without substantial merit and goes more to the weight of the testimony than its competency. "Rarely, if ever, can an experiment be made where the conditions are in every respect a reproduction of those into which an inquiry is being made. The rule requires only substantial likeness" (State v. Nowells, 135 Iowa, 60, 109 N. W. 1018), and we think that in this case the conditions were substantially the same on the night that the experiment was made as they were on the night of the drowning. If anything, the atmospheric and climatic conditions at the time that the test was made were less favorable to the hearing of a scream at the distance existing between the point where Hudson Jack was and the point where the scream seemed to proceed from than they were on the night Mrs. Spencer's life was lost.

In *People v. Phelan*, 123 Cal. 551, 568. 56 Pac. 424, 431, a question similar to that which we now have in hand was disposed of by the Supreme Court, per Chief Justice Beatty, as follows:

"Exception was taken to certain rulings of the court admitting evidence of experiments made by direction of the prosecution for the purpose of contradicting the testimony of some of defendant's witnesses. The testimony related to sounds heard in the nighttime in the vicinity of defendant's cabin. The experiments were conducted at the same place, but in the daytime, and it was not shown that the atmos-

pheric conditions—such as humidity, temperature, et cetera—were the same. The court did not err in admitting this testimony. The principal conditions were the same and the jury could weigh and make allowances for the differences referred to. They affected the weight, but not the competency, of the evidence."

There are several other exceptions to the action of the court in allowing certain testimony to be given. These we have carefully examined, and thus have been convinced that, even conceding the objections, or some of them, to be well taken, no injury resulted to the defendant therefrom. As to these objections, and as to the record generally in this case, the following observations made in the case of *People v. Fealy*, 33 Cal. App. 605, 615, 165 Pac. 1034, 1038, which, like this was one in which the proof of the crime charged was dependent entirely upon circumstantial evidence, are of cogent pertinency to this case:

"It [the crime charged] was supported by what appears to be very powerful circumstances; and, while it is no doubt true, as might reasonably be expected, and, indeed, quite unavoidable in a case where as in this, multitudinous as well as multifarious circumstances are required to be shown to prove the ultimate fact, some erroneous statements or testimony found their way here and there in the record, still a careful examination and consideration of all the testimony, has convinced us that, in the main, the testimony complained of was not only pertinent to the case but legally competent, and that the few errors which were committed were of little consequence, or bore upon matters which, in view of the strong circumstantial case legitimately made against the defendant, could have exerted no baleful influence in bringing about the result arrived at by the jury."

We have painstakingly and with earnest solicitude examined this record, deeming it not in contravention of ordinary propriety to elaborately review the facts herein, since the case is one, so far as the people were concerned, which, as must now be apparent, was planted entirely and exclusively upon circumstantial evidence and, so far as the defendant is concerned, is of obvious moment. We have not from this investigation been able to persuade ourselves that the jury reached an erroneous conclusion upon the question of the guilt or innocence of the accused, or that the errors of law as assigned by the defendant were such as to justify us in holding that he was not accorded a fair and impartial trial.

The judgment is therefore affirmed.

We concur: FINCH, P. J.; BURNETT, J.

(53 Cal. App. 238)

**RECLAMATION DIST. NO. 108 v. ASH et al.,
Board of Sup'rs. (Civ. 2450.)**

(District Court of Appeal, Third District, California. June 21, 1922. Hearing Denied by Supreme Court Aug. 17, 1922.)

1. Courts ⇨207(5) — District Court of Appeal will not dismiss prohibition proceeding because subject-matter is of equitable cognizance.

As under Const. art. 6, § 4, District Courts of Appeal have authority to issue writs of prohibition, the court, having issued an alternative writ and signified its willingness to entertain the proceeding, will not dismiss it merely because the subject to which the writ pertains is solely of equitable cognizance and in the exclusive appellate jurisdiction of the Supreme Court unless transferred.

2. Waters and water courses ⇨231—Board of supervisors act judicially or quasi judicially in hearing on assessment.

In a hearing upon a reclamation district assessment as reported by assessment commissioners, a board of supervisors acts in a judicial or quasi judicial capacity, since it sits for the purpose of hearing and determining controverted facts.

3. Prohibition ⇨10(1)—Lies to prevent unlawful exercise of power or to annul proceedings resulting therefrom.

Under Code Civ. Proc. §§ 1068, 1103, the writ of prohibition, whose office is to test the question whether any board or tribunal has, in the exercise of judicial or quasi judicial functions, exceeded its jurisdiction or threatens to do so, will lie either to annul proceedings resulting from the unlawful exercise of such power or to prevent such board or tribunal from acting in the premises, provided there is no plain, speedy, and adequate remedy in the ordinary course of law.

4. Waters and water courses ⇨231—Apportionment of assessment based on superseded plans and estimates held not a just apportionment.

An apportionment of a reclamation district assessment based upon plans and estimates of the district trustees which had been rescinded and revoked by them and superseded by a new plan and estimates embracing some of the items and estimates of the previous plans, and containing other items and estimates of a different kind, and changing some of the former items and estimates, would not be a just apportionment of an assessment made on the new plan and estimates.

5. Prohibition ⇨3(1)—Lies to prevent apportionment of reclamation district assessment based on superseded plans and estimates notwithstanding statute authorizing action to modify or annul.

Prohibition is a proper remedy to restrain a board of supervisors from further proceeding in connection with purported reclamation district assessment lists filed by commissioners of assessment, and based on a reclamation

plan which had been rescinded and revoked by the district trustees and superseded by a new or amendatory one, notwithstanding Pol. Code, § 3462, authorizing an action to correct, modify, or annul the assessment.

6. Waters and water courses ⇨225—Validity of plans can be raised only by those directly interested.

The question of the validity of reclamation plans adopted for reclamation and irrigation works in combined reclamation and irrigation districts can be raised only by those directly interested in and affected by the provisions of such plans.

7. Prohibition ⇨28—If jurisdiction depends on invalidity of reclamation plans, court may determine the question.

If the reclamation plan and estimates of a reclamation district are absolutely void on their face and proper determination of the question of jurisdiction of board of supervisors to hear objections to assessment based on plan previously adopted requires examination of the latter plan, with a view of ascertaining its validity, the court in a prohibition proceeding may make such examination and determination, though landowners are not parties.

8. Waters and water courses ⇨225—Excess of power in adopting reclamation plan held not to invalidate whole plan.

If trustees of a combined reclamation and irrigation district in adopting a new or amendatory plan and estimates under Pol. Code, § 3454, subd. 6, and section 3455, exceeded their power in attempting to establish the particular quantity of water and the source and duty thereof which a particular area should be entitled to, this did not invalidate the entire plan, but might be regarded as surplusage.

9. Waters and water courses ⇨247(1)—Landowners may prevent unjust distribution of water, though in accordance with reclamation plan adopted.

Landowners of a combined reclamation and irrigation district may, by appropriate action in the courts, prevent the unjust distribution of water or an unjust imposition of the duty of the water by the district board of trustees, even though the reclamation plan adopted by the trustees illegally or legally determined definitely the particular areas which should receive particular water, and fixed the duty of the water.

Original application by Reclamation District No. 108, for a writ of prohibition directed to George Ash and others, as members of and constituting the Board of Supervisors of the County of Colusa. Writ granted.

Devlin & Devlin, of Sacramento, and Hiram W. Johnson, Jr., of San Francisco, for petitioner.

Arthur C. Huston, of Woodland, Chas. K. Atran and Millington & Millington, all of Colusa, for respondents.

Elston, Clark & Nichols, of Berkeley, amici curiæ.

HART, J. This is an original application for a writ of prohibition to restrain the respondents, as members of the board of supervisors of the county of Colusa, from further proceeding in connection with a purported assessment list, filed with said board by the commissioners of assessment in and for the petitioner herein on the 5th day of December, 1921, and from proceeding with the hearing of said purported assessment and from making any order in connection therewith.

The petitioner is a duly formed, organized, and existing reclamation district under the laws of the state of California, which said district embraces, and has at all times mentioned in said petition embraced, lands situated partly in the county of Colusa and partly in the county of Yolo, the larger part of said lands being situated within the limits of the said county of Colusa; that said district was reorganized in the year 1917, and that all the lands therein are now, and at all times mentioned in the petition have been, situated within the boundaries of the Sacramento and San Joaquin drainage district. The board of trustees of said district on August 31, 1917, adopted a plan of reclamation for the lands situated in said district together with estimates of the sums of money required to carry the same into execution, and within due legal time filed said plan and estimates as required by law with the clerk of the board of supervisors of the county of Colusa, and thereupon the said clerk certified two copies thereof to the reclamation board of the state of California. After due hearing and due legal notice given the said plan was approved by the said reclamation board, and thereafter, in the month of November, 1918, the said board of trustees reported the fact of the approval of said plan by the said reclamation board to the board of supervisors of the county of Colusa. Thereafter, and in the month of November, 1918, the board of supervisors appointed L. L. Hicok, H. L. Haehl, and Charles De St. Maurice as commissioners of assessment, pursuant to section 3456 of the Political Code, for the purpose of levying an assessment based upon said plan and estimates, and thereafter the said commissioners of assessment duly qualified as such. On the 19th of August, 1920, the board of trustees of said reclamation district adopted a new, supplemental, and additional plan of reclamation for the lands situated within said district, together with estimates of cost of said works of reclamation and irrigation of said district, and certain modifications and amendments to the existing plan adopted on the 31st day of August, 1917. The said new or supplemental plan and modification was filed with the board of supervisors and subsequently with the state reclamation board, as required by law, and said new or additional or supplemental plan was, within due time, approved by the last-named board and the fact of such

approval reported to the board of supervisors of said county of Colusa by petitioner. Thereafter the board of supervisors made an order appointing the said Hicok, Haehl, and De St. Maurice as commissioners of assessment.

The petition alleges that—

On the 27th day of September, 1921, the board of trustees of petitioner "did by a resolution, duly adopted on the said day, rescind, vacate and set aside the said plan and estimates of August 31, 1917, hereinbefore referred to, also the plan and estimates of August 19, 1920, hereinbefore referred to."

The petition then sets forth the resolution just referred to, and, after reciting the facts as to the plan and estimates adopted in August, 1917, and the supplemental and additional plan adopted in August, 1920, it proceeds:

"Whereas, it now appears that the said plans adopted by the said board of trustees on the 31st day of August, 1917, and the said plans adopted by the said district on the 19th day of August, 1920, when construed together, contained ambiguities and uncertainties, and that by reason thereof the intent of said board of trustees in connection with the said plan of August 31, 1917, and the said plans of August 19, 1920, is not clearly expressed; and

"Whereas, it was the intent of the said board of trustees in the said plans of August, 19, 1920, that the drainage ditches of said reclamation district No. 108 should not be used as being part of said irrigation system of the said district, but that a separate system of irrigation canals should be constructed so as to irrigate exclusively the area of lands described in the said plans of August 19, 1920; and

"Whereas, this intent of the said board of trustees is not clearly expressed in the said plans adopted on August 19, 1920, and when construed with the plans adopted on August 31st, 1917; and

"Whereas, in the plans adopted on August 19, 1920, certain tracts of lands described in the area to be irrigated cannot be irrigated when said plans are completed, as there are no irrigation canals leading to the same or provided in any of said plans; and

"Whereas, the estimates contained in the said plans of August 31, 1917, and of August 19, 1920, required revision and changes; and, whereas, there are other reasons in addition to the reasons above enumerated, requiring that the said plans and estimates adopted on August 31, 1917, and the said plans adopted on August 19, 1920, should be rescinded, vacated and set aside and that the respective resolutions of the board of trustees adopting the said plans of August 31, 1917, and the said plans of August 19, 1920, should likewise be rescinded, vacated and set aside:

"Now, therefore, be it resolved, by the board of trustees of reclamation district No. 108:

"First. That the said plans of August 31, 1917, hereinbefore referred to, together with the estimates therein contained, and the resolution of the board of trustees of said district

adopting the same be, and the same are hereby rescinded, vacated and set aside.

"Second. That the said plans of August 19, 1920, hereinbefore referred to, together with the estimates therein contained, and the resolution of the board of trustees of said district adopting the same, be and the same are hereby rescinded, vacated and set aside.

"Third. That a copy of this resolution certified to by the secretary of the board of trustees of said district be forthwith filed in the office of the clerk of the board of supervisors of the county of Colusa, state of California, and a similar copy so certified to by the secretary of said district be forthwith filed in the office of the secretary of the reclamation board of the state of California and that similar copies so certified be forthwith delivered respectively to H. L. Haehl, Chas. De St. Maurice and L. L. Hicok, the three commissioners of assessment appointed by the board of supervisors of the county of Colusa, state of California, and now acting in apportioning the assessment required by the said plans of August 31, 1917, and the said plans of August 19, 1920, both of which have this day been rescinded, vacated and set aside."

It is alleged in the petition that immediately upon the adoption of the foregoing resolution the said board of trustees caused to be filed in the office of the board of supervisors of said county of Colusa a certified copy of the said resolution and also with the reclamation board of the state of California, and delivered a certified copy to each of said commissioners of assessment. It is further alleged that on the 27th day of September, 1921, the board of trustees of said district, in pursuance of said resolution, adopted a resolution directing the engineer of the said district to prepare a new set of plans and estimates, in accordance with which resolution said engineer did, on the 19th day of October, 1921, present a new plan and estimates of the sum of money required to carry the same into execution to the said trustees of the said district; that on the 19th day of October, 1921, said board of trustees adopted the same as the plan of reclamation in said district and also the estimates as therein contained; that the total estimate of the sum required for the consummation of said plan is the sum of \$3,137,336.54. The resolution adopting said plan is set out in hæc verba in the petition and contains, among other things, a provision that said amendatory and additional plan and estimates shall and "do hereby supersede, in all particulars, the plan and estimates of said reclamation district," which were adopted on August 31, 1917, and also those adopted on August 19, 1920. It also provided:

"That said amendatory and additional plan and estimates be filed in triplicate with the county clerk of the county of Colusa, state of California, in accordance with the provisions of law, and that necessary steps be taken for the approval of the amendatory and additional plans and estimates before the reclamation

board of the state of California and when so approved that the necessary steps for the appointment of commissioners of assessment for the board of supervisors of the county of Colusa, * * * be had in accordance with the provisions of law."

The said plan and estimates (those last adopted), were filed with the board of supervisors of the county of Colusa and the State Reclamation Board, as required by law.

The petition further alleges that upon the adoption of the latest plan and estimates the said board of trustees prepared and filed with the county clerk of the county of Colusa a report of the adoption of said amendatory and additional plan and estimates, the same containing the said plan and estimates, which said report contained recitals to the effect that the amount of money required by said estimates is the sum of \$3,137,336.54; that all the lands situated within said reclamation district are situated within the boundaries of the Sacramento and San Joaquin drainage district, and that said amendatory and additional plans and estimates supersede in all particulars the plans and estimates, original and amendatory, previously adopted by the board of trustees of said district.

It is further alleged:

That said plan and estimates were duly certified to the reclamation board of the state by the clerk of Colusa county; "that the said plan and estimates so adopted on the 19th day of October, 1921, by the board of trustees, and so filed with the clerk of the said board of supervisors on the 20th day of October, 1921, embrace some of the items and estimates contained in the plan and estimates of August 31, 1917, and also contained in the new, supplemental, and additional plan and estimates of August 19, 1920, but also contain many other items and estimates of a different kind, and some of the items and estimates contained in said plans of August 31, 1917, and August 19, 1920, were modified and changed"; that on December 30, 1921, the reclamation board of the state of California, after due hearing, made an order approving said plan and estimates of October 19, 1921.

The petition alleges that—

"Notwithstanding the facts hereinbefore averred, the said commissioners of assessment did, on the 5th day of December, 1921, with said board of supervisors, file a purported assessment upon the lands within the said reclamation district No. 108, based upon the said plan and estimates of August 31, 1917, and the said plan and estimates of August 19, 1920, and that on the said 5th day of December, 1921, the said respondents, as members of and as constituting the board of supervisors of the county of Colusa, * * * set the said assessment for hearing for Wednesday, the 21st day of December, 1921, * * * and gave notice that at such time any landowner would be heard in connection with and concerning said assessment, and on said December 21, 1921, continued the hearing until January 4, 1922," and that said respondents intend, on the day last men-

tioned, to proceed to equalize the said assessment upon the assumption that the plans and estimates of August 31, 1917, and August 19, 1920, respectively, are still in full force and effect, and when said hearing is completed, to make an order equalizing the said assessment and to deposit the said assessment list with such order of approval indorsed thereon in the office of the county treasurer of the county of Colusa and also in the office of the county treasurer of the county of Yolo, and that "thereupon the said purported assessment will become a colorable lien upon the lands within such district to the extent of the amount levied upon each tract of land as described in said purported assessment."

It is finally alleged that—

"There is no plan or estimates upon which such assessment can be based, and therefore the said respondents and the said board of supervisors of the county of Colusa * * * are acting without jurisdiction in having such trial and hearing upon the said purported assessment so filed."

The respondents, upon the return day of this writ, filed a general demurrer to the petition, and also filed the plan and estimates adopted on October 19, 1921. It was stipulated that the said plan and estimates might be considered in the determination of the questions arising upon the demurrer.

[1] We may first dispose of the proposition, urged by counsel for respondents, that this proceeding should be dismissed, for the reason, as suggested, that "the Supreme Court has original jurisdiction in this matter, and as a matter of practice the petition should be presented to that court." The answer to this suggestion is to be found in article 6, § 4, of the Constitution, which expressly vests in the District Courts of Appeal the authority to issue writs of prohibition. In *Favorite v. Superior Court of Riverside County*, 181 Cal. 261, 265, 184 Pac. 15, 16 (8 A. L. R. 290), it is said, speaking of a like suggestion:

"As a matter of policy and practice, both this court and the district courts, respectively, have at times refused to take jurisdiction of an original proceeding where the case involved was in the superior court and was originally appealable to the other court. *Collins v. Superior Court*, 147 Cal. 264 [81 Pac. 509]; *Estate of Turner*, 39 Cal. App. 56 [177 Pac. 854]. But this practice was not adopted because of any want of original jurisdiction in such cases in either court. This was expressly stated in the *Collins Case*."

Therefore, having once issued the alternative writ and thus signified its willingness to entertain the proceeding, a district court of appeal will not dismiss such proceeding merely because the subject-matter to which the writ pertains is solely of equitable cognizance and of which the Supreme Court has exclusive appellate jurisdiction, subject, of course, to the constitutional right of the latter court to transfer the cause involving such subject-

matter to a district court of appeal for hearing and decision.

It is, however, urged by counsel, appearing *amici curiæ*, in opposition to the issuance of the writ, that the petitioner has a remedy in the ordinary course of law—that is to say, that section 3462 of the Political Code affords a complete and adequate remedy by providing that—

"Any person aggrieved by the decision of the board of supervisors [on the hearing of the objections to the assessment lists] may commence an action in the superior court of the county in which the greater part of said district is situated to have said assessment corrected, modified or annulled."

We do not agree with counsel in this contention.

[1, 2] In the hearing upon the assessment as reported by the assessment commissioners, the board of supervisors act in a judicial or quasi judicial capacity, since, in the performance of the duty of equalizing the assessment upon written objections made by the owners of land embraced within the district to the apportionment of the assessment as made by the assessment commissioners, the board sits for the purpose of hearing and determining controverted facts. *Robinson v. Board of Supervisors of Sacramento County*, 16 Cal. 208; *Imperial Water Co. v. Board of Supervisors*, etc., 162 Cal. 14, 120 Pac. 780; *Pac. Tel. & Tel. Co. v. Eshleman*, 166 Cal. 640, 137 Pac. 1119, 50 L. R. A. (N. S.) 652, Ann. Cas. 1915C, 822; *Anaheim Sugar Co. v. Orange County*, 181 Cal. 212, 183 Pac. 809; *Suckow v. Alderson*, 182 Cal. 247, 187 Pac. 965. It follows that a writ, whose office is to test the question whether any board, corporation, or tribunal has, in the exercise of judicial or quasi judicial functions, exceeded its jurisdiction, or threatens to do so, in a given matter, will lie either to annul proceedings resulting from the unlawful exercise of such power or prevent such board or tribunal from acting in the premises, provided, of course, that there is not, as to the matter as to which the alleged usurpation or attempted usurpation of power has been or is about to be taken, "a plain, speedy, and adequate remedy in the ordinary course of law." Sections 1063 and 1103, Code Civ. Proc.

[4, 5] Furthermore, it is clear that, if the present plan and estimates are in all respects valid, the assessment made and returned by the assessment commissioners and now pending before the board of supervisors for hearing, and which it is alleged in the petition the said board intends, if not restrained from so doing, to consider and definitely pass upon, having been made with reference to the plan and estimates adopted in the year 1917, as amended in the year 1920, is, so far as the present plan and estimates are concerned, wholly nugatory and void. This conclusion, upon the assumption stated, is justified by the

allegations of the petition, which are admitted to be true by the demurrer, that the plan and estimates adopted in 1921, while embracing some of the items and estimates contained in the previous plans and estimates, "also contain many other items and estimates of a different kind and some of the items and estimates contained in the said plans of August 31, 1917, and August 19, 1920, were modified and changed." Thus it is readily to be noted that an apportionment of the assessment, based upon the previous plans and estimates, cannot be held to operate as a just apportionment of an assessment made upon a plan and estimates in many respects entirely different from the former. It is, therefore obvious that the legal propriety of the remedy here sought cannot justly be questioned. Indeed, it is clear that said remedy is peculiarly appropriate to the situation presented here for the reason that, again assuming that the present plan and estimates are perfectly valid, the approval of the assessment lists in question and the filing of the same with the county treasurers of the two counties into which the district extends would operate, ipso facto, to burden the lands in the district with an illegal yet colorable lien. The situation might lead to much confusion and many complications which would stand as a barrier against the progress of the work of reclamation. For instance, it might and probably would result in a multiplicity of suits against landowners to recover the assessments, and this certainly would impede the progress of the work required to effectuate the purposes designed by the organization of the reclamation district.

The respondents take the position in this discussion, among others, that the plan and estimates adopted in October, 1921, are invalid upon their face, and that, this being true, the plan of 1917, as amended by the plan of 1920, is still in full force and effect, and that, inasmuch as the commissioners of assessment made their assessment upon said last-mentioned plan and reported the same to the board of supervisors, it is the duty of the board and within its jurisdiction under the law to proceed with the equalization of the assessment as so reported. On the other hand, the petitioner contends that the question of the validity or invalidity of the plan of 1921 cannot be inquired into in this proceeding; that, since the board of supervisors has no power to pass upon the question of the validity of any plan of reclamation adopted by a reclamation district and its duty with reference to said plan after the same has been duly adopted by the board of trustees of the district and approved by the State Reclamation Board is merely to hear objections to the assessment as reported by the assessment commissioners and to perform such other acts with reference to said assessment as are set forth in section 3462 of the Political Code, it cannot complain or raise the ques-

tion of the validity of the plan adopted or the action of the board of trustees in adopting it. Of course, as the attack upon said plan and estimates in this proceeding is in its nature collateral, their invalidity, if invalid they be, must appear upon the face thereof, otherwise they are not subject to attack herein. In this connection, it should be stated that counsel for the petitioner declare that, "while it is true that the plan of October, 1921, was filed, and it was stipulated that it might be regarded as a part of the record, nevertheless, this was done purely to aid the court in the better understanding of the facts set forth in the petition and not with the idea that the court could pass upon the sufficiency of said plan or the right of respondents, or any landowner, to contest the same or any part thereof" in this proceeding, since, so counsel proceed, "such a question would be foreign to the jurisdiction of the board of supervisors."

[6, 7] Abstractly speaking, the petitioner is right in its contention that the question of the validity of plans adopted for reclamation and irrigation works in combined reclamation and irrigation districts can be raised only by those who are directly interested in and affected by the provisions of said plans. *Town of Antioch v. Williams' Irrigation District* (Cal. Sup.) 205 Pac. 688; *City Council of City and County of Denver v. Board of Commissioners of Adams County*, 33 Colo. 1, 77 Pac. 858, 860; *People v. Ames*, 24 Colo. 422, 51 Pac. 426; *Ames v. People*, 26 Colo. 83, 56 Pac. 656; *People v. Salomon*, 54 Ill. 39. But this is not to say that if the plan and estimates of a reclamation district be void upon their face, the same may not be ignored by the board of supervisors or so held to be in a collateral proceeding before a court, where the question of their validity is vital to the determination of the ultimate issue submitted therein for decision. If the plan of October 1921, were absolutely void upon its face and the proper determination of the question whether the board of supervisors of Colusa county was without jurisdiction to hear objections to the assessment based upon the previously adopted plan of the district or to take any other proceeding with reference thereto would require an examination of said plan of 1921, with a view of ascertaining whether it was a valid plan under the law, we can conceive of no reason why we would not be authorized to make such examination and determination in this proceeding, despite the fact that those directly interested in and affected by said plan—the landowners of the district—are not parties hereto.

[8] But we are of the opinion that the plan as it is exhibited to us here is not absolutely void. And, preliminarily, we may take occasion to say that, when, at the oral argument, it was stipulated that the plan and estimates of 1921 might be considered by us in the decision of the question of jurisdiction submit-

ted herein, we did not understand that such consideration was to be limited in its scope as indicated by counsel for the petitioner. Counsel for the respondents raised and argued the question of the invalidity of the plan of 1921 in support of their position that the board of supervisors of Colusa county would act within its lawful jurisdiction in hearing and determining such matters as the law requires that body to hear and determine in connection with the assessment lists reported to said board by the assessment commissioners, and distinctly stated that he would submit with his argument said plan to the court, to the end that the question whether the plan was invalid might be inquired into and determined. And counsel for the petitioner thereupon stipulated that the said plan might be so submitted. We will therefore consider the plan in passing upon the demurrer to the petition, and briefly express the reason for our conclusion that the plan and estimates of October, 1921, are not invalid.

We may first observe that it is not claimed here that the board of trustees was without authority to adopt an amendatory or a supplemental plan to supersede the plans of 1917 and 1920. Indeed, such right in the said board of trustees cannot justly be challenged, in view of the provision of section 3455 of the Political Code to the effect that a board of trustees of a reclamation district may *at any time* file with the clerk of the county an amendatory, additional or supplemental plan, or even an entirely new plan (section 3454, subd. 6, Pol. Code [Stats. 1917, p. 1195]), and this right would, of course, imply the further right in the board to so revise the estimates as to make them accord with the amendatory or supplemental plan, and thus change the basis of the assessment. But the objection that respondents make to the said plan, stating it in general terms, is that the board of trustees of the district has reserved to or invested itself with unauthorized power in the matter of the distribution of the water of the district for irrigating purposes and the use of the drainage ditches involved in the plan. In other words, and employing counsel's own language, the position of respondents is this:

"The board of trustees, as appears on the face of the new plan, has not been satisfied to perform its statutory duty, but has assumed the jurisdiction and power to attempt to control the use of water dedicated to lands in the district; to limit and define the enjoyment of the drainage ditches called for in the plan; to ascertain and determine the duty of water in connection with the irrigation works; to determine that certain lands heretofore irrigated shall not receive water under the new plan, and in many other ways to unlawfully reach out and control the property rights of the individual landowners."

It is not necessary to enter into a detailed examination herein of the plan or even those

portions thereof which it is claimed involve the exercise of unwarranted power by the board of trustees of the district for the purpose of considering the point now in hand. It is deemed sufficient, for the purposes of this decision, to explain, in a very general way, the grounds upon which the asserted invalidity of the plan is based.

Acting under the authority of the provision of section 3455 of the Political Code, as amended by the Legislature of 1917 (Stats. 1917, p. 1197), providing that the term "works of reclamation," as used in said section, shall include not only such public works, etc., as are necessary for unwatering of lands in reclamation districts, but shall also include such like works as may be necessary to water or irrigate the same lands in such districts, the board of trustees, for the purpose, as they seem to have conceived, of facilitating the irrigation of the lands comprising the district in question without impinging upon the just rights or the requirements as to irrigation of any of the landowners therein or imposing upon any particular tracts of land in the district more than their just burden for such irrigation, subdivided said district into five units or subdivisions. The principal basis of such subdivision is in the nature as well as the convenience of the source of the water supply available to each unit. These several units were and are designated as follows: First, the Wilkins Slough system; second, the Boyers Bend system; third, the Tyndall system; fourth, the El Dorado Bend system; fifth, the Steiner Bend system. In some of these units the lands are riparian, while in others the lands are nonriparian. It appears that the district obtained a permit from the state water commission to divert from the Sacramento river sufficient water for irrigating approximately 30,000 acres of land in said district. These last-mentioned lands are situated entirely within the Wilkins Slough unit. In apportioning the water rights of the district in the plan of 1921 the board of trustees specifically and definitely declared that—

"No portion of land and no portion of any tract of land lying outside of the boundaries described above as parcels A and B shall be irrigated by the Wilkins Slough system as herein described and no owner of any such land lying outside of said boundaries shall be permitted or authorized to use for any purpose whatsoever any of the water in the irrigation canals in said system."

It is then provided that—

As to the duty of water "the five hundred second feet of permit No. 388 will be diverted through the system for the service of the 30,210 acres in parcel A described above, giving an average duty of water of about sixty acres per second foot."

It is declared by counsel, and it appears to be true, that this system, as it is described

and delineated on the maps which are a part of the plan as prepared, was designed to serve all of the lands of the district, but it does not appear that it was capable of doing so or, at any rate, that it was practicable to do so. Counsel for respondents in their brief also assert, as illustrating the asserted arbitrary method whereby the board of trustees attempt in the plan of 1921 to dispose of the water to be used under permit No. 388, and to fix the duty of said water, that there was no limit made in the permit to the area in the district to be served thereunder, and that the water derived by virtue of such permit was to be used for the purpose of irrigating through the Wilkins Slough system all of the lands in the district or such of them as might require the same. Thus the specific objection to the plan is presented, and it is hence argued that it is beyond the power of the board definitely to establish the duty of water or likewise to establish a particular area which should be irrigated from the source referred to. The plan is similarly objected to in other particulars than the one here considered. But the objection which we have particularly explained is sufficient to illustrate the specific reasons upon which the respondents claim that the plan is invalid.

[9] We are not required to determine in this case the question whether, in exercising the right to establish in the plan the particular quantity of water and the source and duty thereof which a particular area shall be entitled to, the board of trustees exceeded its lawful power or authority. But, even if it were necessary to concede that it did, this, in our opinion, would not have the effect of invalidating the entire plan. If the fixing of particular quantities and the duty of water with reference to particular tracts of land in the district was beyond the power of the board of trustees, it would be clear that the exercise of that power by said board would involve a matter entirely foreign to the purpose for which the plan was to be established, and could and would be regarded as wholly surplusage. And, indeed, if it were true that the action of the board in this particular was in excess of its power (a proposition which, we desire to make plain, we do not decide), any attempt on the part of the board to apply the scheme so adopted to the detriment or injury of the rights of any landowner—that is to say, if by attempting to carry out the scheme as so established,

any area or portion of the lands in the district is deprived of its just and necessary proportion of the water available to the district for its purposes—then the landowners thus aggrieved may prevent such wrong by an appropriate action in the courts. In other words, a remedy is readily available to the landowners of the district to prevent the unjust distribution of the water or an unjust imposition of the duty of the water by the board of trustees, even though it be true that the latter, in its plan of 1921, has illegally or even legally definitely determined the particular areas which shall receive particular water, and has likewise fixed the duty of the water. And we may add that such a course on the part of the landowners, should they find it necessary to adopt it, is to be preferred over any attempt at the determination of the question here, inasmuch as it would involve a direct attack upon the right of the board so to attempt to control the distribution of the water and the ditches and the canals in a particular way by express provision in the plan. At all events, we are firmly of the opinion that the power thus exercised by the board of trustees, even if ultra vires, does not amount to such a defect in the plan as to justify us in holding that the entire plan is thereby vitiated and rendered void. The board may always be required to distribute the water according to the just rights of the landowners by an appropriate proceeding in court at the behest of the latter.

The conclusion from the foregoing considerations necessarily is that, the plans of 1917 and 1920 having been superseded by the plan of 1921, and the assessment here concerned having been based and made on the plans thus superseded, the assessment so made is null and void, and therefore the board of supervisors of Colusa county is without jurisdiction to hear, entertain, and determine any proceeding or proceedings with reference to said assessment.

In accordance with the foregoing views the writ herein prayed for will be and the same is hereby ordered to be issued out of this court, directed to the respondents, commanding them to desist from taking any further proceeding affecting or from hearing or equalizing the assessment lists in question.

We concur: FINCH, P. J.; BURNETT, J.

189 Cal. 382

**TITLE GUARANTEE & TRUST CO. et al. v.
GRISET et al. (L. A. 6737.)**

(Supreme Court of California. Aug. 2, 1922.)

1. Records ☞9(1)—Proceeding under Torrens Law is adversary proceeding.

A proceeding under the Torrens Act is not a proceeding sui generis, and friendly in its nature, instituted merely for the purpose of obtaining conclusive evidence of title, but, because of the possibility of a hostile claim, essentially an adversary proceeding.

2. Records ☞9(1)—Proceeding under Torrens Law does not differ materially from suit in equity.

While a proceeding to register title under the Torrens Act is a special proceeding, it differs in no material respect from an ordinary action in equity.

3. Records ☞9(3)—Purpose of Torrens Law is to determine all adverse claims.

The purpose of the Torrens Act is not only to create and perpetrate a marketable title to and sought to be registered thereunder, but as well to conclusively determine all adverse claims against the registered land.

4. Records ☞9(5)—Court in Torrens proceeding has jurisdiction to adjudicate all claims affecting title.

The court hearing an application to register title under the Torrens Act has jurisdiction not only to ascertain and certify real estate titles, but to adjudicate all claims affecting in any manner the title in question.

5. Records ☞9(1)—Torrens proceeding not friendly proceeding as to incumbrancers.

A proceeding to register title under the Torrens Act is not, as claimed, a friendly proceeding as to incumbrancers claiming under the applicant.

6. Records ☞9(6)—Incumbrancers entitled to appear in proceeding under Torrens Law.

The Torrens Act, by its provision that the holder of an incumbrance is a necessary and proper party, recognizes the fact that he possesses certain rights for the protection of which he is entitled to appear.

7. Records ☞9(6)—Creditors secured by trust deed entitled to appear in proceeding to register title.

Under trust deed providing that, if grantor failed to appear and defend action affecting the property or the title thereto, the trustee and beneficiary could do so, the trustee and the secured creditor had not only the right, but the duty, to appear in a proceeding by the grantor to register the title, and was not bound to rely upon their interests being adequately protected by the grantor, especially as under the Torrens Act, § 45, a lien not correctly adjudicated and noted on the certificate would be ineffectual after one year.

8. Mortgages ☞209—Trustee entitled to reimbursement for expenses of appearing in proceeding to register title.

As a trustee under a deed of trust was not a mere volunteer in appearing in a proceeding by the mortgagor to register the title under the Torrens Act, the money expended in so doing was not unnecessarily or improperly expended, and the trustee was entitled to look to the mortgagor for reimbursement under Civ. Code, § 2273.

9. Appearance ☞8(6)—Stipulation for judgment in registration proceeding sufficient to constitute appearance.

Where, in a proceeding to register title under the Torrens Act, it was stipulated, after demurrers and objections had been overruled, on behalf of the objectors, that judgment might be entered under certain conditions, this was sufficient in itself to constitute an appearance.

Shaw, C. J., dissenting.

In Bank.

Appeal from Superior Court, Imperial County; Franklin J. Cole, Judge.

Suit by the Title Guarantee & Trust Company and another against William Grisct and another. From a judgment for defendants, plaintiffs appeal. On hearing after decision by the District Court of Appeal. Judgment reversed.

Hickcox, Crenshaw & Trude, of El Centro, for appellants.

Banta & Banta, of El Centro, for respondents.

LENNON, J. The appeal in this case came to this court upon a petition for a rehearing after decision by the District Court of Appeal, First District, Second Division. The facts of the case, as evidenced by the pleadings, proof, and findings, are these: On July 15, 1916, the defendants herein, William Grisct and Eva Grisct, his wife, executed to the plaintiff Mortgage Guarantee Company their note for \$4,000, payable three years after date, which note was secured by a deed of trust to the plaintiff Title Guarantee & Trust Company covering certain land in Imperial county. On April 19, 1917, the defendants herein made application to the superior court of Imperial county to have the title to the land which was the subject of the deed of trust registered under the Land Title Act, commonly known as the "Torrens Act," in effect December 19, 1914. Stats. 1915, p. 1932. Plaintiffs herein were duly served with notice of said application, and, appearing specially in the registration proceedings, interposed their respective demurrers and objections to the application. The demurrers assailed the application generally upon the grounds of the insufficiency of the facts stated, misjoinder of parties, ambiguity, etc., and especially upon the ground that certain of the facts alleged in the application showed that the appellants were not qualified to have registration of the title to the lands in question, and that the respondents in the registration proceedings, the plaintiffs here, were the owners of the legal title to said lands. The objection to the application which accompanied the demurrers was that the Title Guarantee & Trust Company, a respondent in the registration proceedings, and one of the plaintiffs here, was the owner of the legal title to the lands in question, and that it held such title in trust, with full power and authority to sell and dispose of the same in payment of an indebtedness upon a loan made to the then owners of said real property, and payable to the other respondent in the registration proceedings, the Mortgage Guarantee Company, upon default being made in the payment of either the principal or interest of such indebtedness. The said demurrers and the objection were disallowed by the court hearing the application for registration, and the respondents therein, the plaintiffs here, were directed to pay their own costs. Thereafter, on August 17, 1917, counsel for respondents in the registration proceedings entered into a stipulation, which was filed in the proceeding on September 24, 1917, assenting to the registration of the title to the lands in question "on condition that

any certificate of title issued by the order of the court show therein as prior and taking precedence over all other incumbrances on said title," the trust deed in question. Thereafter, on July 17, 1918, pursuant to said stipulation, a decree was made and entered authorizing and directing the registration of the title to the lands in question under said Land Title Act, and accordingly on the last-mentioned date said land was registered by the registrar of titles of Imperial county as the separate property of the appellant William Griset, one of the defendants here. Said decree and the certificate of registration both show the title to said land registered subject to said deed of trust and the provisions thereof and subject to the rights of the plaintiffs herein as shown by said trust deed. The plaintiff herein, Title Guarantee & Trust Company, paid the filing costs, amounting to \$7, incurred in the registration proceedings, and the sum of \$50 as attorney's fees incurred in the presentation and prosecution of the demurrers and objections. Thereafter demand was made upon the defendants here that, as the applicants in the registration proceedings, they reimburse plaintiff Title Guarantee & Trust Company for the moneys thus expended. The demand was refused, and when the note secured by the trust deed became due the defendants herein tendered to the plaintiffs the amount of the principal and interest due thereon. The tender was refused by the plaintiff upon the ground that the amount of the tender was insufficient, in that it did not include the amount of the filing and attorney's fees incurred and paid by the plaintiff in the registration proceedings. This action was then instituted for the purpose of obtaining the consent of the court to sell the property held under the trust deed as security for the payment of the note.

The cause of action pleaded in the instant case was rested substantially upon the facts hereinbefore narrated, and proceeded primarily, upon the theory that, inasmuch as the trust deed in question did not contain the provision "with power of sale," the trustee did not have power to sell or otherwise dispose of the land held under the trust deed without an order of court so to do, and that therefore in order to enforce the provisions of the trust, it was necessary, under the requirements of the Land Title Act, under which the registration proceedings were had, to procure an order of court authorizing the sale of the property secured by the trust deed. Section 69, Land Title Law; Stats. 1915, p. 1944.

The plaintiffs' complaint alleged, among other things, that, in addition to the amount due on the note for the principal and interest, there was due to the plaintiffs the sum of \$57 which they were compelled to pay as costs and attorney's fees in the registration proceed-

ings, and that said last-mentioned sum was a necessary and a reasonable expenditure and was expended under and by the terms and according to the provisions of the deed of trust.

Answering the plaintiffs' complaint, the defendants admitted all of the material allegations thereof save and except the alleged need and right of plaintiffs appearing in the registration proceeding for the purpose of protecting the lien of the trust deed, the allegation concerning the amount, which included the said filing and attorney's fees claimed to be due on the note for principal and interest, and the allegation that the sum of \$57 for said filing and attorney's fees in the registration proceeding was necessarily incurred under the terms of the trust deed or otherwise. Following a denial of the last-mentioned allegations, the defendants in their answer affirmatively allege that plaintiffs' appearance in the registration proceeding was neither necessary nor bona fide. By way of cross-complaint the defendants alleged a tender to and refusal by the plaintiffs of the full sum of principal and interest due on and under the terms of the note at the date of the tender, and that thereby the rights of the plaintiffs under the trust deed were extinguished. It was an admitted fact in the case that, as alleged in the cross-complaint, the application for registration of the title to the land in question fully and properly set forth all of the facts required by the Land Title Act to be set forth, and complied with all of the provisions and requirements of said act, and that, in addition thereto, said application averred that the land described therein for registration of title was subject to the terms and conditions of the trust and to the rights of the plaintiffs under the trust deed. It was also an admitted fact in the case, as alleged in the cross-complaint, that the title to the land in question was registered pursuant to the registration decree in the proceedings, subject to the terms of the trust deed and subject to the rights of plaintiffs as shown by the trust deed. It was a further admitted fact in the case that the sum tendered to plaintiffs on June 18, 1919, in satisfaction of the note and trust deed, covered the principal and interest due thereon on the date of the tender, but did not include the \$57 incurred and paid for filing and attorney's fees in the registration proceedings.

Upon the issues thus raised and the admitted facts of the case a trial was had by the court below and judgment rendered and entered that plaintiffs were not entitled to the order of sale prayed for, and were not entitled under the trust deed to be reimbursed for the costs and attorney's fees incurred and expended in the registration proceedings, and that the defendants, upon the issue presented by the cross-complaint, have

judgment upon the payment to the plaintiffs of the principal and interest tendered to the plaintiffs and found to be due on the note on of the day of the tender cancelling said note; directing the plaintiff Title Guarantee & Trust Company to execute a reconveyance of the property embraced within the terms of the trust deed; directing the registrar of titles of Imperial county to enter a memorial on the certificate of title and the duplicate thereof that said property was no longer subject to said trust deed and that the same was satisfied by order of the court. The judgment rests in part upon findings to the effect that it was unnecessary for plaintiffs, or either of them, to appear in the registration proceedings and that it was not necessary for plaintiffs, or either of them, to pay counsel fees and costs in the sum of \$57, or in any other sum, in said proceeding, and that they, nor either of them, were compelled to pay said sum and that the same was not paid under or by the terms or according to the provisions of the trust deed. Upon this appeal from the judgment thus entered the only point urged in behalf of plaintiffs for a reversal is that the court erred in finding that it was unnecessary for plaintiffs to appear in the registration proceeding and that defendants were not bound by the provisions of the trust deed to pay the filing and attorney's fees incurred and paid in said proceeding. In this behalf it is the contention of plaintiffs that it was the right and duty of plaintiff, Title Guarantee & Trust Company, as trustee, to appear and defend against the registration proceeding under the terms of the trust, which required the trustee "to appear and defend in any action * * * to protect, preserve and defend said property and the title thereto, and to conserve and to commence and prosecute any action necessary to protect the same and to pay all expenses thereof."

[1-4] The petition for a rehearing was granted largely upon the theory that there was much merit in the point made, in effect, in the petition for rehearing, that a registration proceeding under the Torrens Act was not, in theory or in fact, an adversary proceeding, and that, under the facts set forth in the application for registration of the title to the land in question the plaintiffs in this action, the respondents in the registration proceedings, unnecessarily appeared therein and thereby burdened the property subject to the trust with an unnecessary and unprofitable expenditure, which should, therefore, be borne by the plaintiffs. Further consideration of the case convinces us that there is no merit in this contention. The proceeding under the Torrens Act is an adversary proceeding. It is not a proceeding *sui generis*, friendly in its nature, instituted merely for the purpose of obtaining conclusive evi-

dence of title. While under the technical Code definition it is a special proceeding, nevertheless it differs in no material respect from an ordinary action in equity. The notice of hearing, required as in other civil actions, the method of service of summons, and the time for appearance after such service, are practically the same. Verified pleadings are required, and any pleadings, including, of course, a demurrer to the application, which are adequate to create and cover any issue necessary to a determination of the questions involved in the application, are permissible and proper. *Frances Investment Co. v. Superior Court, Imperial County (Cal. Sup.)* 208 Pac. 105; *Duffy v. Shirden*, 139 App. Div. 755, 124 N. Y. Supp. 529. An issue of fact claimed by a person claiming any interest in the land is to be, upon demand, tried by a jury. The jurisdiction to hear and determine the application is conferred upon the superior court, which is the ordinary trial tribunal. As pointed out in *Frances Investment Co. v. Superior Court*, supra, the course outlined for a Torrens proceeding is strikingly similar to that provided by general law for the ordinary civil action, from the filing of complaint to the rendition of judgment. Not only is the procedure provided by the Torrens Act that of an adversary proceeding, but the very object of the act is to furnish a title impregnable against every attack from any source, and the jurisdiction of the court, which is co-extensive with that contained in an equitable action to quiet title, confirms the conclusion that the registration proceedings provided by the Torrens Land Law are in fact adversary. The purpose of the Torrens Land Law is not only to create and perpetuate a marketable title to land sought to be registered under its provisions, but it was intended as well to conclusively determine every and all adverse claims against the registered land. For this purpose the court hearing the application to register has jurisdiction not only to ascertain and certify real estate titles, but to adjudicate all claims affecting in any manner the title in question, even to the extent of rescinding and setting aside a trust deed on the ground that it was procured by fraud. *Frances Investment Co. v. Superior Court*, supra. Notwithstanding the fact that in a particular case there is the possibility that the application for registration will not be opposed, nevertheless the proceeding is essentially an adversary one, for, a hostile claim being possible, there is, in contemplation of law, an adverse claim to be settled, and a right to be protected against a possible claimant. *Robinson v. Kerrigan*, 151 Cal. 40, 48, 90 Pac. 129, 121 Am. St. Rep. 90, 12 Ann. Cas. 829.

[5, 6] Nor is such a proceeding adverse only to persons opposing the registration

and friendly to those claiming under the applicant. It was held in *Hawes v. United States Trust Co. of New York*, 142 App. Div. 789, 127 N. Y. Supp. 632, that a statute of that state similar to ours, authorizing appearance in title registration proceedings by persons adversely interested, was not intended to be limited in its application to persons desiring to oppose the application for registration, or to set up a cross-demand to have the title registered in their own behalf, but allows any person interested in the property, or whose interests may be affected by the judgment, to appear and interpose an answer setting up the precise interest in the property claimed. The holder of an incumbrance does have an interest in the property which may be affected by the judgment. The act itself, by the provision that such persons are necessary and proper parties, recognized the fact that they possess certain rights for the protection of which they are entitled to appear.

[7] The interests of the owner of the land being, as we have seen, hostile to the claims of the holder of the incumbrance, the latter is not bound to rely upon his interests being adequately protected by such owner. If, relying upon the theory that the suit is not hostile in its nature, and that every one who claims under the applicant will be taken care of by the terms of the decree, he fails to take any part in the proceeding, and by mistake or inadvertence the title to the land, the lien of the trust deed, or the amount thereof be not correctly adjudicated and noted on the certificate, he is bound by the decree, and cannot complain. At the end of the one year limitation, if he has failed to note the error, he is without a remedy. Section 45, Land Title Law; Stats. 1915, p. 1940. It is never the safe thing for a necessary party to an adverse proceeding to fail to appear when summoned into court. But, however that may be, the plaintiffs in this action were not required, as necessary respondents in the registration proceedings, to leave the protection of their interests in that proceeding to the applicants for registration whose interests were adverse. The plaintiffs here, as the respondents in the registration proceeding, not only had the right under the provisions of the trust deed, which required them to appear and defend in any action or proceeding affecting or purporting to affect the property or the trust, but it was their duty to appear if for no other purpose than to protect, as against possible mistake and inadvertence, the title of the land embraced by the trust deed, and to see that such title and the terms of the trust deed were fully established, legally decreed, and correctly registered.

[8] Having a right to appear, it cannot be said that the trustee in so coming in was a mere volunteer, and that the money so ex-

pended was an expenditure unnecessarily or improperly incurred. The trustee was merely carrying out the duty of its trust to protect the interests of the beneficiaries (*Mitau v. Roddan*, 149 Cal. 1, 84 Pac. 145, 6 L. R. A. [N. S.] 275), and for such expenses, incurred in the performance of its duty, the trustee may look for reimbursement to the trust property (Cal. Civ. Code, § 2273; 28 Am. & Eng. Ency. of Law, 1089, 1091).

The case generally was correctly treated and decided by the District Court of Appeal in the first instance, and, being satisfied with the conclusion reached by said court, we hereby adopt and approve the opinion of Mr. Justice Nourse as follows:

"The position of respondents is that appellants did not appear in the land registration action or, as to the Mortgage Guarantee Company, if it did appear, it had no right to do so.

[9] "The first proposition is based upon their construction of section 12 of the Land Title Act, from which they argue that a defendant in a suit commenced under that act is not permitted to demur, but can appear only by the filing of an answer, a motion to amend the petition, or an objection. It is then argued that, inasmuch as appellants demurred in the land registration action, they did not 'appear,' and hence are not entitled to any reimbursement for expenses so incurred. The record does not support the position of respondents. In the first place the decree in the land title case recites that these appellants did appear therein. In the second place it is stipulated in this case that after their demurrers and objections had been overruled counsel stipulated on behalf of the objectors that a judgment might be entered under certain conditions. This in itself was sufficient to constitute an appearance.

"Respondents' second proposition in so far as it relates to the Mortgage Guarantee Company is a novel one. It is, in effect, that a party whom the law declares to be a necessary and proper party to an action may be sued as such and served with process, but has no right to appear and defend.

"As to the trustee, the deed of trust expressly provided that the grantors should appear and defend in any action affecting or purporting to affect the property or the title thereto, and that, in the event of their failure to do so, the trustee and the beneficiary, or either of them, could appear and defend and charge the fees and expenses thereof to the grantors. When the litigation was begun by the grantors it was not only the privilege but the duty of the trustee at least to take such proceedings as might be necessary to protect the lien of the trust deed. Though under ordinary circumstances it is not at all probable that the lien would be jeopardized in a proceeding of this nature, nevertheless, the very fact that the trustee was a necessary party to the litigation and was served with process is sufficient to justify the appearance. Both appellants were proper parties to the application to register the title, as they were interested in having the lien of the trust deed correctly noted on the certificate. This was recognized by counsel for the plaintiffs in the land registration action when they en-

tered into a stipulation with counsel for those defendants covering that particular matter."

Judgment reversed.

We concur: WILBUR, J.; LAWLOR, J.; WASTE, J.; SLOANE, J.

SHAW, C. J. I dissent. When the defendants made their application for registration under the Torrens Land Law, the plaintiffs had no defense thereto, nor did either of them have any defense to the action. They should not have appeared. Defendants were not seeking any relief against them, or either of them, but were seeking only the relief they eventually got by the stipulation—that is, that plaintiffs should be declared to have a prior lien on the defendants' title. I fail to see any equity which the plaintiffs had to protect by their appearance and they should not be allowed to charge for it. In fact, the court in that action did not allow them to charge for their appearance, but adjudged the cost they made to them.

189 Cal. 159

VETERANS' WELFARE BOARD et al. v. RILEY, State Controller. (S. F. 10161.)

(Supreme Court of California. June 17, 1922.)

1. Constitutional law §18—Statute existing when Constitution was adopted affords aid in constitutional construction.

A statute in force when the Constitution was adopted, while no justification for sustaining its validity if opposed to the Constitution, is of some evidence that the people did not intend to change an existing system to which the statute related.

2. Constitutional law §20 — Executive and legislative interpretation of Constitution shown by long application of existing statute.

Executive and legislative interpretation of the Constitution by the practical application of a statute for 50 years affords some authority for the enactment of other similar statutes.

3. States §119 — Appropriation by Veterans' Educational Act held not unconstitutional as a prohibited gift.

The appropriation by St. 1921, p. 967, for educational assistance to war veterans, including transportation, purchase of text-books, tuition, and allowance for living expenses, is not unconstitutional as a gift prohibited by Const. art. 4, § 31, since there is an advantage to the state in the stimulation of patriotism, and an additional advantage in educating those who have shown their devotion to the government and obedience to its authority, and who have been intensively educated in patriotism, affording a clear basis for confining to veterans the benefits of this special education provision, which is included in the power of the Legislature under Const. art. 9, § 1, to provide for education.

4. States §119—Prohibition of gifts held not to prevent reasonable allowances to students.

The burden being primarily on the Legislature to determine whether or not the purpose served by an expenditure is a public purpose, and whether or not the development of the state requires the extension of educational facilities and the giving of additional facilities to different types of students, the question is for the Legislature, and the broad general restrictions thereon prohibiting gifts should not be held to procure reasonable allowances to enable students to secure the advantages of educational institutions.

5. Constitutional law §211 — Classification made by Veterans' Educational Act held justified as furthering general welfare by promoting patriotism.

The Veterans' Educational Act (St. 1921, p. 967) is justified as being in furtherance of the general welfare by the promotion of patriotism, and the classification made thereby in conferring the advantages of the law to war veterans is justified on that basis.

6. States §63—Doubt as to inclusion of services to state in constitutional prohibition as to extra compensation held such as not to justify overturning Veterans' Educational Act.

Though soldiers and sailors of the United States render service to the state from whence they came, there is such doubt as to the inclusion of such services within Const. art. 4, § 32, prohibiting extra compensation to public officers, servants, and contractors, that courts would not be justified in overturning the Veterans' Educational Act (St. 1921, p. 967) as violating that section.

7. States §119—Appropriation based on moral obligation is a prohibited "gift."

An appropriation of state funds based on a moral obligation is a gift, within the meaning of Const. art. 4, § 31.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Gift.]

Shaw, C. J., dissenting.

In Bank.

Original proceedings in mandamus by Veterans' Welfare Board and others against Ray L. Riley, as State Controller. Writ granted.

See, also, 206 Pac. 631.

Walter K. Tuller and M. B. Silberberg, both of Los Angeles, George Hatfield and Milton Sapiro, both of San Francisco, and O'Melveny, Millikin & Tuller, of Los Angeles, for petitioners.

Dion R. Holm and H. C. Lucas, both of San Francisco, for respondent.

WILBUR, J. The petition for a writ of mandamus in this case involved the validity of three statutes passed by the Legislature for veterans' welfare and aid. We ordered a writ of mandate to issue as to those items of expense involving the validity of the

"California Veterans' Welfare Act" (Stats. 1921, p. 969) and the "Veterans' Farm and Home Purchasing Act" (Stats. 1921, p. 815), but reserved the question as to the validity of those items involved in the Veterans' Educational Act (Stats. 1921, p. 967) for further consideration. Upon this question we asked the parties to argue certain questions submitted to them in the following order:

"1. Is the allowance made to the veterans under that bill a gift within the meaning of article 4, § 31, of the Constitution? See State v. Switzler, 143 Mo. 287 [45 S. W. 245, 40 L. R. A. 280, 65 Am. St. Rep. 653]; Barker v. Crum, 177 Ky. 637 [198 S. W. 211, L. R. A. 1918F, 673]; State v. Clausen [113 Wash. 570] 194 Pac. 793, 795 [13 A. L. R. 580]; State v. Johnson [170 Wis. 251] 176 N. W. 224, 225; McClure v. Nye, 22 Cal. App. 248 [133 Pac. 1145].

"2. If it is not a gift, is it an allowance or grant to an agent or servant, within the prohibition of article 4, § 31? See State v. Clausen [113 Wash. 570], 194 Pac. 793 [13 A. L. R. 580]. Note in this connection that the decisions upholding pension laws and allowances by the state as made for a public service place the decision on the ground that the services of the soldier were rendered to the state as well as to the nation. See Brodhead v. Milwaukee, 19 Wis. 624 [88 Am. Dec. 711]; State v. Johnson [170 Wis. 251] 176 N. W. 224, Ann. Cas. 1913B, 955, note.

"3. Assuming that the proposed benefit to the veterans under the Educational Act is neither a gift, grant, or allowance within article 4, §§ 31, 32, and that for some purposes the Legislature may designate the veterans, as a class, and by general law legislate with reference to such class, can it do so when the sole basis of the classification is gratitude or moral obligation, in view of article 4, §§ 31, 32?"

Upon the reargument of the matter counsel representing the Veterans' Welfare Board insisted that the law provided for neither a gift, a loan or extra compensation within the meaning of article 4, §§ 31, 32, of the Constitution. The validity of the law was maintained upon the plenary power of the Legislature to provide for education (Const. art. 9, § 1) and upon the right to classify the citizens of the state in any reasonable manner for the purpose of offering such education facilities. Upon the argument counsel representing the state board of control conceded the validity of the provisions of the Veterans' Educational Act in so far as it authorized the purchase of text-books and the payment of transportation to and from the educational seat. As to the purchase of text-books our decision in MacMillan v. Clarke, 184 Cal. 491, 194 Pac. 1030, 17 A. L. R. 288, is cited as authority. The plan of transporting school pupils to and from their homes, particularly in large union districts, is quite common in this state, and is expressly authorized by statute. Pol. Code, §§ 1741, 1764b (as added by St. 1921, p. 734, § 1), 1610 (as added by St. 1917, p. 739, § 9). Section 1764b

of the Political Code authorizes the payment of such transportation expenses not exceeding \$10 per month to pupils attending high school in an adjoining state. The validity of these sections of the Code has not been questioned in the courts of this state. Other states have similar provisions, but in those referred to there seems to be no express constitutional provision against a gift of money to an individual, except in New Jersey, where counties, cities, boroughs, towns, townships and villages are so prohibited (N. J. Const., art. 1, § 19), and where a loan of credit of the state is prohibited (N. J. Const. art. 4, § 6, par. 3). State ex rel. Jackson, 168 Ind. 384, 81 N. E. 62; Nelson v. State ex rel. 168 Ind. 491, 81 N. E. 486; Lyle v. State ex rel., 172 Ind. 502, 88 N. E. 850; Newcomb v. Rockport, 183 Mass. 74, 66 N. E. 587; Mills v. School Directors, 154 Ill. App. 119; School Dist. v. Atzenweiler, 67 Kan. 609, 73 Pac. 927; Re West Fallowfield School Dist., 29 Pa. Co. Ct. 600; Carey v. Thompson et al., 66 Vt. 665, 30 Atl. 5; Queeny v. Higgins, 136 Iowa, 573, 114 N. W. 51; Board of Education v. Atwood, 74 N. J. Law, 638, 65 Atl. 999; Harris v. School Dist., 72 N. H. 424, 57 Atl. 332; State v. Hall, 74 N. H. 61, 64 Atl. 1102; Fogg v. Board of Education, 76 N. H. 296, 82 Atl. 173, 37 L. R. A. (N. S.) 1110, Ann. Cas. 1912C, 758. See 35 Cyc. 1001; 37 L. R. A. (N. S.) 1110, note, and 38 L. R. A. (N. S.) 710, note.

[1, 2] At the time of the adoption of the Constitution of 1879, the blind, deaf, and the dumb were entitled under the law to an education in the asylum, located in Alameda county, free of charge (Pol. Code, §§ 2237, 2238, as enacted in 1872), although when the asylum was established a tuition of \$300 per annum was charged to such inmates or students as were able to pay. Stats. 1861, p. 81, § 2. Of course, the existence of such a statute at the time of the adoption of the Constitution is no justification for sustaining its validity, if opposed to the plain terms of the new Constitution, but it is at least some slight evidence that the people did not intend to change a system of education that had been in force for years by the use of such general terms as were used in the Constitution concerning gifts. The statute concerning the education of the deaf, dumb, and blind has apparently been carried out, notwithstanding the provisions of article 4, § 31, of the Constitution. If this practical interpretation of the Constitution for nearly half a century by the executive and legislative branches of the state government is to have any weight—and under cardinal rules of construction it should have some weight—such practical and contemporaneous construction points to the authority of the Legislature to make similar provision for others, without violating the constitutional prohibition against making gifts to individuals. In

the case of *Barker v. Crum*, 177 Ky. 637, 198 S. W. 211, L. R. A. 1918F, 673, the Supreme Court of Kentucky held invalid a law providing scholarships in the state university for a few exceptional students on the ground that such provision was a gift in violation of the Constitution prohibitions, but in the later case of *Carman v. Hickman County*, 185 Ky. 630, 215 S. W. 408, it was explained that the decision was based in part upon the fact that no exceptional service had been rendered by such students or could be expected from them. In the later case it was stated:

"We do not, however, find any similarity between the legislation condemned in the *Barker Case* and the legislation here drawn in question. In the *Barker Case* the public funds were sought to be appropriated for the benefit of a few favored boys in each county in the state, while other boys equally as deserving were denied these emoluments. It did not and could not be made to appear that the progress or growth or wealth or welfare of the state could be promoted by the privileges conferred on the few boys who were selected from a large number as the recipients of state bounty, and when it was confessed that they had performed no public service entitling them to this distinction there was nothing left for the act to stand on. While in the case we have the appropriation, although it may be treated as having been made directly to and for the chief benefit of those engaged in agricultural pursuits, *its ultimate purpose was plainly to develop the great agricultural interests of the state, and thus contribute to the welfare and wealth of the people of the whole state*. In no sense can it be fairly said that the emoluments and privileges conferred by this act were confined to any man or set of men within the meaning of the section of the Constitution relied on." (Italics ours.)

[3] The decision in the case of *MacMillan v. Clarke*, 184 Cal. 491, 194 Pac. 1030, clearly authorizes the purchase of text-books for the use of students, if they remain the property of the state or public agency furnishing them. The law under consideration authorizes the Veterans' Welfare Board to purchase necessary text-books and supplies, and, in the absence of an express authority to give the books to the student, the title would remain in the Veterans' Welfare Board. The legislative action, so far as it authorizes the purchase of text-books in furtherance of education, is sufficiently clear. With reference to the matter of transportation the observations of the Supreme Court of Massachusetts in *Commonwealth of Mass. v. Interstate Consol. St. Ry. Co.*, 187 Mass. 436, 73 N. E. 530, 11 L. R. A. (N. S.) 973, 2 Ann. Cas. 419, are pertinent. That case involved the right of the Legislature's power to require street railway companies to carry pupils to and from school at half fare. In view of the exceptional benefit thus conferred, the court said:

"In this case the selection of a class is not entirely arbitrary. The education of children

throughout the commonwealth is a subject for legislation which has occupied the thoughts of our lawmakers from early times. The duty of Legislatures and magistrates to be diligent in the promotion of education among all the people is specially declared in c. 5, § 2, of the Constitution of the commonwealth. Compulsory attendance of children in the schools is provided for by our laws. R. L. c. 44, § 1. Money may be appropriated by cities and towns for conveying pupils to and from the public schools. R. L. c. 25, § 15. It cannot be said that the Legislature may not concern itself with the transportation of children to the public schools in the interest of popular education, just as it provides such children with books and other necessary articles. R. L. c. 42, § 35. So far as this statute merely gives help to these pupils in connection with their acquisition of knowledge in the schools, it is justified. As a police regulation in the interest of education, the law may well require street railway companies to permit these children to ride to school upon their cars, without profit to the companies, provided it can be done without causing them loss. But if such a requirement involves expense, the cost can only be put upon the general taxpayers. It cannot be imposed upon the street railway companies, or upon that part of the public which pays fares to street railway companies. If, therefore, it plainly appeared that the enforcement of this section would cause expense to street railway corporations, which they must bear themselves, or put upon other classes of passengers in the form of increased fares to make good the loss from carrying school children at half rates, we should be obliged to hold that there was a taking of property without due process of law, through unconstitutional discrimination."

The furnishing of transportation to students attending the higher institutions of learning is a method of partially equalizing the inequalities arising out of the necessity of locating the institution in a certain place. It would hardly be contended that the state university at Berkeley offered its advantages on an equal basis to the high school graduates of Eureka, San Diego, and Berkeley, because of the difference in cost of transportation. In the case of some of our state institutions, such as the state prisons and state hospitals and state schools at Preston and Whittier, the cost of transportation to and from the institution is borne by the state, thus equalizing the burden between the near and more distant counties, although in some of these institutions the cost of maintenance is in part a county charge. There seems no good reason for holding that the Legislature has no power under the Constitution to in part equalize the opportunities offered to the students.

The question of an allowance to the student for subsistence is a more difficult one. Forty dollars per month authorized by the law as the maximum will not now pay the reasonable expenses of a student, due to the fact that he must subsist away from home and at or near the institution he is attending.

In the case of the elementary, grammar, high school, and junior colleges the school is usually so near the home of the student that the cost of subsistence is not greatly increased by school attendance, but in the case of the state university the majority of the 10,000 or more students, upon whom the state is spending \$4,500,000 per year, or about \$450 per capita, are away from home, and are thus required to spend at least that much more because of that fact. The capital investment of the state is also at the service of the student who is fortunate enough to have the means to pay the necessary expenses. Shall it be said that the Legislature is powerless to in any manner relieve the burden that falls upon a student because its principle institution of learning is located in the center of the state? If special schools are instituted by the state to provide the character of education needed to meet special cases shall it be said that the state must either establish such schools in every school district, or be powerless to bring the proper children into such school? Whittier state school and Preston state school furnish food and clothing to the criminal, the incorrigible, and to the needy orphan. They are special schools. Is this the limit of legislative authority? It is, of course, true that the normal and innocent child or scholar is in a different class because it is such with their parents who bear the burden of the state government.

There is no doubt that our educational system in this state and in many other states has gone far beyond what was contemplated at the time the Constitution was adopted. It is said, no doubt truly, that the high schools of to-day furnish facilities and opportunities for education superior to the colleges of a century ago. There has been a continual development in our ideas of the necessity and scope of education. This has partly grown out of the fact that the demands of modern life require experts in various lines, and the fields of knowledge have been so much widened that a more comprehensive system of education is demanded. It is recognized that the function of education is to fit the scholar for the problem of everyday life, and these problems are increasing. The compulsory education laws and the child labor laws have not only required the child to spend a large part of its minority in public or private institutions of learning, but have also prohibited the employment of such children in gainful occupation. The state has thus not only assumed the function of giving an education to the children, but has also insisted upon the surrender by the child and by its parents of the time necessary for that education. The young man or woman graduating from the state university as a rule will have spent from 15 to 18 years in the educational institutions of the state, and

during that entire period has been a financial burden instead of an asset to parents. The state has contributed enormously to the education of the graduate, but the parents have also done so, and the pupil as well in the surrender of its earning capacity. While the state university is theoretically open to all, it is practically confined to those who have attained certain standards of education and who have the financial ability to leave their homes and reside in the vicinity of the university during their university course. This necessarily confines the advantages of this institution to the comparatively small number of high school graduates or the graduates of similar institutions who have the means to supplement the expenditures of the state in providing schoolrooms and teachers by their own means for providing books, apparatus, and food and clothing during this period in which they are earning nothing, but are surrendering their time to gain the education which the state attempts to furnish. Can it be said that the Constitution is so written as to absolutely prohibit the state from extending aid in addition to the tuition and schoolrooms which are already provided in our higher institutions of learning? To say that the broad general restrictions against the making of gifts is such a limitation upon the part of the Legislature and prohibits for all time the meeting of the exigencies that may develop in the educational system seems to us going further than the founders of the Constitution intended. For more than a century the federal government has maintained at West Point an academy for the education of young men for the army, who, during the period of their training, are paid a salary which is amply sufficient for their maintenance, including food and clothing, with a small amount for spending money and for the procuring of an outfit upon graduation. The same is true of the United States Naval Academy maintained at Annapolis since 1845. It is true that the cadets at these institutions are being educated as officers in the army and navy, and that in a sense their education and maintenance is a consideration held out to them for their agreement to subsequently render that service.

The Constitution of this state, like that of most of the states, requires that its judicial officers shall have special education, evidenced by admission to practice as an attorney at law. Thus, one of the three coequal subdivisions of the government is dependent upon a special and technical education, and these requirements are increasingly rigorous. If there should for any reason be a dearth of suitable material for such offices, would the state be powerless to aid worthy students, because of a prohibition against making gifts to individuals? We fully recognize the clear distinction between the question

involved in the payment of this compensation to the military and naval cadets in these national institutions, the suppositious case of legal education, in preparation for special service to the state; and the broader question where the government receives only the indirect advantage of an educated citizenship. However, in the case at bar the government receives the highly important advantage of the stimulation of patriotism by a definite recognition of the magnificent, unhesitating, and courageous service of the World War veterans, whose valor and spirit turned the tide of history in favor of our form of government, based, as it is, upon the fundamental principles of the freedom and equality of all men and upon their equal right to participate in the government and to the advantages of such government. This advantage derived from the stimulation of patriotism is sufficient to justify outright gifts of money by way of bonus and pension, and is universally recognized as a sufficient ground for such expenditures. Where there is added to this the additional advantage to the state of giving an education to those who during their term of service have shown their devotion to the government and their obedience to its authority, and who have been intensively educated in patriotism, there would seem a clear basis for a classification confining the benefits of this special education provision to veterans.

[4] Bearing in mind that the burden is primarily upon the state Legislature to determine whether or not the purpose served is a public purpose, and whether or not the development of the state requires the extension of educational facilities and the giving of additional opportunities to different types of students, it may safely be said that the question is one for the Legislature, and that the broad general restrictions upon the state Legislature prohibiting gifts should not be held to prevent reasonable allowances made to enable students to secure the advantages of educational institutions.

[5] In view of the conclusion that the legislative power to provide for education includes the power to make the expenditures involved under this law, is it permissible to confine the advantages of the law to veterans who have served in the World's War? It must be conceded that such classification is permissible for legislation having for its purpose the giving of rewards, bonuses, or extra compensation to ex-soldiers. The decisions all agree upon this point, and it is unnecessary for that reason to cite specific cases. We have held in the opinion already filed (*Veterans' Welfare Board v. Riley* [Cal.] 206 Pac. 631) that it is permissible to confine the benefits of those acts to the veterans, and this decision was based upon the ground that such citizens could be designated as a class to receive the benefit of those acts.

Unless, therefore, we hold that the benefits conferred by the educational act constitute extra compensation or a gift of money or a loan of credit prohibited by the Constitution (article 4, §§ 31, 32), the principles applicable in the decision already rendered are also applicable here, so far as classification is concerned.

[6] One reason that we called for reargument of the constitutionality of this law was the fact that it seemed to us that if the classification was made for the sole purpose of conferring a benefit by way of extra compensation or allowance to the soldiers of the World's War, it could not be justified in view of the provisions of section 32 of article 4, which expressly prohibits the granting of any extra compensation or allowance to any public officer, agent, servant, or contractor after the service had been rendered. In our order directing the reargument we called attention to the decision of the Supreme Court of Washington in *State v. Clausen*, 113 Wash. 570, 582, 194 Pac. 793, 797. That court disposed of the matter in the following paragraph:

"Our attention has been called to section 25 of article 2 of the state Constitution, which provides that the Legislature shall never grant any extra compensation to any 'public officer, agent, servant or contractor after the services shall have been rendered or the contract entered into. * * *'. But this provision has no application to the present statute. The parties who are to receive compensation under the act do not come within the constitutional specifications. This provision of the Constitution does not seem to be insisted upon, and it would necessarily prolong this opinion to enter upon a further discussion of it."

The law under consideration by the Supreme Court of the state of Washington in that case provided for a bond issue of \$11,000,000 for the raising of funds to pay money directly to the veterans of the World's War and to establish a fund known as the Veterans' Compensation Fund. In view of the fact that the court expressly held that the statute was one for extra compensation, it must have been the view of the court that the soldiers were neither public officers, agents, servants, or contractors within the meaning of the state Constitution of that state, for the court expressly stated that:

"The act before us is based upon the theory of *compensation or compensation in addition* to that which the beneficiaries thereunder have already received from the federal government. For the service rendered by those who came within the terms of the act in the cause which was then of paramount importance there arose a moral obligation to compensate for such service, and, as has already been pointed out, such an obligation is sufficient to sustain the taxing power of the state. This decision will be rested upon the ground that the legislative power of the state is sufficient to enable it to make *compensation for the services rendered* because there

is a moral obligation to compensate for those services and that such services were public, and not private." (Italics ours.)

[7] Our own decisions consistently hold that an appropriation of public funds based upon a moral obligation as a consideration is a gift within the meaning of the Constitution. See cases cited in Veterans' Welfare Board v. Riley, *supra*. The reasoning of the Supreme Court of Washington, by which it avoids the conclusion that the payment was not a gift, would not, therefore, apply under our decisions. But its conclusion that ex-soldiers of the United States army are not public officers, agents, or contractors within the meaning of article 4, section 32, is directly in point. It is true that a soldier is neither a public officer, a servant, an agent, or a contractor as those terms are ordinarily used. It is also true that the general practice throughout the country which obtained at the time and previous to the adoption of the Constitution of 1879 was to grant pensions and allowances to ex-soldiers. It may well be that if the Constitution was intended to prohibit the granting of allowances to ex-soldiers we might expect to find such prohibition definitely stated in the Constitution itself. State aid in various forms had been the rule rather than the exception in the case of ex-soldiers and naval men. The Constitution draws a rigid distinction between officers of the state and of its various subdivisions, and those of the United States. Article 4, §§ 20, 21; article 5, § 12. It uses the term "soldier." Article 1 § 12. It expressly refers to persons employed in the service of the United States (article 2, § 4), and it is altogether probable, all things considered, that the words "public officers" and "servants" in article 4, § 32, do not refer to soldiers, sailors, or marines in the service of the United States. On the other hand, it is equally clear that all appropriations in favor of ex-soldiers are based upon the fundamental and underlying principle that such soldiers not only act for the federal government, but also for the state government, and that in their effort to maintain the union they also maintain the separate states making up that union. The soldier from each state is a soldier from the state of his residence as well as of the United States.

In *Beach v. Bradstreet*, 85 Conn. 344, 82 Atl. 1030, Ann. Cas. 1913B, 946, an act of the Legislature of that state providing for allowances to be made to all ex-soldiers residing in the state of Connecticut at the time of the passage of the act in 1911 (Pub. Acts 1911, c. 187), who had served in the army and navy and marine corps or revenue service of the United States during the Civil War and received an honorable discharge therefrom, was held unconstitutional because it extended the benefit not only

to those who had been residents of the state at the time they entered the service of the United States, but also to all those who had subsequently come into the state, and thus was made equally applicable to the citizens of other states. It was held that the extension of this bounty to soldiers from other states who served in the United States army was a violation of the implied constitutional restriction against the giving of public money for private purposes. In discussing that matter the court said:

"The nation can take for its defense the men and the treasure of Connecticut measured only by its necessities. It can call upon her to do her assigned part; it cannot call upon her to do the assigned part of some other state. The soldiers and sailors of other states, and the aliens, who served, were not hers; to them she owed no duty. She could not tax her people to pay bounties to these to induce them to enter the service of the United States; no more can she reward them for their services in the war. * * * A state's bounty must be limited to her own soldiers and sailors. Service to the credit of other states is not service for her. The grant to aliens, to widows and parents, to pensioned widows and parents, without affecting the principle involved, marks with increasing clearness the lengths to which a vicious principle of taxation may lead. Cooley, in his work on Taxation (volume 1, 3d Ed.), p. 195, says: In deciding on which side the tax shall fall we must be governed 'mainly by the course and usage of the government, the objects for which taxes have been customarily and by long course of legislation levied, what objects or purposes have been considered necessary to the support and for the proper use of the government.' * * * States have granted pensions to the disabled or indigent soldiers and sailors; but, so far as we have discovered, no state has granted a pension to soldiers and sailors who have served in, and been honorably discharged from, the United States service, without regard to disability or indigence."

The cases authorizing state aid as legitimate expenditure of state money are all based upon the relationship borne by the soldier to his own state. The basis of this special bounty is variously spoken of as extra compensation, as a gratuity or reward, or as a method promoting patriotism, all of which are recognized as public purposes. Counsel for the respondent in this case concede that the allowance made to ex-soldiers by the Educational Act does not come within the prohibition of article 4, § 32, and agree with counsel for the petitioners that the ex-soldiers are not public officers, servants, or contractors within the meaning of that constitutional provision. It is clear that classification by which the ex-soldiers are separated from the body of the community could not be justified where the sole and only purpose thereof is to grant extra compensation which was expressly prohibited by article 4, § 32. It is equally clear that if the purpose is not to grant extra com-

penation within the meaning of that section, the classification is justifiable even though the purpose of it is to authorize a gift or loan of public money (assuming for the moment that such gift or loan is not prohibited by article 4, § 31). While it is true as the cases recognize that soldiers and sailors of the United States not only render service to the United States government, but also to the states from which they come, we think there is such doubt about the inclusion of such services within article 4, § 32, prohibiting extra compensation to servants, public officers and contractors, that we would not be justified in overturning the act of the Legislature upon that basis. It remains for us, therefore, to determine whether or not the classification is otherwise permissible. This question is readily answered in the affirmative, if such a classification has a reasonable relation to the subject-matter under consideration. If the statute only authorized the extension of aid to those whose studies were interrupted by the war and who were during the time they were engaged in the service of the United States thus precluded from continuing their education, it would be clear that the classification was a perfectly justifiable one. If it is proper to select from the student body of various institutions of learning certain individuals because of their age and physical qualifications for service in the forces of the United States, allowing those of other ages and of inferior physical qualifications to remain and pursue their studies, it is clear that it would be equally permissible to again consider such classification when the time came for the demobilization of the army, and when the young men who had been deprived of the opportunity to continue their education because of the call to service were permitted to again resume their studies. Assuming that the state has power to make the provisions herein made for its citizens for the purpose of extending to them the benefits of an education, it would follow that the particular citizen who had been deprived by the war of that opportunity would be susceptible of classification as the recipients of the benefits of a statute intended to promote such education. It is possible that the statute under consideration is susceptible of the construction that it applies only to those whose education was so interrupted, and no doubt if its constitutionality depended upon such a construction it might very well be held that the provisions of the law authorizing the extending of aid to veterans to *continue* their education could be held to confine the benefits of the law to those who at the time of their enlistment were in educational institutions receiving instruction, and thus receiving an education which was to be *continued* by the means proposed by the statute.

If, however, the statute is susceptible of

a broader interpretation and this interpretation is constitutionally justified, it must be given that interpretation. It must be conceded that the extending of these special benefits to veterans of the World War would tend to promote patriotism. The promotion of patriotism is recognized as a proper exercise of governmental functions and as a field for the expenditure of public money. We think, then, that this legislation may be justified upon the proposition that it is in furtherance of the general welfare by the promotion of patriotism and that the classification made is justifiable upon that basis. See *State v. Johnson*, 170 Wis. 251, 176 N. W. 224, and *Wheelon v. S. D. Land Settlement Board*, 43 S. D. 551, 181 N. W. 359, 14 A. L. R. 1145.

It follows that the aid extended to the veterans of the World War under the Veterans' Education Act is a constitutional exercise of the legislative authority.

Peremptory writ of mandate will issue.

We concur: SLOANE, J.; LENNON, J.; WASTE, J.; LAWLOR, J.; SHURTLEFF, J.

SHAW, C. J. I dissent. The Constitution (article 4, § 31) provides that the Legislature shall not have power "to make any gift, or authorize the making of any gift, of any public money or thing of value to any individual." Certain exceptions are provided for, but they only serve to emphasize the prohibition as to everything not within the exceptions. None of them provides for gifts to individuals to assist them in obtaining an education. The language quoted is simple, unambiguous, and clear.

The act in question (Stats. 1921, p. 967) provides for and authorizes the making of gifts to persons who served in the military forces of the United States in the late war, out of the public money of the state, not exceeding \$1,000, to any one person, as follows: (1) The paying of the cost of their transportation, once a year, from their respective homes to the university, college, or school which they choose to attend to begin or continue their education. (2) The payment of their annual tuition fees, if any, at such institution. (3) The payment of the cost of the "books and supplies" necessary for their education there. (4) The payment of \$40 a month for each month to any student during his actual attendance upon any day school, to be applied to defray his living expenses. If this is not the making of gifts of public money to these individuals, nothing could be. It is as clear and unmistakable a violation of the prohibition of section 31 as could be devised.

It is in fact conceded that it is contrary to the above-quoted limitation of section 31 upon the legislative power. The claim is that, so far as education is concerned, sec-

tion 31 is modified and controlled by section 1 of article 9, the article on the subject of education. It reads as follows:

"A general diffusion of knowledge and intelligence being essential to the preservation of the rights and liberties of the people, the Legislature shall encourage by all suitable means the promotion of intellectual, scientific, moral and agricultural improvement."

It is a well-established rule of construction that where a constitution has been prepared by a convention and submitted to the people and adopted as a whole, it will not be assumed that any provision therein was intended to set aside or qualify another provision, unless such intent appears, either expressly or by necessary implication, or unless the inconsistency is so clear that no other conclusion can reasonably be made from the language. No such intent appears, and no such inconsistency exists with respect to the two provisions here in question. Section 1 of article 9 does not even purport to grant power to the Legislature. It imposes on it a duty to encourage the promotion of education in the things therein specifically mentioned. But it directs that this shall be done "by all suitable means." This necessarily implies that it is not to be done except by "suitable means." So understood, it is not contrary to or inconsistent with the prohibition of section 31 above quoted, but is clearly in harmony with it. The meaning is that it shall encourage education by the use of the powers which it has under the other provisions of the Constitution. The making of gifts of public money to individuals cannot be considered as a "suitable means" for the promotion of education, because such gifts are expressly prohibited, and because, in the absence of any language to indicate such intent, it cannot be that section 1 of article 9 was meant to sanction a violation of any other part of the Constitution. For illustration, and to show the length to which such doctrine would lead, it cannot be supposed that the direction to the Legislature to encourage the promotion of education by all suitable means was intended to or does authorize it to promote education by enacting a special law for the assessment of taxes to raise money for educational purposes, contrary to subdivision 10 of section 25, article 9; or a special law exempting property of a private school from taxation (subdivision 20); or a special law providing for the management of common schools (subdivision 27); or a law authorizing a lottery or gift enterprise to raise money for educational purposes (article 4, § 26); or a law providing for the taking of private property for educational purposes without compensation to the owners (article 1, § 14); or, in short, any law transcending any of the other express restrictions upon legislative

power found elsewhere in the Constitution. Yet there is as much warrant for allowing any of these things to be done as there is for allowing the making of gifts to individuals from public money to enable such individuals to obtain an education with less effort than would be required without such aid.

The suggestion that it would be good public policy to make such gifts for that purpose presents a matter beyond the proper scope of our inquiry. The public policy fixed by the Constitution cannot be changed by the Legislature, or by the courts, unless they exceed the limits of their own powers. If public opinion has so changed since the adoption of these constitutional provisions in 1879 that it now favors a different policy from that therein fixed and declared, there is only one legitimate method to give effect to such change, that is by amending the Constitution so that it will express the present desire of the people, instead of the desire they expressed in 1879.

It may be that in the absence of such declaration of policy in the Constitution as it is, and in the absence of any restriction forbidding the making of gifts to individuals, the Legislature could lawfully provide for aid to individuals who have served the country in the late war to enable them to obtain an education. But even if it were conceded that such persons had been in the service of the state in the war, such a disposition of public funds is expressly forbidden by section 32 of article 4 of the Constitution, which declares that—

"The Legislature shall have no power to grant * * * any extra compensation or allowance to any public officer, agent, servant, or contractor, after service has been rendered." *Conlin v. Board*, 99 Cal. 21, 33 Pac. 753, 21 L. R. A. 474, 37 Am. St. Rep. 17; *Molineux v. State*, 109 Cal. 378, 42 Pac. 34, 50 Am. St. Rep. 49; *Taylor v. Mott*, 123 Cal. 497, 56 Pac. 256.

There was no law authorizing compensation by the state for any service of that character at the time the service was rendered. Hence any compensation now made for such service, still conceding it to have been a service to the state, would be "extra compensation," within the meaning of this section. The proposition that a mere moral obligation, or any obligation not enforceable by law, cannot be made the basis of an allowance of public money to the person or class of persons claiming to be beneficiaries of such obligation is settled beyond question by the decisions last cited.

It is my opinion that, however desirable we may believe such a law to be, the court must say that it is unconstitutional and void, and that the writ of mandate should be refused.

189 Cal. 394

McAVOY CO. v. ITALIAN-AMERICAN VINEYARD CO. et al. (L. A. 7077.)

(Supreme Court of California. Aug. 11, 1922.)

1. Sales ☞80—Where buyer's telegram ambiguous, contract held to call for payment upon presentation of documents at bank.

Where seller on receipt of contract negotiated by its representative wired him to obtain buyer's agreement to pay on presentation of shipping documents at Los Angeles banks, as it had previously directed him, and, in reply, the buyer wired that payments would be made on receipt of drafts with bills of lading attached without designating the point where they were to be presented, the contract, construed against the party creating the uncertainty as required by Civ. Code, § 1654, called for payment upon presentation of the shipping documents at a Los Angeles bank.

2. Sales ☞183—Buyer's failure to instruct bank to pay upon presentation of shipping documents as agreed held breach justifying cancellation.

Where contract called for payment upon presentation of shipping documents at Los Angeles bank and buyer after seller was ready to ship ignored the seller's telegrams, asking it to make arrangement for payment by the bank, the buyer broke the contract, and the seller was justified in canceling it.

In Bank.

Appeal from Superior Court, Los Angeles County; Charles Wellborn, Judge.

Action by the McAvoy Company against the Italian-American Vineyard Company and others. From a judgment for defendants, plaintiff appeals. Affirmed.

Lissner, Lewinson & Barnhill, Joseph L. Lewinson and William A. Barnhill, all of Los Angeles, for appellant.

Prescott & Prescott, of Los Angeles, Samuel M. Samter, of San Francisco, Frank C. Prescott, Frank G. Fallon, and Haas & Dunigan, all of Los Angeles, and Thomas, Beedy & Lanagan, of San Francisco, for respondents.

RICHARDS, Justice pro tem. This action was instituted by the plaintiff corporation against the defendant Italian-American Vineyard Company, a corporation, and certain other defendants, to enforce the specific performance of a certain contract for the sale and delivery to the plaintiff of 6,000 barrels or approximately 300,000 gallons of wine; or, in case specific performance could not be had, then for damages in a large sum. The said defendant Italian-American Vineyard Company denied the making or execution of any such contract for the sale or delivery of a larger amount of wine than about 15,000 gallons, which it alleged had been delivered and paid for. It then proceeded in its an-

swer to set forth in detail the history of the transaction between itself and said plaintiff as to the remainder of the said 6,000 barrels of wine, and after so doing alleged that it was the plaintiff which had reached whatever contract existed between the parties as to the sale and delivery of said wine by its failure to make the payments required by it to be made at the time and place specified in the writings which embodied the agreement of the parties. The trial court made its finding upon the issues as thus tendered in the said defendant's favor, and rendered its judgment accordingly, that the plaintiff take nothing by its said action. The correctness of these findings of fact and the law is the chief subject of consideration upon this appeal.

The evidence in the case sufficiently shows that the respondent, Italian-American Vineyard Company, for a number of years prior to the month of March, 1920, had been a corporation engaged in the business of buying grapes and making and marketing wine, with its principal place of business at San Gabriel, Cal., and its main winery at Cucamonga, in the vicinity of which latter place the grapes were grown by various growers who had organized themselves into a corporation known as the "Cucamonga Vintage Company," for the purpose of better collecting and handling their grape product. According to the arrangement between the Italian-American Vineyard Company and the Cucamonga Vintage Company, when the grape growers of the region would bring their grapes to the warehouse of the latter they would be taken over by the former and made into wine, which would be stored in the bonded winery of the Cucamonga Vintage Company and also in the wineries of the Italian-American Vineyard Company until such time as the latter could make sales of said wine. In the latter part of the year 1919 the Italian-American Vineyard Company found that it had, or presently would have, under this arrangement, about 300,000 gallons of wine in the bonded winery of the Cucamonga Vintage Company, for which it was necessary to find a market in order to meet its obligations to the grape growers who had furnished the grapes from which said wine had been manufactured. In the course of that effort the president of the Italian-American Vineyard Company went to Chicago to attend a beverage exposition being held in that city in the spring of the following year. He there met personally one Joseph Schneible, who was an employee of the plaintiff herein, and who had invented a process for dealcoholizing beer, and had installed a plant for the utilization of his said process upon the plaintiff's premises. Schneible was also engaged in experimenting with a view to developing the process for the dealcoholizing of wines

for the dual purpose of extracting their alcohol content and of developing from the residue a beverage which could be marketed within the laws relating to prohibition. Depending upon his success in such experiment, he was desirous of securing for his employer, the plaintiff herein, a large amount of wine having uniform qualities because manufactured by a single winemaker from grapes grown in a single or limited region. Several interviews were had with said Schneible, and some letters passed between himself and the president of the Italian-American Vineyard Company upon the subject, but nothing came of these until early in the month of March, 1920, when the Italian-American Vineyard Company came in touch with a man named B. F. Klein, who was represented to it as a person who could probably dispose of their wine. The result was an arrangement entered into between said corporation and Klein by which the latter was to go to Chicago as a representative of the said corporation in quest of a purchaser for its wine. In thus securing the services of said Klein it was fully explained to him at the time and reiterated to him in the correspondence which followed, the necessity of having whatever contract he might be able to make for the sale of said wine provide that the payments therefor should be made at Los Angeles prior to the shipment of the wine, and beginning by or about the 1st of May and being completed by August, in order to enable the Italian-American Vineyard Company to meet its obligations to the grape growers from whose product said wines had been made. Klein took his way to Chicago during the first week in March, 1920, equipped with the resolution of said corporation empowering him to act as its special representative for the purpose of disposing of its said wine and also with letters of introduction to Joseph Schneible. Arriving in Chicago he presented these credentials to said Schneible, who in turn presented him to the president of the plaintiff herein, with whom several conferences occurred relative to the sale of the respondents' wine, which resulted in a tentative offer to purchase 6,000 barrels of wine at the price of 51 cents per gallon, with deliveries of 1,000 or more barrels per month, and a cash advance of \$10,000 upon consummation of the contract for such purchase. This tentative offer was communicated by Klein to the Italian-American Vineyard Company by a telegram sent to its president on March 10, 1920, who on the following day sent a telegram to Klein accepting said order, but particularly providing that the payments of the balance thereon should be made on presentation of the shipping documents at a bank in California. Following the receipt of this order the officials of the Italian-American Vineyard Company had a conference with the officials of the Cucamonga Vintage Com-

pany relating to the shipment of and payment for said wine, at which meeting said telegrams were exhibited. It was then insisted by the Cucamonga Vintage Company that all wines shipped under said order must be paid for before shipment, and that in any event the Italian-American Vineyard Company must begin making to the Cucamonga Vintage Company payments upon said wine, whether or not the same should be shipped under said order, in the following amounts and at the following times, viz.: On March 20, 1920, \$20,000; during May, 1920, \$26,500; during June, 1920, \$26,500; during July, 1920, the balance due upon the grapes from which said wine had been made, amounting to \$47,732.69. In the event of failure to make said payments the Italian-American Vineyard Company was notified that it would be in default and that its interest in said wines would be sold elsewhere. Following this interview the Italian-American Vineyard Company sent a letter to Klein, explaining its purport and emphasizing the necessity of having its payments made at a bank in California as a prerequisite to the shipment of said wine. On the 15th day of March, 1920, the following agreement was drawn up and executed by the Italian-American Vineyard Company, acting through its representative, B. F. Klein, and Joseph Schneible as trustee, it being understood by the immediate parties executing said contract that said Schneible was acting as trustee for the plaintiff herein. Said contract reads as follows:

"Chicago, Ill., March 15, 1920.

"Agreement of Sale and Purchase.

"Joseph Schneible, trustee, of Chicago, Illinois, has this day purchased from the Italian American Vineyard Co., of San Gabriel, California, a quantity of wines owned by them and stored in the bonded wineries Nos. 45 and 46 of the 6th district of California, said purchase being made under the following conditions:

"For and in consideration of a prepayment of ten thousand dollars (\$10,000.00), receipt of which is hereby acknowledged by the vendor, as payment in full for fifteen thousand seven hundred eighty-one (15,781) gallons of Zinfandel wine in barrels (as hereinafter set forth), the vendor agrees to sell and deliver f. o. b. cars Los Angeles, California, or common point, approximately six thousand (6000) barrels of assorted wines in the following approximate proportions: 20% Barbara. 40% Zinfandel. 20% Claret. 10% Reissling. 10% Palermo.

"The agreed price of same to be 51 cents per gallon with an additional charge of \$6.50 each for fifty gallon cooperage. Shipments to be made strictly in accordance with Federal Regulations Nos. 60 and 61, under titles 2 and 3 of the National Prohibition Act of Oct. 28, 1919, and in quantities to be governed by vendees requisitions, total amount to be ordered out approximately a thousand barrels per month. The vendee reserves the right to cancel this order at any time prior to April 30

1920, as to all but said fifteen thousand seven hundred eighty-one (15,781) gallons of Zinfandel wine for which payment has been made as above, and which shall be shipped out in barrels when requested in writing by said Schneible. Title to said fifteen thousand seven hundred eighty one (15,781) gallons of Zinfandel wine shall vest immediately in said Schneible on payment of said ten thousand dollars (\$10,000), but said wine shall be stored for him by said Vineyard Company (without expense) until April 30, 1920, if so desired.

"The vendor agrees that all wines delivered in accordance with this agreement shall measure up to the same standard and analysis as samples submitted.

"In witness whereof, both parties to this agreement have placed their hands and seals this day and date above written.

"Joseph Schneible, Trustee.

"Italian American Vineyard Co.

"Per B. F. Klein, Special Rep.

"That a barrel of wine contains about fifty (50) gallons."

The original of this contract together with the check for the \$10,000 referred to therein, were immediately sent to the respondent at San Gabriel, Cal., in response to which the latter sent to Klein at Chicago the following two telegrams, the first of which read as follows:

"Received today contract ten thousand dollars Can you have Schneible wire us immediately stating if they take all the goods they will pay in full by August thirty even if they have not yet received all the goods You know we have to pay all the goods before August first Contract does not state payment in full for shipment on presentation shipping documents bank here Did you receive letter hundred dollars Wire immediately sign permit for car and mail immediately."

The second of the two telegrams read as follows:

"Received check sample Schneible Wire us immediately concerning contract and agreeing to pay fifty one cents per gallon naked to us f o b shipping point here cooperage six dollars fifty cents extra and all taxes extra payment on presentation shipping document at bank here agreeing to pay us for at least one thousand barrels every month if they take the thousand barrels or not and to pay the six thousand barrels in full not later than August thirtieth cannot deposit check until we hear from Schneible Wire immediately."

These two telegrams being exhibited to said Schneible he declared, according to his own testimony, that he would not agree to make payments for the wine at Los Angeles, and that if Klein's principal insisted upon this the deal was off; that payments for the wine would only be made in the city of Chicago upon receipt of drafts with bills of lading attached. He was requested by Klein to wire direct to the respondent what his wishes were in this respect, and he accordingly sent the following telegram to the respondent on or about March 21, 1920, viz.:

"Klein's telegram received. I will pay prices mentioned your telegram and taxes extra and will take and pay for one thousand barrels monthly beginning May first as per my contract unless I cancel contract by April thirtieth and will pay in full by August thirtieth all payments to be made on receipt drafts with bills of lading attached."

Two days later the respondent sent directly to the appellant herein the following telegram:

"Your wire satisfactory We have our permits but you must get Chicago Prohibition Director to sign permit to ship from bonded winery 45 Have Klein sign permit for us on receipt permit will ship car immediately Will see VAI tomorrow regarding his check Trusting everything satisfactory With best wishes."

Within a few days thereafter the respondent began shipping to the appellant the 15,781 gallons of wine, which shipments were received by the appellant in due course, the same being the shipments of wine for which, according to the contract above set forth, the sum of \$10,000 already forwarded by check was to constitute payment in full. During the early part of May several telegrams passed between the parties, relating chiefly to the shipments of the balance of the 15,871 gallons of wine for which the respondent was already paid; but on May 18, 1920, the respondent sent to B. F. Klein, in care of Joseph Schneible at Chicago, the following telegram:

"Alhambra, California, May 18, 1920.

"B. F. Klein, Care Joseph Schneible, 130 North Wells Street, Chicago, Illinois. Will start shipping thousand barrels tomorrow first car white balance to be shipped immediately. Wire bank instructions by return wire.

"G. Demateis."

The reason for sending this urgent message was that the Cucamonga Vintage Company was pressing the Italian-American Vineyard Company for money due, through it, to the grape growers from whose product the wine in question had been made, with the result that on May 20th, 1920, the respondent sent a direct message to Schneible reading as follows:

"Los Angeles, California, May 20, 1920.

"Mr. Joseph Schneible, 130 North Wells Street, Chicago, Illinois. For convenience in our banking operations please instruct immediately Farmers Merchants National Bank of Los Angeles to pay us against shipping documents for balance of one thousand barrels which we are shipping before June first. Please answer by return wire.

"G. Demateis."

To this dispatch also no reply was made either by Schneible or by the appellant herein. On May 24, 1920, the respondent sent to Schneible the following telegram:

"Alhambra, California, May 24th, 1920.

"Joseph Schneible, Trustee, 130 North Wells Street, Chicago, Illinois. Having not received any confirmation of telegram sent you on the twentieth instant we regret to advise that we have broken agreement with you for the six thousand barrels of non-beverage wine.

"Italian American Vineyard Co.,

"G. Demateis, President."

On May 28, 1920, the respondent received from Schneible a reply to its telegram of May 24th, which read as follows:

"Your telegram of May 24th received. I will hold you to the letter of the contract for wine purchase and will expect shipments to come forward in accordance therewith. I have fulfilled all terms of the contract and you have not even completed the first shipment thereunder. I am ready to perform on my part all conditions."

In the meantime another situation had arisen, which the appellant strongly insists caused the alleged breach of its contract on the part of respondents. In the latter part of April, 1920, one Maurice Selig, a wine broker and real estate dealer in San Francisco, came into communication with the respondents herein with a view to making some profitable arrangement for the disposal of the said wines of said respondents. Between that time and the latter part of May several interviews occurred between the respondents' officials and said Selig, which finally took form in a proposition in writing, bearing date of May 31, 1920, and which was accepted by the respondents on the following day, wherein said Selig proposed that he would undertake the sale of about 280,000 gallons of respondents' wine, the same to be sold to the best possible advantage and the profits arising out of such sale to be divided equally between the respondents and said Selig. Under this arrangement during the month that followed a considerable amount of wine, which the appellant claims to have been covered by said agreement with it, was disposed of at prices which indicated that there had occurred a decided advance in the selling price of wine during the month of May. As to this transaction, however, the trial court found, upon sufficient evidence, that it was a bona fide transaction on the part both of the corporation and of said Selig and those associated with him in the disposal of said wines. With respect to the main transaction between the parties hereto, the trial court found that as to the 15,781 gallons of wine embraced in the first shipments to the appellant, the transaction was a single purchase, and was completely consummated by the shipment of said wines by the defendant and by the payment therefor in full through the application thereto of the \$10,000 check which had been transmitted to the defendant upon the execution of the original agreement for the sale to Joseph Schneible,

trustee, of its said wine. As to the balance of the 6,000 barrels of wine covered by said agreement, the trial court found that the defendant had expressly provided, in its two telegrams modifying the contract as originally drawn by Klein, that the payments for said wine were to be made at some bank in Los Angeles, Cal., to be designated by the plaintiff, and were to be begun at an early date in May, when the said defendant was prepared to make shipments of the balance of its wine, and to present the shipping documents at such designated bank. The trial court further found that the said Schneible so understood the said telegrams of the defendant modifying the original arrangement, and that said Schneible also believed and understood that his said answer to said telegrams would be understood by said defendant as agreeing with that arrangement as to the payments for said wine. The trial court further found that when the defendant sent its dispatch of March 23, 1920, in reply to the plaintiff's said answering telegram, in which it was stated that the terms of said telegram were satisfactory to both parties to the transaction, it understood and believed that the wine was to be paid for at Los Angeles, California.

[1, 2] The plaintiff makes its main assault in this field upon these findings of the trial court as to the time and place of the payment for the undelivered portion of the 6,000 barrels of wine, claiming that said findings are unsupported by the evidence and are in conflict with the terms of the writings which embraced the contract between the parties. In making this assault the plaintiff chiefly relies upon the language of its reply telegram, dated March 21, 1920, where it states that "all payments to be made on receipt drafts with bills of lading attached." It will be noted, however, that the sender of this telegram did not expressly state at what point, whether in Chicago or in Los Angeles, the draft with bills of lading attached was to be presented on receipt. This omission was most significant in the presence of the explicit statement in the two telegrams of the defendant, above referred to, and to which the plaintiff's said dispatch was a reply, that the payments were to be made at a Los Angeles bank. The utmost that can be said with reference to the above expression in the plaintiff's answering dispatch is that it created an uncertainty upon the subject of the place of payment; and this gives application to the well-established rule for the interpretation of contracts embodied in section 1654 of the Civil Code, providing that in cases of uncertainty "the language of a contract should be interpreted, most strongly against the party who caused the uncertainty to exist." So interpreted, this contract required the plaintiff to make the payments upon the shipments of the balance of

the 6,000 gallons of wine at a bank in the city of Los Angeles, and not in Chicago, as insisted upon by it. This being so, it became the duty of the plaintiff, upon being notified that the defendant was prepared to make its initial shipment of 1,000 barrels of said wine during the early part or middle of the month of May, to designate the bank in Los Angeles at which the latter should present its draft and shipping documents in order to receive such payment. The defendant having proceeded with its shipments of the first lot of 316 barrels of the 15,871 gallons of wine according to the initial order, prepared to begin the shipment of the 1,000 barrels to be shipped in May; and on May 18th sent to B. F. Klein, in care of Joseph Schneible at Chicago, its dispatch stating:

"Will start shipping thousand barrels tomorrow; first car white. Balance to be shipped immediately. Wire bank instructions by return wire."

Upon receiving no reply the defendant followed this message with another dated May 20, 1920, and sent direct to said Schneible, requesting the designation of a particular bank in Los Angeles at which the payment for said shipment of 1,000 barrels of wine then ready for transmission was to be made, and asking for an answer by return wire. After waiting four days for a reply, which did not come, the respondent wired to said Joseph Schneible its cancellation of its said agreement to sell said wine, to which said Joseph Schneible sent his reply dated May 28th, informing the respondent that he proposed to hold it to the letter of its contract, but in which no intimation was given of any intention on his part to make payments for said wine at Los Angeles, or to designate any bank in that city or elsewhere in California at which such payments would be made. When the entire month of May had passed the respondent entered into the agreement with Maurice Selig for the disposal of its wines, to which reference has above been made. On June 17, 1920, the plaintiff herein commenced an action in the United States District Court for the Southern District of California, against the respondent herein, seeking an injunction to prevent the said defendant in that action from disposing of its said wines to or through said Selig, in which action the agreement between the parties was fully set forth, and it was affirmatively alleged that the same was made and was to be performed in the city of Chicago. Having failed to secure such injunction, the said plaintiff commenced the present action, making similar allegations as to the place wherein said agreement was by its terms to be performed. It was upon the foregoing state of the facts that the trial court reached the conclusion embodied in its

findings, that the contract between these parties required the plaintiff to make payments of the amounts due from time to time upon the defendant's shipments of said wine at a bank in Los Angeles to be designated by said plaintiff, and upon the presentation by the respondent of the shipping documents showing the shipment of said wine, and that having failed and refused, upon the defendant's repeated requests, to designate said place of payment at which the defendant should present said shipping documents and thereupon receive such payment, the plaintiff had violated the terms of said agreement, and that such violation justified the defendant in its cancellation of said agreement. We are satisfied that the findings of the trial court in this regard find ample support in the evidence in the case. We do not deem the other alleged errors of the trial court during the trial as of sufficient importance or merit to warrant particular consideration.

The judgment is affirmed.

We concur: WILBUR, J.; SHAW, C. J.; WASTE, J.; LENNON, J.; LAWLOR, J.

189 Cal. 457

BRADLEY v. VAN NOSTRAND. Judge of Superior Court. (Civ. 4325; S. F. 10325.)

(District Court of Appeal. First District, Division 2, California. June 27, 1922. Hearing Denied by Supreme Court Aug. 24, 1922.)

On Hearing in Supreme Court.

Prohibition  10(1)—Order transferring case to another department of court not excess of jurisdiction.

While an order of a judge of the superior court of the city and county of San Francisco, other than the presiding judge, transferring a case from one department to another, may be irregular, it is not void, and prohibition will not lie to prevent a hearing of the case by the department to which it is transferred, on the ground that it is exceeding its jurisdiction.

Petition for prohibition by Richard Bradley, prayed to be directed to Hon. John J. Van Nostrand, as Judge of the Superior Court in and for the City and County of San Francisco, presiding in Department No. 4 thereof. Writ denied by the District Court of Appeal, and hearing denied in Supreme Court.

Herbert Chamberlin, of San Francisco, for petitioner.

Chas. Baer, of San Francisco, and James Campbell, for respondent.

PER CURIAM. It is ordered that the writ be and it is hereby denied.

Opinion of Supreme Court in Bank Denying Hearing.

SHAW, C. J. The petitioner herein asks that an order be made prohibiting the court below from proceeding to the hearing of an application presented to said court by Emma R. Bradley, praying that the applicant be directed to pay \$85 per month to said Emma R. Bradley in pursuance of a decree theretofore rendered against him by said court. The petitioner presented his petition, in the first place to the District Court of Appeal of the First District, Division 2, and this petition was denied. He now presents to this court a petition for rehearing of said cause.

The case of Bradley v. Bradley was a divorce proceeding, and the judgment contained a clause commanding the defendant, Richard Bradley, to pay \$85 monthly to the plaintiff, as alimony. The petitioner claims that the defendant herein is without jurisdiction to hear the said case for contempt, because of the fact that the divorce case aforesaid was heard and determined by Hon. George H. Cabaniss, judge of the said court, and not by the said Hon. John J. Van Nostrand. He contends that, because no order has been made, either regularly or irregularly, by Hon. Franklin A. Griffin, who is the presiding judge of said court, that an order transferring the case from department 3, presided over by Judge Cabaniss, in which the judgment was rendered, to department 4, presided over by the defendant, was given and made by Hon. Walter P. Johnson, judge of the said court, and is void.

The said order is not an excess of jurisdiction. This is expressly decided by the case of Brown v. Campbell, 110 Cal. 644, 43 Pac. 12. The plaintiff claims that the contrary was decided by White v. Superior Court, 110 Cal. 66, 67, 42 Pac. 480. The plaintiff here misunderstands the effect of that case. It says:

"The power to distribute and regulate the business of the court resting with the presiding judge, though it be exercised in a grossly unfair and arbitrary manner, is not an excess of power, but an abuse of it. The remedy for such abuse rests in the hands of the judges of that court, since they have the power to remove that functionary at their pleasure and substitute another in his stead; and possibly, in an instance where the violation of the rules of the court by the judge, without notice to a party litigant, worked the latter an injury by depriving him of some substantial right, the act would amount to an irregularity which could be corrected on appeal. * * * But we do not understand that, after a cause has been once assigned, it may not be reassigned or transferred, even irregularly, without jeopardizing the jurisdiction of the court therein. The power of the presiding judge in the premises is not exhausted by the original assignment of an action or proceeding."

This does not declare that the order would be void if made by other than the presiding judge. While it may be conceded that it would be irregular, it must be held that it is nothing more. There may have been good cause for the interference, but, whether so or not, his action in directing that the cause be heard before department 4 would not have the effect of depriving the court of jurisdiction. It is decided in Brown v. Campbell, supra, that there is but one superior court in the city and county of San Francisco, and all actions brought in that court are within the same jurisdiction. Whether it gets into a department of the court regularly or irregularly, after the court has acquired jurisdiction, is not a matter which we can determine in this proceeding, which only goes to the jurisdiction of the court.

The petition for a rehearing is denied.

We concur: WASTE, J.; LENNON, J.; MYERS, Justice pro tem.; RICHARDS, Justice pro tem.

58 Cal. App. 362

FITTS v. MISSION HEALTH & BEAUTY SHOP et al. (Civ. 3652.)

(District Court of Appeal, Second District, Division 2, California. June 29, 1922.)

1. Partnership — 261—Provision in contract as to termination held to require the consent of all the partners.

Where a partnership agreement between I., F., and V. provided that I. should furnish the capital and act as manager of the business, and that F. and V. should perform services and receive a certain percentage of the profits, and that in the event of dissolution of the firm, the property of the firm should belong to I., an agreement between I. and V. that the partnership should be dissolved was not binding on F., and she was entitled to maintain an action against I. and V. as for a breach of the contract.

2. Appeal and error — 854(2)—Judgment not reversed merely because conclusion is unsound.

A judgment will not be reversed because the conclusion is not legally sound, if it is in fact a proper judgment.

3. Partnership — 105—Broken contract supports action on contract, but not for services performed.

Where two partners break their contract of partnership, the third partner may sue at law to recover damages for breach of the contract, but not for services performed at defendant partners' request.

4. Partnership — 122½—Partner's measure of damages for breach of contract stated.

In a suit at law by a partner to recover for breach of the partnership contract, the measure of damages is loss of plaintiff's share in the prospective profits of the enterprise.

5. Compromise and settlement ⚖5(2)—**Offer to pay for services, made by way of compromise not accepted, will not support action.**

Where defendant committed a breach of a partnership agreement existing between himself and plaintiff, an offer by defendant to pay plaintiff the reasonable value of her services since the commencement of the business by way of compromise, but which offer was not accepted, would not support an action to recover the value of such services.

6. Appeal and error ⚖194(2), 236(2)—**Objection to imperfect denial of verified complaint not considered for first time on appeal.**

The objection that denials contained in an answer to a verified complaint are not specific cannot be presented for the first time on appeal, where such objection was not made in the trial court by demurrer, motion for judgment on the pleadings, or otherwise, and the denials were treated as sufficient on the trial.

Appeal from Superior Court, Los Angeles County; Charles Wellborn, Judge.

Action by Lela May Fitts against the Mission Health & Beauty Shop and others. From a judgment for partial relief only, plaintiff appeals. Affirmed.

William O. Jensen, of Los Angeles, for appellant.

C. L. Belt and A. E. Hamilton, both of Los Angeles, for respondents.

CRAIG, J. In this action the plaintiff brought suit upon seven alleged causes of action. She was made defendant in a cross-complaint. The court rendered judgment in her favor on all except the first count of the complaint, and gave her judgment on the issue tendered by the cross-complaint. The appeal is taken from the whole judgment, but appellant only urges a reversal of that part of the judgment which was rendered by the court against her on the seventh cause of action alleged in the complaint.

A written agreement was entered into between Stephen Innes, party of the first part, and Lela May Fitts and Isola Vassar, parties of the second part. This writing was dated February 24, 1920, and by its terms it was provided that it should last for a period of two years. In a general way the party of the first part was to finance and manage the beauty shop whose conduct was contemplated, and the parties of the second part were to supply their expert services in connection with the same. The memoranda of agreement is a long one, and we will only set forth excerpts therefrom which are necessary to be construed.

After the stipulation to the effect that the contract shall endure for a period of two years, there follows this paragraph:

"It is hereby stipulated and agreed by all the parties hereto that in the event of annulment

or cancellation of this contract, that in such event, all the assets, furnishings, equipment, utensils, belongings of any and every sort whatsoever, used in connection with this business during the period of operating same, shall be, and are hereby declared to be, the sole and exclusive property, title to all of which to alone vest in the party of the first part hereto. Both and each of the parties hereto, making the parties of the second part to this agreement, renouncing and disclaiming, as they now hereby do renounce and disclaim, any right, title or interest whatever in these said assets. Further declaring and stipulating at this time that all the claim, interest or right whatever said second parties either have or claim to have in this said enterprise is solely that of the payment to each one of them respectively of the remuneration on the percentage basis as named and set forth above in this document for services, etc., rendered this enterprise as above. It being hereby further stipulated and agreed that in the event of dissolution of this co-operation, settlement with the parties of the second part hereto on the terms of this agreement shall have and is by stipulation hereby given prior claim."

[1] This contract was terminated by the defendants before two years had expired. Concerning this fact finding 3 contains this statement:

"The court finds that it is true that said defendants did on the 26th day of May, 1920, cancel and terminate said agreement without the consent and over the objections of plaintiff Fitts."

It then concluded as a matter of law:

"That the cancellation of said contract by defendants without the consent of plaintiff created no liability on the part of defendants or either of them by way of compensation or damages by reason of said cancellation of said contract."

Appellant is correct in contending that this conclusion does not follow from the finding above quoted. While it is true that the contract provides a basis for settlement in case of dissolution, we think that by that provision the parties had in mind a dissolution by consent. They having fixed two years as the term for which their proposed association should endure, two of them could not annul it without the consent of the third party to the contract. *Ehrman v. Rosenthal*, 117 Cal. 491, 49 Pac. 460. A legal dissolution, therefore, did not take place.

[2] The termination, which the court found defendants brought about, was wrongful, and constituted a breach of contract, but it is elementary that a judgment will not be reversed because a conclusion is not legally sound, if the judgment is in fact a proper one.

[3] In this case the plaintiff is not entitled to judgment on her seventh cause of action.

By it plaintiff seeks to recover, not damages for breach of contract, but compensation for "services performed by plaintiff for the defendants at their special instance and request." In the count under consideration a remedy is sought to which plaintiff is not entitled under the facts of this case. By the terms of the contract she was a copartner with defendants, not an employé. She might have sued at law to recover damages for breach of contract. *Farwell v. Wilcox* (Okla. Sup.) 175 Pac. 936, 4 A. L. R. 156.

[4] In that event, assuming that the facts proved would justify a recovery, the measure of damages would be her loss of a share in the prospective profits of the enterprise. *Bagley v. Smith*, 10 N. Y. 489, 61 Am. Dec. 756. But plaintiff has not sued for damages, and she has failed to show that she is entitled to recover on a contract, express or implied, for services rendered.

[5] Appellant insists that certain oral promises were made by defendant and were binding upon him, and that judgment should have been rendered for plaintiff accordingly. The court found that the offers of defendant, Innes, to pay the plaintiff the reasonable value of her services since the commencement of the business were efforts at compromise. If this is true, such offers, not having been accepted, cannot be a basis upon which she can predicate a right to recover in this action. Appellant has not pointed out any evidence upon which she may rely as a basis for the contention that this finding is not supported by the evidence, and, from an examination of the transcript, we are satisfied that the finding was justified.

The plaintiff at no time indicated an acceptance of the offers made by Innes.

[6] Appellant's third contention is based upon the following facts: The complaint was verified. The denials contained in the answers are not specific, but general only in character. Nevertheless, the court found that "Paragraph 2 of the seventh cause of action set out in the amended complaint on file herein is untrue."

Appellant insists that this finding is not supported because no issue was raised by the general denials of the answers. It does not appear that the plaintiff, by demurrer, motion, or otherwise, has heretofore raised the point that the denials in the answers, were defective. It does appear that they were acted upon at the time of trial as sufficient. Under such circumstances appellant cannot at this time avail himself of the ground that they are in fact imperfect, and that they are general instead of specific in form. *Lofthus v. Fischer*, 106 Cal. 616, 39 Pac. 1064; *Stockton, etc., Wks. v. Glens, etc., I. Co.*, 121 Cal. 167, 53 Pac. 565. If appellant's contention is true, she should have moved for

judgment on the pleadings. *Hearst v. Hart*, 128 Cal. 327, 60 Pac. 846.

The judgment is affirmed.

We concur: FINLAYSON, P. J.;
WORKS, J

GARIN v. PELTON et al. (Civ. 4186.)

(District Court of Appeal, First District, Division 2, California. May 22, 1922.)

Appeal and error — §59(6) — Where paper sought to be included in transcript not considered below, motion for diminution futile.

Motion for diminution of the record, made under Code Civ. Proc. § 953, as amended by St. 1921, p. 194, is properly denied where the paper requested to be included in transcript was not considered by the trial court in reaching its decision.

Action by H. P. Garin against Allen E. Pelton and others. Motion for diminution of record on an appeal from judgment of dismissal, after sustaining defendant's demurrer to petition for writ of certiorari. Motion denied.

George D. Collins, Jr., of San Francisco, for appellant.

Pillsbury, Madison & Sutro, of San Francisco, and J. Allison Bruner, City Atty., of San Leandro (Chas. A. Ruggles, of San Francisco, of counsel), for respondents.

NOURSE, J. An appeal is pending in this court from a judgment of dismissal entered after the trial court had sustained, without leave to amend, defendant's demurrer to a petition for a writ of certiorari. The transcript on appeal contains a copy of the petition, demurrer thereto, the minute order sustaining the demurrer, the judgment, the notice of appeal therefrom, and the clerk's certificate. In this motion for diminution of the record respondents ask that the appellant be required to include in the transcript on appeal a copy of the writ and return thereto which they assert they filed in response to said writ.

It appears without dispute that the entire proceedings in the superior court were confined to the hearing of the demurrer to the petition, and that, upon the sustaining of that demurrer, the court dismissed the proceedings. If the return had been before the court and had been considered for the purpose of reviewing the proceedings of the respondents, the judgment would have been one of affirmance of those proceedings rather than a dismissal of the action. Section 1075, Code Civ. Proc. In an appeal from a judgment in certiorari either affirming or annulling the proceedings of an inferior tribunal the judgment roll consists of a copy of

the judgment attached to the writ and return. Section 1077, Code Civ. Proc. But, when the proceedings are on demurrer only (the filing of which is permitted under section 1109, Code of Civil Procedure), the inquiry is really one as to whether the petition states facts sufficient to justify the review of the proceedings of the inferior tribunal, the effect of the filing of a demurrer under such circumstances is to adopt the petition as the return. When the cause is dismissed upon the sustaining of a demurrer without reviewing the proceedings, the petition and the demurrer thereto are a part of the judgment roll from the judgment of dismissal. They are papers which the appellate court is required to examine on an appeal from such a judgment. *Stoner v. City Council*, 8 Cal. App. 607, 612, 97 Pac. 692.

The suggestion for a diminution of the record is made under section 953, Code of Civil Procedure as amended by St. 1921, p. 191 which provides that, when it appears that a paper which was before the trial court is omitted from the record on appeal, and that "an examination of such paper or record will assist in a determination of the appeal on its merits," the appellate court may require its production as part of the record on appeal. Though, strictly speaking, the return in this case may have been before the trial court in that it was on file in the clerk's office, it is undisputed that the trial court did not consider it, but based its judgment solely upon its ruling on the demurrer to the petition. Our review of the judgment being confined to proceedings had in the trial court, this return would be of no assistance to this court in the determination of the appeal.

The motion is denied.

We concur: LANGDON, P. J.; STURTEVANT, J.

58 Cal. App. 483

VERGANO v. DENIS. (Civ. 4235.)

(District Court of Appeal, First District, Division 1, California. July 5, 1922.)

Sales — 91—Evidence held to show that buyer did not accept payment from seller in full for all demands on rescission by seller.

In buyer's action on a contract for the sale of a restaurant, providing for an initial payment of \$500 and for rescission by either party within two months, the seller by returning the initial payment, together with one-half the profits, evidence held to show that the buyer did not accept a payment of \$600 from the seller in full for all demands on seller's rescission.

Appeal from Superior Court, City and County of San Francisco; Bernard J. Flood, Judge.

Action by Domenico Vergano against Paul Denis. Judgment for plaintiff, and defendant appeals. Affirmed, on condition of remittitur.

Clay A. Pedrazzini, of San Francisco, for appellant.

Harry I. Stafford, of San Francisco, for respondent.

PREWETT, Justice pro tem. This is an action to recover from the appellant an alleged balance due to the respondent for labor. The record discloses that the appellant was the owner of a restaurant, which he contracted to sell to the respondent for \$1,500, of which sum \$500 was then and there paid in cash. It was further stipulated that either party might withdraw from the contract within two months—the appellant by returning the \$500 initial payment, and the respondent by simply withdrawing and forfeiting his payment. The parties did not enter into partnership, but they agreed to do so, if the sale was finally consummated, and in that event they were to have been partners from the beginning, so far, at least, as concerns the profits and losses.

The respondent entered the restaurant, and for the period of two months and a little over he devoted his time and services to the business. It was agreed that each party should draw down during the two months \$200 a month as "expenses." The appellant does not dispute that each was to draw down \$200 per month, but he testifies that the \$200 received by the respondent was to be by way of compensation to him for his services. The court resolved this conflict in favor of the respondent, and under a familiar rule this court is bound by the finding. The respondent further testified that it was agreed that, in the event that the appellant withdrew from the contract he (the respondent) was to be compensated for his services by receiving one-half the profits of the business during the period. The appellant denied the existence of such an arrangement, and the court found against him thereon. The matter does not rest entirely upon the unsupported testimony of the respondent. The appellant returned the \$500 payment to the respondent, and when he did so he added to it the sum of \$100. This sum of \$100 was not due at all, unless it was paid as a recognition of the claim of the respondent to one-half the profits as his compensation. Furthermore, the appellant, a few days after returning the \$500, destroyed his books of account showing the amount of profits. The respondent had seen them previous to their destruction, and had learned that the profits were about \$1,500. There was abundant evidence to sustain the finding of the trial court. But it seems that the court erroneously failed to credit the

appellant with the \$100 overpayment. No reason is apparent why he should not have credit for this.

The respondent is made to say, by means of an affirmative answer to a question on cross-examination, that he accepted the \$600 (being the \$500 return of advance payment and the extra \$100) "in full payment," but a transcript of his testimony on this point shows clearly that he did not intend to say that it was accepted in full payment for both the return payment of \$500 and his claimed compensation. The following is a transcription from the record:

"Q. Mr. Vergano, did you not at that time accept the \$600 check which was given to you that day from Mr. Denis in full payment of what was coming to you? A. Yes.

"Q. You did? A. Yes; I received it; yes.

"Q. Very well. Then during the time that you were working there for Mr. Denis, you had received regularly the sum of \$200 a month; is that right? A. Both of us.

"Q. I mean you had? A. Yes, sir.

"Q. Very well. Now, did you not have an agreement with Mr. Denis whereby you were to receive \$200 a month for your wages? A. No."

It is apparent from this examination that the respondent did not intend to admit that he accepted the \$600 in full of all demands. On the whole, it must be held that the findings of the trial court are fully sustained by the evidence, save as to the item of \$100.

If the respondent shall file herein within 30 days his stipulation that the judgment may be reduced in the sum of \$100, the judgment, as thus modified, is affirmed; otherwise, the judgment is reversed.

We concur: TYLER, P. J.; RICHARDS, J.

58 Cal. App. 485

GOODRUM v. ABAJIAN et al. (Civ. 3860.)

(District Court of Appeal, Second District, Division 2. California. July 6, 1922.)

Sales 479(7)—Evidence held to justify finding of payment.

Evidence in action of replevin by seller, held to justify finding of payment to seller by buyer of the first installment of the price of the truck sold.

Appeal from Superior Court, Los Angeles County; Chas. Wellborn, Judge.

Replevin by George Goodrum, doing business under the fictitious name of the Commercial Motor Company, against Edward A. Abajian and others. Judgment for defendants, and plaintiff appeals. Affirmed.

Fredericks & Hanna, of Los Angeles, for appellant.

M. G. Ferrahian, of Los Angeles, for respondent.

WORKS, J. This is an action to recover possession of an automobile truck. Plaintiff and defendant Abajian had entered into an agreement whereby the former contracted to sell the truck to the latter upon the making of certain payments, delivery to be made to Abajian upon the payment of a certain installment of \$300. Abajian, claiming to have paid this amount, took possession of the vehicle. Judgment went for defendants, and plaintiff appeals. Abajian alone is a party respondent as the other defendants are out of the case.

The trial court found that respondent paid the \$300 to appellant before taking possession of the truck. The sole point made by appellant is that this finding is without support in the evidence. The occurrences bearing on this question transpired in the room of one Beardsley, there being present Abajian, Beardsley, who was assistant manager of appellant's business, one Meisel, who was employed as an automobile salesman by appellant, and one Platt. Abajian testified that the payment was made, but Beardsley, Meisel, and Platt all asserted the contrary. Appellant concedes that this state of the evidence justified the trial court in finding that \$300 was paid by Abajian, but he contends that the entire finding is not supported by the evidence, in that the record is barren of evidence tending to show that the payment was made to appellant. Appellant's point is that the money was passed to Meisel, who had no authority to receive money or payments due appellant, and that it was not paid to Beardsley, who alone possessed such authority. Abajian knew of Meisel's lack of authority in this respect, for after the latter had conducted with Abajian the negotiations leading up to the agreement for the sale of the truck he told Abajian that he had no authority to accept the \$300 payment, but that it must be made to Beardsley. It was for the very purpose of making this payment and closing the contract that Abajian went to Beardsley's room when they two and Meisel and Platt were there together. The record shows the following testimony of Abajian:

"Mr. Meisel told me the truck was ready and he sent me down to Mr. Beardsley's office. * * * I then went to Mr. Beardsley's office. While I was there I was talking about the insurance because he was charging me a whole lot of money, too much, and I didn't want to pay that much money. In all we were talking to Mr. Beardsley four or five minutes, something like that, and then he told me, 'Well, just a minute; I am going to call Mr. Meisel,' and said, 'Don't you know him, he knows you because you have been doing business with him.' Mr. Meisel came right into Mr. Beardsley's of-

fice and when they were all there Mr. Beardsley says, 'Mr. Meisel, you can talk with Mr. Abajian.' I signed the contract at that time, and Mr. Beardsley said I have to sign my bill of sale, whatever it is I have got to sign, and pay money. I don't remember how many papers I signed, but there was a few papers. * * * Mr. Beardsley was talking to Mr. Platt, and he turned me to Mr. Meisel. They turned around the other way; they started to talk together. After signing the paper I paid money to Mr. Meisel. I paid \$300, three \$100 bills, and Mr. Meisel got the money. I don't know what he did with it. Q. Did he put it in his pocket or on the table? A. No, no, when he started mentioned money, I says, 'Well, here's the money,' and laid on the desk like this, \$300; he put the hands on it like this, and that time I think I sign the contract when I give him the money, but I don't remember for sure. I don't remember for sure whether I signed the contract before or after paying the money. I think after I paid. He showed me the contract. Mr. Beardsley was talking with another fellow. I remember I signed the contract, I think after I paid the money. Mr. Meisel gave me the contract. He gave me this paper."

Abajian thereupon produced a duplicate of the original contract, and the trial judge remarked:

"There is no use incumbering the record with two of these long printed things," the original having been already received in evidence, "the only difference is this original white one, while signed by Mr. Abajian, has not received the signature of Mr. Goodrum, per V. S. B.; while the one in Abajian's possession was completely signed by, as you see, by Goodrum, per V. S. B., meaning Mr. Beardsley. Otherwise the two are exactly the same."

We think the record shows sufficient evidence to justify the finding that the \$300 was paid to appellant.

Judgment affirmed.

We concur: FINLAYSON, P. J.; CRAIG, J.

58 Cal. App. 390

PEOPLE v. BASSETTI. (Cr. 622.)

(District Court of Appeal, Third District, California. June 30, 1922. Rehearing Denied July 31, 1922. Hearing Denied by Supreme Court Aug. 28, 1922.)

1. Intoxicating liquors §213—Indictment for maintaining place where liquor was sold held sufficient.

An indictment charging that defendant did willfully and unlawfully conduct a place in no-license territory where alcoholic liquor was sold, served, and distributed, and did willfully and unlawfully conduct a place where alcoholic liquor was kept for sale and distribution, held sufficient under St. 1911, p. 599.

2. Intoxicating liquors §236(9) — Evidence held sufficient to warrant conviction for keeping a place.

In a prosecution for maintaining a place where intoxicating liquor was kept for sale and distribution, evidence held sufficient to warrant conviction.

3. Criminal law §1186(4)—Modification of judgment by clerk of superior court held not reversible error.

The modification by the clerk of the superior court of the judgment in a prosecution for unlawfully keeping for sale and selling prohibited liquor, from a "violation of Mendocino County Ordinance No. 210" to "maintaining a place where intoxicating liquor is kept for sale and distribution" held not reversible error, in view of Pen. Code, §§ 1258, 1404, and Const. art. 6, § 4½, relating to technical error.

Appeal from Superior Court, Mendocino County; H. L. Preston, Judge.

S. Bassetti was convicted of keeping a place where liquor was sold, etc., in no-license territory, and he appeals. Affirmed.

M. H. Iversen and Charles Kasch, both of Ukiah, for appellant.

U. S. Webb, Atty. Gen., and J. Chas. Jones, Deputy Atty. Gen., for the People.

BURNETT, J. Defendant was convicted under an indictment charging that on the 13th day of July, 1921, in the county of Mendocino, "within the boundaries of the first supervisor district of said county and outside the corporate limits of any incorporated city or town," he did "willfully and unlawfully keep and conduct a place where alcoholic liquor was sold, served and distributed, and did then and there willfully and unlawfully keep and conduct a place where alcoholic liquor was kept for the purpose of sale and distribution; said supervisor district being then and there no-license territory under the laws of the state of California." The indictment contained a second count, charging that on said date he sold alcoholic liquor to two certain individuals, naming them, but he was acquitted on this particular charge.

[1] In his opening brief appellant attacks the sufficiency of the indictment, but we understand that he has abandoned that position. At any rate, the charge upon which he was convicted was sufficiently set forth within the requirement of the statute known as the "Wyllie Law." Stats. 1911, p. 599; People v. Williams, 29 Cal. App. 552, 156 Pac. 882; People v. Mueller, 168 Cal. 526, 143 Pac. 750; State v. Busick, 90 Or. 466, 177 Pac. 64; People v. Strickler, 25 Cal. App. 60, 142 Pac. 1121.

[2] We perceive no merit in the claim that the evidence failed to sustain the charge. It was stipulated that—

"Mr. Bassetti's residence was during the year 1921 in the first supervisorial district of Men-

Mendocino county and outside the incorporated limits of any city or town and that the first supervisorial district of said county was at all times during the year 1921 no-licensed territory under the laws of the state of California."

As to the sale of prohibited liquor by the defendant the proof was ample. The testimony shows clearly that on said July 13 a Mr. Wolfe purchased two bottles of wine, and Mr. Ganter and Mr. Snyder purchased a jug of "Jackass." This liquor was analyzed by one R. L. Love, a chemist for the internal revenue department of the United States, and he testified that it contained "12 and 26 per cent. alcohol by volume." Appellant seeks to discredit this witness, but there is nothing inherently improbable in his testimony. His veracity and the weight to be accorded his declarations were considerations for the jury. As to the identity of the liquor, and that it had not been tampered with after having been purchased from the defendant, the evidence is entirely satisfactory. We may add that several witnesses testified to having purchased wine of the defendant, and, while there was no expert evidence of the alcoholic contents of such wine, that character of proof is not required. *People v. Mueller*, supra. Moreover, some of them testified the wine was intoxicating. Indeed, the record contains more ample evidence of guilt than is usual in this class of cases.

[3] The cause was on the May calendar of this court for argument, but on the statement of counsel for appellant that the record was incomplete and inaccurate, the matter was continued to the June calendar. In the meantime appellant was permitted to file a supplemental transcript containing a bill of exceptions signed by the trial judge. There may be some question, as suggested by the Attorney General, whether this proceeding was regular, but we have concluded to regard the bill of exceptions as a part of the record on appeal. Therein it appears:

"That the clerk of the superior court of the county of Mendocino, subsequent to the pronouncement of judgment in the above matter, and on the 7th day of February, 1922, prepared and entered a judgment and certified the same to be a true and correct copy of the judgment actually rendered by the court; that thereafter, on or about the 28th day of February, 1922, said clerk 'removed, destroyed, tore up and obliterated the said judgment, and in lieu thereof made and entered a new judgment in words and figures as shown in the original clerk's transcript now on file in the office of the clerk' of this court.

"That subsequent to the making of the judgment hereinabove set forth in detail, and prior to the making of an entry of the judgment now of record and set forth in the original transcript as aforesaid, no order of court was made or entered by the superior court of the state of California by and for the county of Mendocino or by the District Court of Appeal aforesaid, or any other court, authorizing or ordering or directing the clerk of the superior

court of said Mendocino county to efface or destroy or obliterate the judgment heretofore set forth in detail, or to prepare or enter or file in said matter a judgment, a copy of which now appears in the original clerk's transcript and filed in the office of the clerk of the district court aforesaid, and that the defendant above named, or his counsel, had no notice of an application to enter a new or different judgment, until the same had been made and entered as aforesaid."

The entry of the judgment, as originally made, was as follows:

"The district attorney, with the defendant and his counsel, Charles Kasch, came into court. The defendant was duly informed by the court of the nature of the indictment filed against him for the crime of misdemeanor, to wit, violation of Mendocino County Ordinance No. 210, committed on or about the 13th day of July, 1921, of his arraignment and plea of 'not guilty as charged in the indictment,' of his trial and the verdict of the jury on the 7th day of February, 1922, 'guilty as charged in the indictment.' S. Bassetti, the defendant, was then asked by the court if he had any legal cause to show why judgment should not be pronounced against him, to which he replied that he had none. And no sufficient cause being shown or appearing to the court, thereupon the court rendered its judgment: That, whereas the said S. Bassetti having been duly convicted in this county of the crime of misdemeanor, to wit, violation of Mendocino County Ordinance No. 210, it is further ordered, adjudged, and decreed that the said S. Bassetti is guilty of the crime of misdemeanor, and that he be punished by paying a fine of \$500, and that he be punished by imprisonment in the county jail of the county of Mendocino in the state of California, for the term of four months."

The change made by the clerk was in erasing the words "violation of Mendocino County Ordinance No. 210" and substituting therefor the following: "Maintaining a place where intoxicating liquor is kept for sale and distribution."

The question is whether the conduct of the clerk in thus irregularly changing the record constitutes such violation of the defendant's rights as to necessitate a reversal of the judgment. And the determination of that question must, of course, be influenced by the consideration whether said irregularity has resulted in a substantial wrong to the defendant.

While the Penal Code, § 1200, prescribes no particular form for the judgment (*People v. Terrill*, 133 Cal. 120, 65 Pac. 303) it does provide:

"When the defendant appears for judgment he must be informed by the court, or by the clerk, under its direction, of the nature of the charge against him and of his plea, and the verdict, if any thereon, and must be asked whether he has any legal cause to show why judgment should not be pronounced against him."

It is to be observed that the court complied with this requirement in every respect, except that the trial judge made a mistake in stating that the offense constituted a violation of a certain ordinance of said county. It was probably an inadvertence, or it may be that said Ordinance 210 contains the same provisions and imposes the same penalties as the state law, and the court mistakenly supposed that the indictment was drawn under this ordinance. But how could the mistake have resulted in any prejudice to the defendant? He had a copy of the indictment, he could not be misled as to the nature of the charge against him, he knew for what he was being tried, and that the verdict of the jury was that he was guilty of the charge contained in count 1 of the indictment. Under such circumstances he was not deceived or prejudiced by the mistake of the trial judge. Indeed, if any misapprehension was caused to him or his counsel, he should have directed the attention of the trial judge to the error that it might be corrected. Not only was the defendant not misled, but it is quite apparent that the mistake would not prevent him from successfully urging the plea of a former conviction should he be prosecuted again for the same offense as is charged in the indictment herein. In the *Matter of Ring*, 28 Cal. 252.

Even if we were to consider the irregularity of sufficient gravity to justify a reversal of the judgment, we would direct the trial court to resentence the defendant, correcting said mistake. *People v. Johnson*, 71 Cal. 384, 12 Pac. 261; *People v. Sama* (Cal. Sup.) 207 Pac. 893; *People v. Tomskey*, 20 Cal. App. 672, 130 Pac. 184.

But since the judgment is in proper form, it would be an idle thing to send the case back to have the trial judge inform the defendant of something he already knows, and to impose upon him the same penalty that has already been pronounced.

We may add that the following citations are indicative of the proper view of said irregularity: *People v. Gregory*, 8 Cal. App. 738, 97 Pac. 912; *Ex parte Murray*, 43 Cal. 455; *People v. Sam Lung*, 70 Cal. 515, 11 Pac. 673; *People v. Eppinger*, 109 Cal. 294, 41 Pac. 1037; *People v. Terrill*, *supra*; *State v. Cook*, 92 Iowa, 483, 61 N. W. 185; *Pointer v. United States*, 151 U. S. 396, 14 Sup. Ct. 410, 38 L. Ed. 208; *White v. United States*, 164 U. S. 102, 17 Sup. Ct. 38, 41 L. Ed. 365; sections 1404, 1258, Pen. Code; article 6, § 4½, Const. Cal.

In conclusion, it may be stated that the defendant was fairly tried and justly convicted. The instructions were complete and accurate, and there was no dispute of the material facts to which the witnesses for the people testified.

The judgment is affirmed.

We concur: FINCH, P. J.; HART, J.

53 Cal. App. 288

BAKER v. SUPERIOR COURT, SACRAMENTO COUNTY, et al. (Civ. 2488.)

(District Court of Appeal, Third District, California. June 23, 1922.)

1. Statutes  114(2)—Compensation Act provision for consolidation of suits held valid.

The provision of Workmen's Compensation Act 1919, § 26, for consolidation of separate suits by the employer and the employee against a third person, is fairly connected with the declared object of the act, and is not violative of Const. art. 4, § 24, though not indicated in the title.

2. Action  57(2)—Suits held not subject to consolidation under Workmen's Compensation Act.

A suit by an employee against a third person for injuries and a suit by the employee against the wrongdoer for injury to property, as the principal item of damages, should not be consolidated, under Workmen's Compensation Act 1919, § 26.

3. Prohibition  3(2) — Refused to prevent consolidation of cases, where remedy lies by appeal.

Writ of prohibition will not be granted, to prevent the superior court from consolidating employer's and employee's actions under Workmen's Compensation Act 1919, § 26, since appeal from an erroneous consolidation is provided for by Code Civ. Proc. § 956, and under section 1103 the writ is not available where other adequate remedy exists.

Application by Thomas W. Baker for writ of prohibition, prayed to be directed to the Superior Court of Sacramento County and another, to prevent the consolidation of certain causes for the purpose of trial. Writ denied.

Fred J. Harris, of Sacramento, for petitioner.

Ben P. Tabor, of Sacramento, for respondents.

BURNETT, J. This is a petition for a writ of prohibition to prevent the superior court from trying another action in connection with and at the same time as the trial of the case of *Baker v. Central California Traction Company*. Thomas W. Baker and one Alfred Schultz were injured in the city of Sacramento while riding on a fire truck that was wrecked by an interurban car belonging to said company. At the time Baker was an employee of said city as a member of the fire department, and was acting in the course of his duty as tillerman of the truck. He brought an action in the superior court against said company for damages caused by the alleged negligence. A separate action of the same character was brought against the company by Schultz and another by the city of Sacramento for damages caused by the de-

struction of the truck, and for compensation for certain moneys paid out on behalf of Baker and Schultz. When petitioner moved the superior court to set his case for trial before a jury, respondent company moved the court to consolidate the actions for the purpose of trying them together. This latter motion was granted over the objection of Baker, Schultz not appearing, and the court set the consolidated action for trial for June 29.

Petitioner seems to attach some importance to the circumstance that the superior court has exclusive jurisdiction to try the Baker and Schultz cases, while it has only concurrent jurisdiction with the Industrial Accident Commission over the city case. But since the suit was properly brought in the superior court, as far as the order of consolidation is concerned, the concurrent jurisdiction of said commission is of no significance, and the rules of procedure that are prescribed for the trial of actions in said court must, of course, apply. This is true unless, as contended by respondents, there is a common-law right in the court to consolidate these actions regardless of statutory provisions. As to this, though, we are satisfied that respondents are in error. Whatever may be the rule in other jurisdictions, in this state the subject is regulated and controlled by statute. In support of their position respondents rely upon the authority of *Cyc.* and *Corpus Juris*. In the former it is said:

"In the absence of legislative enactment, courts of general common-law jurisdiction have inherent power to consolidate two or more actions at the instance of the defendant, or with his consent." 8 *Cyc.* 591.

In *Corpus Juris* the rule is stated as follows:

*"Courts of general jurisdiction have, independently of statute, inherent power to consolidate different actions where the conditions authorizing consolidation exist. * * * The practice of consolidating actions has now in many jurisdictions been expressly authorized, either generally or under certain conditions, by statutory provisions, some of which, it is to be observed, are broader than others, and it has been held that this statutory authority is exclusive of the common-law authority."* 1 *C. J.* 1122.

It is further stated on page 1124 that—

"If the conditions essential to authorize a consolidation do not exist, the court has no discretion to exercise."

But it is a familiar rule here that "the Code establishes the law of this state respecting the subjects to which it relates" (section 4, Preliminary Provisions, Code Civ. Proc.), and section 427 of the Code of Civil Procedure provides what causes of action may be joined. It is not disputed that the facts herein do not bring the case within the contemplation of said section. Indeed, the only statutory pro-

vision upon which respondents rely as justifying the order of consolidation is section 26 of the Workmen's Compensation Act. Stats. of 1919, p. 920. Said section, as far as applicable, provides:

*"The term 'employee,' as used in this section, shall include the person injured and any other person in whom a claim may arise by reason of the injury or death of such injured person. * * * The claim of an employee for compensation shall not affect his right of action for damages arising out of injury or death against any person other than the employer; and any employer having paid, or having become obligated to pay, compensation, may likewise bring an action against such other person to recover said damages. If either such employee or such employer shall bring such action against such third person, he shall forthwith notify the other in writing, by personal service or registered mail, of such fact and of the name of the court in which such suit is brought, filing proof thereof in such action, and, if the action be brought by either, the other may, at any time before trial on the facts, join as party plaintiff or must consolidate his action, if brought independently."*

[1] Petitioner attacks this provision as violative of section 24 of article 4 of the state Constitution, requiring the subject of any act of the Legislature to be expressed in its title. He calls attention to the fact that in the original "Workmen's Compensation Act" (Stats. of 1913, p. 279), the only portion of the title in which any mention is made of the superior court is found in these words:

"And creating an industrial accident commission, providing for its organization, defining its powers and duties and providing for a review of its orders, decisions and awards"

—and that the portion of the above which we have italicized is also contained in the title of the act as amended in 1917. Stats. of 1917, p. 831. In the amendment of 1919 the language is:

"An act to amend sections [enumerating them] of the Workmen's Compensation, Insurance and Safety Act of 1917, approved May 23, 1917, and to add thereto a new section, to be numbered forty-six and one-half, relating to the issuance of injunctions by the superior court to enforce safety measures in places of employment."

No reference is made to the superior court, except in relation to the review of the awards of the Industrial Accident Commission and the issuance of injunctions to enforce safety measures. There is no mention of separate suits at the instance of the employer and the employee, or of the consolidation of such actions. The asserted change in the law upon which respondents rely is manifestly of great concern to litigants, and it is at least unfortunate that it was not indicated in the title to the act. However, the courts are disposed to be liberal in their construction of said constitutional provision, and to be governed by

the principle stated in volume 1 of Dillon on Municipal Corporations (5th Ed.) p. 136, as follows:

"Many of the state Constitutions contain in substance a provision that no legislative act shall embrace more than one object, or, as some of them phrase it, one subject, which shall be expressed in its title. Requiring such subject or object to be expressed in the title is to prevent deceptive titles, and to enable members of the Legislature, and the people, through the usual publication of legislative proceedings, to form from the title an opinion of the nature and objects of the bill. Subject to the foregoing fundamental requirements, the provision has been frequently and properly construed to require only the general or ultimate object to be stated in the title, and not the details by which the object is to be attained. Any provision fairly and reasonably connected with and calculated to carry the declared object into effect is unobjectionable, although not specially indicated in the title. It is sufficient if the title fairly expresses or plainly gives notice or warning of the subject dealt with in the body of the act."

Applying this principle and the other rule of construction, that effect must be given, if possible, to the acts of the Legislature, we think said provision may and should be upheld.

[2] However, it is to be observed that the suit brought by the employer which may be consolidated with that of the employee is for damages by reason of compensation paid or obligation to pay to the injured employee. Obviously it does not refer to an action brought by the employer against the third party to recover damages done to the property of the former. The consolidation is permitted because the employer, by reason of having compensated the employee or having become liable for his loss, is subrogated to his claim against said third party for the damages suffered by said employee through the negligence of the third party. But, of course, there can be no subrogation, and no interest on the part of the employee, in a separate and independent action by the employer for an injury done to his property by said third party. Such was the principal item in the cause of action on the part of the employer herein. The complaint of the city of Sacramento was to recover of the traction company the sum of \$3,998.58 for damaging, breaking, and wrecking the truck and the hook, ladder, and fire apparatus. It is true that the complaint also alleges that the city, by reason of its employment of said Baker, "was compelled to and did necessarily expend

certain sums of money for hospital charges, medical and professional attendance, and salary to said Thomas Baker during his said illness, to wit, the sum of \$473.80, to the damage of plaintiff in said amount"; but this small item should not characterize the action to the extent of compelling the plaintiff Baker to share with the city the control of the trial, when the main features of the two actions are so entirely disconnected. Of course, it is a matter of great concern to Baker under his constitutional right to a jury trial, since his privilege of challenge to individual jurors will be greatly curtailed if the actions be tried together (section 601, Code Civ. Proc.), and it is manifestly of importance that a litigant be not improperly hampered in conducting the trial according to his own theory.

[3] However, the error complained of can undoubtedly be reviewed on appeal from the judgment (section 956, Code Civ. Proc.) and no reason has been suggested why that method does not afford a plain, speedy, and adequate remedy, within the purview of such decisions as *Hamberger v. Police Court of City of Fresno*, 12 Cal. App. 153, 106 Pac. 894, 107 Pac. 614; *Simpson v. Police Court of Riverside*, 160 Cal. 530, 117 Pac. 553; *Germain Seed & Plant Co. v. Justice Court*, 41 Cal. App. 397, 182 Pac. 784; *Kurtz v. Superior Court*, 37 Cal. App. Dec. 643; ¹ *Lindley v. Superior Court*, 141 Cal. 220, 74 Pac. 765. As we understand it, no exceptional circumstances are disclosed that take the case out of the general rule, which recognizes an appeal as an adequate remedy. Such circumstances are pointed out in *Ophir Silver Min. Co. v. Superior Court*, 147 Cal. 467, 82 Pac. 70, 3 Ann. Cas. 340, and *Consolidated Adjustment Co. of California v. Superior Court* (Cal. Sup.) 207 Pac. 552.

Unless we are to ignore the plain provisions of section 1103 of the Code of Civil Procedure, we must hold that petitioner must await the result of the trial, and then, of course, he may be satisfied without an appeal. We may add that, while under the rule as to prohibition, we do not feel authorized to issue the writ, yet we do not mean to hold that the trial court may not, if so advised, still permit petitioner to try his case separately.

The demurrer to the petition is sustained, and the writ denied.

We concur: FINCH, P. J.; HART, J.

¹ Opinion withdrawn. New opinion substituted (see 38 Cal. App. Dec. 105), hearing thereon granted by Supreme Court June 24, 1922, decision of District Court of Appeal upheld by order, without opinion, October 22, 1922.

58 Cal. App. 357

BARTLETT, Mayor, v. BELL, Auditor.
(Civ. 4082.)

(District Court of Appeal, First District, Division 1, California. June 29, 1922. Hearing Denied by Supreme Court Aug. 28, 1922.)

1. Municipal corporations ⚡1027—Mayor not authorized to maintain action to require auditor to sign warrant for another's claim against city.

Where a city established a municipal market as authorized by its charter, and an ordinance required the auditor to sign all warrants for the market equipment, the mayor in his official capacity, not being the real party in interest, could not maintain an action to compel the auditor to sign a warrant for equipment furnished by another, though Const. art. 11, § 6, empowered cities to make and enforce regulations respecting municipal affairs, and the city charter required the mayor to see that all contracts made with the city were performed.

2. Municipal corporations ⚡168—Mayor not authorized to assist private litigants in collecting claims against city.

A charter, requiring the mayor to see that the ordinances are enforced and contracts with the city performed, covers only matters in which the city has an affirmative interest, and does not authorize the mayor to assist private litigants in asserting their monetary rights against the city.

Appeal from Superior Court, Alameda County; James G. Quinn, Judge.

Application for a writ of mandate by Lewis Bartlett, Mayor, etc., against Elmer F. Bell, Auditor, etc. From a judgment denying the application, petitioner appeals. Affirmed.

Lemuel D. Sanderson, Asst. City Atty., of Berkeley, for appellant.

Richard B. Bell, of Berkeley (R. M. F. Soto, of San Francisco, of counsel), for respondent.

PREWETT, Justice pro tem. [1] The city of Berkeley is a municipal corporation organized under a freeholders' charter. During all the period of time involved in this proceeding the appellant was the mayor and the respondent was the auditor of said city. The council of said city on the 15th day of March, 1921, adopted an ordinance amending a former ordinance establishing a municipal market in said city. Said ordinance and the amendment thereto provide for the selection of a market manager. Section 4 of said amended ordinance reads as follows:

"Sec. 4.—That the market manager shall make the purchases of equipment and shipments of foodstuffs, and all demands for payment of the same when allowed by the council, shall be signed by the president and clerk of the council, and shall be properly numbered and dated. Likewise, a warrant numbered and dated the same as the demand shall be issued and signed

by the same officers. Both must, before they can be paid, be presented to the auditor. The auditor shall allow it, and indorse upon said warrant the word 'Allowed' and the date of such allowance and sign his name thereto. The treasurer shall pay said demand on the presentation of the warrant so allowed."

To supply the needs of the market established by said ordinances, the proper officers purchased from the Mercantile Box Company 500 lug boxes at a price of \$106.25. The demurrer admits that the amount of the aforesaid claim is a fair and reasonable sum to be paid for said materials. A claim for the same was regularly presented by said Mercantile Box Company, and the same was passed and authenticated as required by ordinance and then presented to said respondent as said auditor for allowance. That officer refused to allow the claim or in any manner to endorse the warrant. This proceeding is instituted by said appellant in his official capacity as mayor of said city to procure a writ of mandate compelling said respondent to allow said claim. It has been stipulated that this case shall be submitted to this court upon the sole issue as to the power of the appellant as said mayor to maintain this proceeding.

Section 6 of article 11 of the Constitution provides, among other things, as follows:

"Cities and towns hereafter organized under charters framed and adopted by authority of this Constitution are hereby empowered, and cities and towns heretofore organized by authority of this Constitution may amend their charters in the manner authorized by this Constitution so as to become likewise empowered hereunder, to make and enforce all laws and regulations in respect to municipal affairs, subject only to the restrictions and limitations provided in their several charters, and in respect to other matters they shall be subject to and controlled by general laws."

The charter of said city provides that it shall have the right and power to acquire, establish, maintain, equip, own, and operate markets and market houses and all other public buildings, places, works, and institutions, and to enact appropriate legislation and do and perform any and all other acts and things which may be necessary to carry out its general powers and to exercise all powers not in conflict with the Constitution and its charter. Article 6, § 21, of said charter reads as follows:

"The mayor shall be the chief executive officer of the city and shall see that all the ordinances thereof are duly enforced. He shall be charged with the general oversight of the several departments of the municipal government. He shall see that all contracts made with the city are faithfully performed."

The appellant complains that, by reason of the refusal of said respondent to approve

warrants for claims incurred in connection with said municipal market, the market director is deprived of the means of carrying on his duties, and that he, the appellant, is deprived of the means of enforcing said ordinances providing for said market.

It is clear that the appellant is not authorized to maintain this proceeding. He is not the real party in interest. His only interest in the matter of payment of this claim arises by reason of its supposed favorable effect upon other negotiations and contracts had by the city with other contractors. But this condition is remote and inconsequential. There exists no direct and tangible interest on the part of the city in the payment of this claim. The city received the commodity in conformity with the terms of the contract had with the claimant. It cannot further seek or obtain anything that it has not already acquired. If the writ were granted, the city would be no richer, and no property or other tangible right would be secured to it. So far as the rights of the city are concerned, the controversy is over a mere moot question in which it has no financial interest. In no manner and in no degree does the city or the mayor represent any of the interests of the claimant, and the claimant alone is entitled to complain if it demands are unpaid.

The appellant draws our attention to *State v. Crawford*, 28 Fla. 441, 10 South. 118, 14 L. R. A. 253, as sustaining his position. In that case the court upheld the right of the Governor to prosecute a writ against the Secretary of State to compel that officer to sign, seal and deliver a commission to a public officer. It was held that the state had such an interest in seeing that all public offices were properly filled that the Governor could prosecute the writ. The court says:

"The entire public are directly interested in the consummation of his appointment, in order that he may perform the duties of his office, which duties, and the necessity of the performance thereof to the public account, not only for the appointment, but for the creation of the office itself."

He relies, also, upon *Russell v. Ayer*, 120 N. C. 180, 27 S. E. 133, 37 L. R. A. 246; but in that case the Governor sought to compel the state auditor to perform a ministerial duty with reference to the levy and collection of certain taxes. Manifestly the entire state was interested in the matter, and the Governor, as its chief executive, was charged with the duty of seeing that all officers performed their duty. It was held that he could maintain the proceeding.

But here we have a public officer seeking to compel another public officer to perform an act for the benefit of a private party, and an act in which the public as such has no manner of interest. If the respondent, as

auditor, refuses to perform some ministerial duty which injuriously affects the claimant, then the person injured should seek the remedy. The city cannot depart from its proper functions to assist private litigants in collecting their private debts. The fact that the city owes the debt in no way affects the duty of the claimant himself to seek the proper relief.

No more does *City of San Buena Ventura v. McGuire*, 8 Cal. App. 497, 97 Pac. 526, 528, aid the appellant. That case involved the refusal of an officer to authenticate an ordinance passed by the board of trustees, and the city, being interested in passing the ordinance, brought an action for a writ compelling the discharge by the officer of his ministerial duty. The court upheld the right of the city to sue. *City of San Diego v. Capps*, 32 Cal. App. 461, 163 Pac. 235, involves a similar principle. Neither case is authority here.

[2] Appellant further insists that, because the charter requires the mayor to see that all ordinances of the city are duly enforced and that contracts made with the city are faithfully performed, that official may intervene in matters affecting either ordinances or contracts even though the city has no actual interest in their observance. The duties conferred by the charter cover only matters in which the city has an affirmative interest, and they do not require or permit him to reach out and assist private litigants in asserting their monetary rights, even though, in a remote sense, the city may be affected by them.

The judgment of the lower court is affirmed.

We concur: TYLER, P. J.; RICHARDS, J.

58 Cal. App. 448

PENDLETON v. HELLMAN COMMERCIAL TRUST & SAVINGS BANK.
(Civ. 3823.)

(District Court of Appeal, Second District, Division 1, California. July 3, 1922. Rehearing Denied by Supreme Court Aug. 31, 1922.)

1. Banks and banking ⇨134(2)—Bank has right of set-off when depositor dies insolvent, though debt not due.

Where a depositor died insolvent, the bank had a right to set off a note in its favor against the deposit, though the note was not then due, and even assuming that Civ. Code, § 3054, giving a banker a lien on property in his hands for any balance due him, applies to deposits of money.

2. Banks and banking ⇨119—Relation to depositor is that of debtor, and money belongs to bank.

Money deposited in a bank is not the property of the depositor, but belongs to the bank,

which is the depositor's debtor for the amount deposited.

3. Banks and banking ⚡134(1) — **Right of set-off not confined to statutory lien.**

A bank's right of set-off as against an insolvent depositor, who is also indebted to the bank, is not confined to the statutory lien conferred by Civ. Code, § 3054, on property in the hands of the bank for any balance due.

4. Executors and administrators ⚡434(5) — **Bank may set up right of set-off, though claim not presented.**

A bank, sued by an insolvent depositor's administrator, may set up its right to offset a note due it against the deposit, though the claim on the note has not been presented, as this defense is not in the nature of a counterclaim, but in effect that no indebtedness exists.

Appeal from Superior Court, Los Angeles County; Edwin F. Hahn, Judge.

Action by C. W. Pendleton, as administrator of C. W. Pendleton, Jr., deceased, against the Hellman Commercial Trust & Savings Bank. From a judgment for plaintiff, defendant appeals. Reversed.

Page & Hurt and Arthur F. Coe, all of Los Angeles, for appellant.

Kimball Fletcher, of Los Angeles, for respondent.

CONREY, P. J. The plaintiff, as administrator of the estate of C. W. Pendleton, Jr., deceased, brought this action to recover the amount of a deposit credit of \$360.33 as shown on the books of People's Trust & Savings Bank, a corporation. By reason of transactions between the People's Trust & Savings Bank and the defendant bank, it is conceded that the liability, if any there be, is now the liability of the defendant. C. W. Pendleton, Jr., died on April 25, 1919. The answer of the defendant states that on February 28, 1919, the People's Trust & Savings Bank loaned to decedent the sum of \$5,000, for which he gave his note, without security, payable 90 days after that date. The note was not paid, and prior to the commencement of this action it was transferred to the defendant for the purposes stated in the answer. It does not appear that any claim has been presented to the administrator for allowance of the amount of the note as a debt of the estate payable in course of administration. The answer further alleged that C. W. Pendleton, Jr., was insolvent at the time of his death, and that the assets of his estate were insufficient to pay his liabilities, and that the estate is insolvent. The plaintiff having moved for judgment on the pleadings, this motion was granted, and judgment entered in favor of the plaintiff for the amount of the deposit. From this judgment the defendant appeals.

For all practical purposes, the questions at

issue are the same as if the deposit had been made in defendant bank and the note of decedent had been made to the defendant. The judgment rests upon the assumption that, because the debt of Pendleton to the bank was not due at the date of his death, the bank never acquired any right of set-off, or any so-called "banker's lien" upon the deposit fund, whereby that fund could be applied toward payment of the debt owing, but not then due, from Pendleton; that therefore the bank, with reference to the note held by it, is only a general creditor, and as such creditor can only present its claim against the estate as an item wholly unconnected with the amount which decedent had left on deposit in the bank.

[1, 2] It is not to be denied that under ordinary conditions, where the debt to the bank is not due, the banker's right to set-off a deposit against such debt does not exist. But in this case the depositor at the time of his death was insolvent. It is provided by section 3054 of the Civil Code:

"A banker has a general lien, dependent on possession, upon all property in his hands belonging to a customer, for the balance due to him from such customer in the course of the business."

Relying upon this section, respondent contends that the lien does not exist, because at the time of Pendleton's death the note to the bank was not due. In reply to this it might well be questioned whether the section is applicable to the case, since money deposited in a bank is not property of the depositor. The money belongs to the bank, which is the depositor's debtor for the amount deposited. Assuming, however, that the indebtedness of the bank to its depositor is lienable property within the terms of said section 3054, the contention that the lien is not enforceable here, because the debt to the bank was not due, takes no account of the fact of insolvency. In the majority of jurisdictions, in the states where the question has been presented, it has been held that on the insolvency of a depositor a right of set-off exists against the insolvent or his assignee, even though the debt is not due; the cases evidently proceeding on the theory that insolvency renders all debts due and furnishes of itself a sufficient ground for set-off. This proposition is stated, and the authorities on both sides of the question are collected, in a note found in Ann. Cas. 1915A, at pages 689, 690.

Gnarini v. Swiss American Bank, 162 Cal. 181, 121 Pac. 726, is listed as sustaining the minority rule, which, however, it does not do. That case holds only that, where a bank has mortgage security for a debt, it must exhaust that security before recourse can be had to the bank account or personal responsibility of the debtor. So far as we are ad-

vised, the question here presented has not been decided in this state. We are of the opinion that the fact of insolvency of the debtor, as applied to the situation existing in this case, is sufficient to sustain the right of set-off in favor of the creditor bank, notwithstanding that the debt of the depositor was not due at the time when he died leaving an insolvent estate. The principles involved are discussed at length in *Nashville Trust Co. v. Fourth Nat. Bank*, 91 Tenn. 336, 18 S. W. 822, 15 L. R. A. 710. In that decision it was noted that the doctrine of set-off, whether legal or equitable, is essentially a doctrine of equity. It was that natural justice and equity which dictates that the demands of parties, mutually indebted, should be set off against each other, and only the balance recovered, that gave birth to the idea of accomplishing the result in a judicial proceeding. Although the common law determined otherwise, the rule was amended, in the case of bankrupts, by English statutes.

"In pursuance of these old statutes, and of the dictates of equity, the principle of set-off between mutual debts and credits has, for nearly two centuries past, been adopted in the English bankrupt laws, and has always prevailed in our own whenever we have had such a law in force on our statute book, and it mattered not whether the debt was due at the time of bankruptcy or not." *Carr v. Hamilton*, 129 U. S. 255, 9 Sup. Ct. 295, 296, 32 L. Ed. 670.

"The jurisdiction of courts of equity over the subject of set-off was exercised before there was any statute upon the subject. * * * By the civil law, from which the great body of our system of equity comes, a cross-debt was, by mere operation of law, without any act of the party, extinguished. It was treated as an absolute payment. Courts of equity in this country, while not going so far, have accomplished the same results in numerous cases, by granting perpetual injunctions against judgments in favor of insolvent persons who were indebted in larger amounts to the judgment debtor. * * * The court, in all such cases, is governed, not by the statute of set-off, but by the general principles of equity." *Nashville Trust Co. v. Fourth Nat. Bank*, supra.

The court further held, in the case last cited, that insolvency of itself is a sufficient ground for the application of equitable set-off, and that the fact that the indebtedness on one side is not due when the set-off is claimed constitutes no obstacle to the assertion of the right against an insolvent debtor.

[3] We perceive no reason why a bank's right of set-off, as against an insolvent depositor who is also indebted to the bank, should be confined to the statutory right of set-off recognized by the Civil Code:

"The 'banker's lien' referred to in section 3054 of the Civil Code, was familiar, as a part of the law, long before the enactment of the Codes. Section 3054 does not extend its

scope." *Berry v. Bank of Bakersfield*, 177 Cal. 206, 209, 170 Pac. 415, 417.

We may add the section does not restrict the scope of the principles thereby recognized. There is no magic in the statutory enactment of a rule derived from equity, whereby in receiving this legislative sanction the principle is deprived of its equitable qualities. It is not just that the representative of an insolvent debtor, who on another account is the creditor of his debtor, should be permitted to enforce the insolvent's claim without paying the other, merely because the obligation in his favor is due while the correlative obligation is not due.

"It is well settled that the insolvency of a party against whom a set-off is claimed constitutes a sufficient ground for the allowance of a set-off not otherwise available." *People v. California, etc., Trust Co.*, 168 Cal. 241, 250, 141 Pac. 1181, 1185 (L. R. A. 1915A, 299).

[4] Respondent contends, also, that under the statutes of this state no claim can be used as a set-off and counterclaim against the estate of a decedent unless the claim upon which the same is founded has been presented to the personal representative of the decedent. Thus, in *Reed v. Johnson*, 127 Cal. 540, 59 Pac. 986, it was indicated that an answer which set out a counterclaim against the estate of a decedent did not constitute a defense or counterclaim; it not appearing that the demand had ever been presented for allowance to the executrix. But in the case at bar the defense presented is not in the nature of a counterclaim. Its allegations are, in effect, that there exists no indebtedness of the defendant to the plaintiff. The bank is not seeking to collect its note from the decedent's estate. For that purpose its claim would have to be presented for allowance and for payment pro rata with other claims out of the assets of the estate, such as they may be. Appellant's claim here is that, by reason of the insolvency of Pendleton, it was entitled to apply the amount of the deposit pro tanto to the payment of the note. This contention, we believe, should be sustained.

There is one decision of our Supreme Court arising out of facts very much like those of the present action, except that in that case the bank presented to the executrix its claim, although not for the entire amount of the note, but for a stated balance, crediting thereon the amount of the deposit, and except, also, that the fact of insolvency did not appear. At the time of his death the decedent was indebted to defendant on a note not yet due, and had on deposit in the bank a lesser sum. When the note matured, the bank applied on the note the amount of the deposit. The bank having refused to pay to the executrix the amount of the deposit, she brought this action. The Supreme Court, re-

versing the judgment of the superior court, held that the bank was entitled to credit for the amount of the deposit, as a cross-demand which might be set off against the note; that, although the note of deceased was not due when he died, it was sufficient that it had become due when the action was brought. In its decision the Supreme Court pointed out that there was no finding or evidence as to the solvency or insolvency of the estate. The decision was grounded upon the proposition that the purpose of the law was to ascertain the balance existing and to give to both the claimant and the estate the benefit of all just offsets, whether the estate be solvent or insolvent. In view of this conclusion, the court held it "unnecessary to decide whether the appellant had a right to apply the deposit by virtue of the banker's lien claimed by it." *Ainsworth, Executrix, v. Bank of California*, 119 Cal. 470, 51 Pac. 952, 39 L. R. A. 686, 63 Am. St. Rep. 135.

The judgment is reversed.

We concur: SHAW, J.; JAMES, J.

(189 Cal. 417)

PICKWICK STAGES, NORTHERN DIVISION, v. BOARD OF TRUSTEES OF CITY OF EL PASO DE ROBLES et al. (L. A. 6846.)(Supreme Court of California. Aug. 14, 1922.
Rehearing Denied Sept 11, 1922.)**1. Pleading ⚡4—Nature of defendant's pleading determined from its contents, not its designation.**

Whether defendant's pleading is a cross-complaint or a counterclaim is to be determined from its allegations, and not from the designation given it.

2. Pleading ⚡138—Answer held a counterclaim and not a cross-complaint.

In an action for malicious interference by defendant with plaintiff's stage line franchise, an answer, denominated a cross-complaint, and alleging that defendant had a local stage line franchise which plaintiff was infringing by intercepting local traffic and praying for actual and exemplary damages, set forth a cause of action connected with the subject of plaintiff's action, and hence was a counterclaim under Code Civ. Proc. §§ 437, 438, and not a cross-complaint.

3. Judgment ⚡106(8)—Where answer is a counterclaim and not a cross-complaint, it is deemed controverted, and default against plaintiff improper.

Under Code Civ. Proc. § 462, providing that new matter in the answer constituting a counterclaim is deemed controverted, defendant is not entitled to judgment by default on an answer, which, though designated a cross-complaint, sets forth a cause of action connected with the subject of plaintiff's action, and which is therefore a counterclaim under sections 437 and 438, and as such deemed to be controverted.

In Bank.

Appeal from Superior Court, San Luis Obispo County; T. A. Norton, Judge.

Action by Pickwick Stages, Northern Division, against the Board of Trustees of the City of El Paso de Robles, J. E. Price, and others. From judgment for defendant Price on his cross-complaint or counterclaim, plaintiff appeals. Reversed.

Fogel & Beman, of Los Angeles, for appellant.

S. V. Wright, of San Luis Obispo, and Alex. Webster, of Paso Robles, for respondent.

SHAW, C. J. The plaintiff appeals from a judgment entered against it in favor of the defendant J. E. Price on October 5, 1920, for damages in the sum of \$3,500. It is based upon a pleading of said J. E. Price denominated a cross-complaint.

The plaintiff's complaint stated a cause of action in equity, showing that the plaintiff was operating a public stage line between

Los Angeles and San Francisco in this state, through the cities of El Paso de Robles and San Luis Obispo, under the franchises from the Railroad Commission and said cities, authorizing it to do so for the period of five years; that the defendants were maliciously conspiring together to deprive plaintiff of said franchises through the city of El Paso de Robles, and threaten to do so, and thereby prevent and interfere with the operation of its stages, and made their intent to do so public, thereby preventing passengers from traveling on plaintiff's stages, to its damage in the sum of \$5,000. The complaint prayed for an injunction and for \$5,000 as damages.

To this complaint defendant Price filed an answer denominated as an answer and cross-complaint. The so-called cross-complaint, however, merely states a cause of action in favor of Price against plaintiff for damages. It alleges that Price was operating a stage line from San Luis Obispo to El Paso de Robles for local business, and had a franchise and permit from the Railroad Commission, duly issued, authorizing it to do so; that the plaintiff was operating a through line of stages from Los Angeles to San Francisco, and contrived to intercept local business between its stations in the two cities of San Luis Obispo and El Paso de Robles, which would otherwise have been transacted by Price, to his damage in the sum of \$3,500. It asked judgment for this sum and also for exemplary damages in the sum of \$5,000.

The plaintiff failed to file any answer to this so-called cross-complaint. Thereupon, on motion of Price, the court made an order, declaring the plaintiff's default for failure to answer or otherwise plead to the said cross-complaint. The plaintiff soon afterwards moved to set aside the order of default on the ground: First, that the court had not jurisdiction to make such order; and, second, that the failure to answer was due to the inadvertence and excusable neglect of the plaintiff. This motion was denied by the court. Thereafter the cause was set for trial on May 18, 1920. Upon the trial, both parties being present, the court refused the demand of the plaintiff that the defendant be required to prove the allegations of the cross-complaint in relation to the damages alleged. It held that the default admitted all of the allegations of the cross-complaint, so called, including the amount of actual damages alleged, and entered judgment in favor of the defendant Price against the plaintiff for \$3,500.

[1] The court was in error in holding that the pleading filed by the defendant was a cross-complaint. It is true that it is so denominated in the introduction and by indorsement thereon, but it is thoroughly established that the designation given by a

party to his pleading does not determine its character. The question whether it is a cross-complaint or counterclaim must be determined by the court from its allegations, and not from the designation given to it by the party. *Holmes v. Richet*, 56 Cal. 311, 38 Am. Rep. 54; *Harrison v. McCormick*, 69 Cal. 619, 11 Pac. 456; *Gregory v. Bovier*, 77 Cal. 124, 19 Pac. 232; *Meeker v. Dalton*, 75 Cal. 156, 16 Pac. 764; *Mills v. Fletcher*, 100 Cal. 148, 34 Pac. 637; *McDougald v. Hulet*, 132 Cal. 160, 64 Pac. 278; *Hibernia, etc., Soc. v. Insurance Co.*, 138 Cal. 260, 71 Pac. 334. The Code provides that the answer shall contain: (1) A general or specific denial of the material allegations of the complaint controverted by the defendant. (2) A statement of any new matter constituting a defense or *counterclaim*. Code Civ. Proc. § 437. It also provides that a counterclaim may consist of a cause of action connected with the subject of the plaintiff's action. Code Civ. Proc. § 438.

[2, 3] The facts alleged in the complaint show that the plaintiff had a franchise to operate a public stage line running through San Luis Obispo and El Paso de Robles, and plaintiff sought to enjoin the defendants, including Price, from endeavoring to destroy its franchise, and asked damages for the injury already suffered from the publication of their threats and purposes. The cause of action of the defendant Price was for damages to him because of the alleged interception by the plaintiff of Price's business over said line in and between said two cities. It arises out of the rival claims of the parties to the same route, and although it does not seek relief as to the property in the franchise of either party, it is manifestly connected with the subject of the plaintiff's action, and therefore it comes within the definition of a counterclaim in section 438. Section 462 provides that—

"The statement of any new matter in the answer, in avoidance or constituting a defense or *counterclaim*, must, on the trial, be deemed controverted by the opposite party."

It is obvious, therefore, that no default should have been entered for the failure of plaintiff to answer the allegations of the counterclaim, mislabeled a cross-complaint; that the same should have been deemed controverted on the trial; that the defendant Price should have been required to prove the material allegations thereof; that the court should have required such proof; and that it erred in entering judgment upon the theory that the default had admitted all its allegations.

As the judgment must of necessity be reversed for this error, it is unnecessary to consider the question whether the failure to answer was inadvertent. The court should have set aside the default of its own motion.

It was not authorized to enter such default, and it should have had no effect as a matter of law.

We express no opinion as to the sufficiency of the facts stated in either the complaint of the plaintiff, or the counterclaim of Price, to constitute a cause of action.

The judgment is reversed.

We concur: WASTE, J.; LENNON, J.; LAWLOR, J.; RICHARDS, Justice pro tem.; MYERS, Justice pro tem.

189 Cal. 433

SONOMA MAGNESITE CO. v. NATIONAL MAGNESITE PRODUCTS CORPORATION. (S. F. 10261.)

(Supreme Court of California. Aug. 15, 1922.)

Appeal and error — 788—Appeal from judgment roll alone will be dismissed.

Where it appears that a party has appealed from a judgment upon the judgment roll alone, and transcript shows no cause of appeal and the judgment is sustained by the findings, the appeal will be dismissed.

In Bank.

Appeal from Superior Court, Sonoma County; R. L. Thompson, Judge.

Action by the Sonoma Magnesite Company against the National Magnesite Products Corporation. Judgment for defendant, and plaintiff appeals. Appeal dismissed on motion of defendant.

Erwin L. Chloupek and George E. Crothers, both of San Francisco, for appellant.

J. R. Leppo, of Santa Rosa, and Sterling Carr, of San Francisco, for respondent.

SHAW, C. J. Defendant moves this court to dismiss this appeal on the ground that the judgment was entered by consent of the parties, that the sale was made by the consent of the parties, and upon the further ground that the agreement of January 17, 1922, between Chloupek, as attorney for plaintiff, and the National Magnesite Products Corporation, estops plaintiff from appealing from the judgment herein.

Since the notice of motion was filed, the appellant and the respondent have each filed additional papers, and, among other things, the transcript on appeal has been filed, wherefrom it clearly appears that the plaintiff has no cause of appeal whatever, that it has appealed from the judgment upon the judgment roll alone, and that the judgment is in full accord with the findings. Wherefore no cause whatever appears whereby said appeal can be sustained. It is considered that the appeal should be dismissed

without regard to the sufficiency of the causes set forth in the motion.

Let the dismissal be made without costs to either party.

We concur: WASTE, J.; SLOANE, J.; LENNON, J.

189 Cal. 429

PEOPLE v. MOHAMMED. (Cr. 2438.)

(Supreme Court of California. Aug. 14, 1922.)

1. Criminal law §822(1)—Instruction to be considered as a whole.

Relative to whether part of an instruction is erroneous, it must be considered with what precedes and follows.

2. Criminal law §805(1)—Single instruction need not cover whole case.

A single instruction need not cover the whole case, but it is enough that the instructions as a whole do so.

3. Witnesses §313—Manner of testifying may be considered by jury relative to credibility.

The character of a witness which a jury should consider in determining his credibility is not limited to innate truthfulness, as shown by general reputation, but includes his accuracy in observing, and of recollecting and in relating what he has observed and recollects as shown by the character of his testimony and his manner in testifying.

4. Criminal law §829(1)—No need to give requested instruction already covered.

A requested instruction, being covered by others given, may be refused on that ground.

5. Homicide §110—Killing in self-defense precluded by circumstances.

Where a person strikes another on the head and knocks him down, and then procures a razor and therewith cuts his throat from ear to ear, producing death, it would seem that self-defense was not within the realm of possibility relative to necessity of instructing thereon.

6. Homicide §163(2)—Evidence of conviction of deceased unknown to defendant immaterial.

Evidence of a conviction of deceased, attempted to be shown by defendant, was immaterial; its only purpose being to show that defendant at the time of the killing knew of deceased's character, and it not appearing that he had ever heard of the judgment.

In Bank.

Appeal from Superior Court, Sonoma County; R. L. Thompson, Judge.

Ullah Mohammed was convicted of murder in the first degree, and appeals. Affirmed.

Gil P. Hall, of Petaluma, for appellant.

Ross Campbell, of Santa Rosa, U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

SHAW, C. J. The defendant was convicted of murder of the first degree and sentenced to death. He appeals from the judgment.

The evidence fully established his guilt. It shows that he entered the house of one Allie Akbar, about midnight, with a shotgun; that he fired the shotgun at Akbar as he lay in bed and missed him; that Akbar sprang out of bed, and the defendant struck him upon the head, knocking him down and rendering him unconscious, and then cut his throat, as the result of which Akbar died. The defendant admitted these facts, and all the circumstances tend to corroborate his statement.

[1, 2] Defendant's counsel, in his argument, selects passages from the instructions, and contends that they are erroneous, because the particular part selected does not cover all the points in the case. For example, instruction 3 contains, among other statements the following:

"It is only necessary that the unlawful act of killing be preceded by concurrence of will, deliberation and premeditation on the part of the slayer, and if such is the case the killing is murder of the first degree."

This is criticized because "it omits both the element of self-defense, the element of malice, and the element of intent." This passage, however, was only a part of a single clause of the instruction. The words next following were, "no matter how rapidly these acts of the mind may succeed each other or how quickly they may be followed by the act of killing." Putting the two parts together and connecting them with what precedes both of them, we find that it is apparent that this part of the instruction was intended to define the elements of premeditation and deliberation. The element of intention as defined in the opening sentence of the paragraph is also correctly stated in another instruction. The element of malice is fully treated in other instructions and so, also, is the element of self-defense. It has been so often stated in opinions of this court that the fact that each instruction does not cover the whole case does not make such instruction erroneous, if the instructions, as a whole, did so; that it is unnecessary to cite the cases, or to say more on the subject in this case. This answers all the objections made to the instructions except those which we shall presently discuss.

Instruction 19 directed the jury that the "character of the witnesses as shown by the evidence should be taken into consideration" in determining their credibility. Counsel criticizes this instruction on the ground that it makes "the character of the witness an element for the jury to consider in judging his truthfulness, that the jury would take

this to mean his general character, whereas, so it is claimed, they can only take into consideration the character of the witnesses for truth, honesty, and integrity. We think counsel attached too much importance to the expressions we have quoted from the instruction. It was in the introductory sentence, and it was followed by a statement of the specific things to which it refers, as follows:

"A witness is presumed to speak the truth. This presumption, however, may be repelled by the manner in which he testified, his interest in the case, or his bias or prejudice against one of the parties, by the character of his testimony, or by evidence affecting his character for truth, honesty, or integrity, or by contradictory evidence."

All these things make up the character of the witness, and are proper for the consideration of the jury. General reputation for truth, honesty, or integrity, if shown, is proof affecting his character for truthfulness. Truthfulness is only one of the elements of the character of the person who testifies. It takes all of the others to make up the character which the jury may consider as establishing, not only his innate truthfulness, but also his accuracy in observing, his accuracy of recollection, and his accuracy in relating that which he has observed and recollects, so as to reach a conclusion regarding his credibility. It is clear that the word "character," in the opening sentence, was used in this general sense. The instruction, as a whole, could not have misled the jury. No witness was impeached by proof that his general reputation for truth, honesty, or integrity was bad. Consequently, the jury could not have had their attention directed to proof of the character of any witness in that respect, and they would naturally understand that it was the character of the witnesses generally that was referred to in the instruction.

[3-5] The defendant offered an instruction to the effect that it was not necessary for the defendant to establish self-defense by evidence sufficient to satisfy the jury that it was true, but that if there was evidence sufficient to raise a reasonable doubt as to whether the defendant was justified, then he was entitled to an acquittal. The instruction was correct in point of law, and it may as well have been given. The court below refused it on the ground that it was covered by charges already given. Defendant's counsel thinks this is not the case. We have examined the instructions on the subject, however, and we are satisfied that the other instructions given covered the point of the one offered. Besides, we do not think there is any substantial evidence that the defendant was acting in self-defense when he killed the deceased. Where a person strikes another a blow on the head and knocks him down, and then procures a razor with which he cuts his throat from

ear to ear, thereby producing death, it would seem that self-defense was not within the realm of possibility.

[6] The defendant also claims that the court erred in excluding a judgment roll of the district court of the second judicial district of the state of Montana as evidence in the case. The purpose of the evidence was to show the character of Allie Akbar. The ruling was correct. The record in the case does not show what offense, if any, Allie Akbar was accused of. Furthermore, it does not appear that the defendant had ever heard of the judgment. The only purpose of the evidence would be to show that the defendant had knowledge of Akbar's character at the time of the killing. As it does not appear that he ever heard of it, the evidence is wholly immaterial.

We find no error in the record.

The judgment is affirmed.

We concur: LENNON, J.; LAWLOR, J.; WASTE, J.; RICHARDS, Justice pro tem.; MYERS, Justice pro tem.

(189 Cal. 426)

ROCCA v. STEINMETZ et al. (Sac. 3336.)

(Supreme Court of California. Aug. 14, 1922.)

1. Judgment ⚡239—Court may render judgment in favor of one tort-feasor, and allow case to proceed against the others.

Where an action is against two or more tort-feasors, the court may, under Code Civ. Proc. § 579, render a judgment in favor of one tort-feasor, and allow the case to proceed against the others.

2. Appeal and error ⚡79(2)—Appeal may be taken from judgment in favor of one tort-feasor before case is tried against the others; "final judgment."

Where an action is against two or more tort-feasors and the court has rendered a judgment dismissing the action as against one of them, and allowing the case to proceed against the others, such judgment is a final judgment within the meaning of Code Civ. Proc. § 963, and an appeal may be taken from such judgment.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Final Decree or Judgment.]

In Bank.

Appeal from Superior Court, Tuolumne County; G. W. Nicol, Judge.

Action by William Rocca, an infant, by J. G. Pedro, his guardian ad litem, against D. H. Steinmetz and D. H. Steinmetz, Jr. A judgment of dismissal was rendered in favor of D. H. Steinmetz, and the case allowed to proceed against the other defendant, and plaintiff appeals. On motion to dismiss appeal. Motion denied.

J. C. Webster and C. H. Grayson, both of Sonora, for appellant,
J. B. Curtin, of Sonora, for respondents.

SHAW, C. J. The respondent D. H. Steinmetz moves the court to dismiss the appeal herein on the ground that no appeal lies from a judgment against one of two tortfeasors before the final trial on the merits of the action.

The action is against D. H. Steinmetz, the father, and D. H. Steinmetz, Jr., his son, for an injury alleged to have been caused by the carelessness of the son in recklessly and negligently driving an automobile off the road and down an embankment, whereby one Marguerita L. Rocca, mother of William Rocca, was killed, she being at said time a passenger in the automobile and a guest of said D. H. Steinmetz, Jr. It is alleged that D. H. Steinmetz, the father, was the owner of said automobile, and bought and kept it for the use and pleasure of his family, including said D. H. Steinmetz, Jr.; that the said D. H. Steinmetz, Jr., was a careless and reckless driver of said automobile; and that the said D. H. Steinmetz, knowing him, the said D. H. Steinmetz, Jr., to be such a careless and reckless driver of said automobile, negligently allowed and permitted him to drive said automobile on the occasion of said accident to said Marguerita L. Rocca, and while he was so driving the same he was doing so with the consent, knowledge, and permission of said D. H. Steinmetz.

In the case of *Nolan v. Smith*, 137 Cal. 360, 70 Pac. 166, the action was on a bond given by a justice of the peace against the justice and his two sureties to recover damages against them for an unlawful imprisonment. The sureties demurred to the complaint separate from their principal, and their demurrer being sustained, what purported to be a judgment for costs was entered in their favor. From this judgment the plaintiff appealed. No judgment was taken against the principal, and the action was still pending against him. The two sureties as defendants moved the court to dismiss the appeal on the ground that the judgment was not final. The court held the point to be well taken, and accordingly dismissed the appeal.

The motion was made in department 2 of this court, and there was never any petition for a rehearing; consequently it never received any further consideration by the court. The decision appears to have been well considered in some respects, and it holds in a case of that character that a final judgment should not be given against some of the defendants, but the case should be held until the final judgment is given for or against all of the defendants, in which event a judgment may be entered in favor of some of the defendants and against others, and thus it will be final as to all of them at the same time. The court in coming to this conclusion

evidently overlooked section 579 of the Code of Civil Procedure. It is not cited or referred to. It reads as follows:

"In an action against several defendants, the court may, in its discretion, render judgment against one or more of them, leaving the action to proceed against the others, whenever a several judgment is proper."

[1, 2] The present action is unquestionably of a character in which a joint or several judgment could be rendered. The court, upon finding that one of the parties is not liable in the action, could render a judgment in his favor, and then leave the action to proceed against the other parties. That was the course taken by the court in the present case. It held that the allegations against D. H. Steinmetz were not sufficient to put him to his defense, and rendered judgment in his favor, allowing the plaintiff to pursue his action against the other defendants. No reason is perceived why this was not proper. The Code expressly allows it, and to hold the person bound to wait until the final judgment against the other party before taking an appeal from the judgment against the first party already rendered is wholly unreasonable, and finds no warrant in any provision of the Code. That the judgment must be final against the defendant in whose favor it is given is essential to the right of appeal. But such a judgment is final within the meaning of that term, as given in section 963. No other judgment can be entered against him, as he will go free if the case goes no further against him. *Nolan v. Smith*, supra, must be overruled on this point, unless it is considered as creating a special class of cases consisting of suits on bonds of justices of the peace, which would make such cases a class by themselves. We express no opinion as to whether this is allowable or not. It is sufficient to hold that the case is not in point here.

The fact that the defendant D. H. Steinmetz is sued as the owner of the automobile and D. H. Steinmetz, Jr., is sued as the perpetrator of the tort does not make either of them any the less liable to have a judgment rendered against him while the action is allowed to continue as to the other defendant.

It is not necessary to say anything in regard to the liability of D. H. Steinmetz further than this, that his liability has never been decided in any court in this state. He is not sued as the mere owner of the automobile, but he is sued as the owner who has allowed and permitted his son to drive his automobile knowing that his son is a reckless and careless driver of said automobile. That fact differentiates it from all other cases on the subject.

The motion to dismiss the appeal is denied.

We concur: LENNON, J.; WASTE, J.; RICHARDS, Justice pro tem.; MYERS, Justice pro tem.

189 Cal. 434

**LAWRENCE et al. v. SOUTHERN PAC. CO.
et al. (L. A. 6605.)**

(Supreme Court of California. Aug. 16, 1922.)

1. Railroads ⚡5½, New, vol. 6A Key-No. Series—Complaint held sufficient to hold Director General.

A complaint, in an action for negligent death, which sufficiently sets forth a cause of action against the railroad company and alleges that the railroad was under the control of the Director General at the time of the accident, is sufficient to hold the Director General responsible.

2. Railroads ⚡350(16)—Contributory negligence of automobile driver held for jury.

In an action for death at a spur track crossing, whether deceased was guilty of contributory negligence in driving his automobile upon the track without stopping and looking for approaching trains *held* for the jury.

3. Appeal and error ⚡1170(9)—Failure to instruct that neglect to ring locomotive bell on approaching crossing must be proximate cause of accident held not reversible error.

Though an instruction in crossing accident case, as to duty to ring locomotive bell was erroneous in the omission of a statement that the failure to ring the bell must contribute directly to the accident, the error *held* not such as to cause reversal, in view of the evidence and Const. art. 6, § 4½.

4. Appeal and error ⚡1170(9)—Instruction that pecuniary condition of widow and child may be considered in determining damages held not reversible error.

In an action for the death of plaintiffs' decedent at a railroad crossing, an instruction that the pecuniary condition of plaintiffs as widow and minor child of deceased may be considered in determining the amount of damages was not reversible error, where there was no evidence to support the instruction, and in view of Const. art. 6, § 4½.

In Bank.

Appeal from Superior Court, Imperial County; Franklin J. Cole, Judge.

Action by Gertrude E. Lawrence and another against the Southern Pacific Company and Walker D. Hines, Director General of Railroads. Judgment for plaintiffs, and defendants appeal. Judgment as to the Southern Pacific Company reversed, and judgment as to the Director General affirmed.

Hickcox, Crenshaw & Trude, of El Centro, for appellants.

Chas. L. Childers, of El Centro, for respondents.

RICHARDS, Justice pro tem. This action was brought by the plaintiffs, the widow and minor child of George V. Lawrence, deceased, to recover damages for his death, which occurred on April 3, 1919, in El Centro, Cal., at the intersection of Orange avenue with a

spur track of the Southern Pacific Company in that city. The defendants named in the action are the Southern Pacific Company and Walker D. Hines, Director General of Railroads, and it is a conceded fact in the case that at the time of the accident which caused the death of the decedent the railroad and its equipment was being operated by the Southern Pacific Company and its officials and employees under the control of the Director General of Railroads acting under and by virtue of the proclamation of the President of the United States, issued on December 26, 1917, pursuant to the act of Congress of August 29, 1916 (U. S. Comp. St. § 1974a), which act empowered the President in time of war "to take possession and assume control of any system or systems of transportation, or any part thereof, and to utilize the same, to the exclusion, so far as may be necessary, of all other traffic thereon, for the transfer or transportation of troops, war material and equipment, or for such other purposes connected with the emergency as may be needful or desirable." By the terms of the proclamation a director general of railroads was appointed, with full authority to take possession and control of the systems embraced in the proclamation and to operate and administer the same. To this end the Director General was given authority to avail himself of the services of the existing railroad officials, boards of directors, receivers, employees, etc., who were authorized to continue to perform their duties in accordance with their previous authority until and except so far as such Director General shall from time to time by general or special orders otherwise provide; "but any orders, general or special, hereafter made by such Director General shall have paramount authority and be obeyed as such."

The accident in question occurred through a collision between an automobile in which the decedent and a companion were riding and which the former was driving along Orange avenue, and a line of freight cars which were being backed along a spur track of said railroad in said city. With respect to the parties defendant and their relation and liability, the plaintiffs' amended complaint alleges that Walker D. Hines is the regularly appointed, duly qualified, and acting Director General of Railroads, under and by authority of the laws of the United States; that the defendant Southern Pacific Company was on the date of said accident and still is the lessee and in control of the railroad in question and of its track, locomotives, cars, and other equipment, and was operating the same at the time of the accident, "subject only to the control of the Director General of Railroads of the United States." The amended complaint then proceeds to allege that—

"The defendant Southern Pacific Company carelessly and negligently caused certain of its cars to approach said crossing at a rapid rate of speed, and then and there pass rapidly over the same, and negligently and carelessly omitted its duty while approaching said crossing to give any signal which could be heard or seen by said George V. Lawrence, and carelessly omitted its duty by failing and neglecting to have a switchman or flagman or any other person at said crossing to warn the said George V. Lawrence of the said approaching train, and that in consequence thereof the cars of the defendant Southern Pacific Company struck the said automobile as aforesaid," etc.

The amended complaint further alleges "that said injury was not caused or contributed to by the acts or carelessness of said George V. Lawrence, but was wholly because of the negligence and carelessness of the Southern Pacific Company"; and finally avers that "by reason of the death of said George V. Lawrence by the careless and negligent acts of the defendant Southern Pacific Company the plaintiffs have been damaged in the sum of \$20,000.

The defendants appeared separately, though by the same counsel. The defendant Southern Pacific Company moved to dismiss the action as against it upon the ground that it was not a proper party defendant in the action, for the reason that it was not operating said railroad at the time of said accident, but that the same, with its tracks, locomotives, cars, and other appurtenances, was then and there being operated by Walker D. Hines, Director General of Railroads. The motion specified General Orders 50 and 50a of the Director General of Railroads, and quoted from the latter the portion thereof ordering:

"That all actions at law growing out of the possession, use, control or operation of any railroad or system of transportation by the Director General of Railroads which might have been brought against the railroad company should be brought against the Director General of Railroads."

This motion was upon hearing denied. The defendant Walker D. Hines, as Director General of Railroads, demurred to the amended complaint upon the general ground that same did not state facts sufficient to constitute a cause of action against said defendant, and also upon the special ground of misjoinder of parties defendant, in that Walker D. Hines, Director General of Railroads, was joined with the Southern Pacific Company as such defendants. The defendant Southern Pacific Company also presented a demurrer upon the general ground, and also upon the ground of misjoinder of itself with the defendant Walker D. Hines, Director General of Railroads. These demurrers being overruled, the defendants answered separately, denying specifically any negligence on the part of said defendants, or either of

them, and alleging that the accident occurred through the contributory negligence of the decedent. The defendants also each denied that the Southern Pacific Company was in the possession, control, or operation of said railroad at the time of said accident, but did not deny that the defendant Walker D. Hines, Director General of Railroads, was in the possession and control of said railroad at said time. Upon the issues thus joined the cause proceeded to trial before a jury. At the conclusion of plaintiffs' case the defendants moved separately for nonsuit, which motion the trial court denied. Upon the submission of the cause the jury rendered its verdict against both defendants in the sum of \$20,000 damages, for which sum judgment was thereafter entered.

Motions for a new trial, made separately by said defendants, were denied, whereupon they united in taking and prosecuting an appeal to this court. The cause was transferred to the District Court of Appeal for hearing, and upon said hearing therein it was stipulated that the judgment should be reversed as to the defendant Southern Pacific Company. This stipulation being in full force and effect, the judgment against the defendant Southern Pacific Company will be reversed solely upon said stipulation, and not upon the merits. This renders unnecessary any consideration of the alleged errors of the trial court in so far as they might affect the defendant Southern Pacific Company, and leaves only for consideration upon this appeal the errors alleged to have been committed by the court affecting the defendant Walker D. Hines, Director General of Railroads.

[1] The first of these alleged errors urged in behalf of said last-named defendant is that the trial court erred in overruling its demurrer upon the general ground that the amended complaint failed to state a cause of action as to said defendant. This contention is based upon the fact that said complaint did not contain any express averment of negligence upon the part of said defendant Walker D. Hines, Director General of Railroads; its averments of negligence being wholly confined to the alleged negligence of defendant Southern Pacific Company. This latter fact being conceded, it does not, however, follow that the plaintiffs' amended complaint fails to state a cause of action against defendant Walker D. Hines, Director General of Railroads. It avers, somewhat inartificially, but still sufficiently to pass a general demurrer, that the operation of the railroad by the Southern Pacific Company at the time of the accident complained of was under and subject to the control of the Director General of Railroads. In so alleging it follows substantially the language of the act of Congress and the proclamation of the President of the United States, above re-

ferred to, empowering the Director General of Railroads to take over the possession, control, and operation of the railroads during the war period, and in so doing to make use of the officials and employees of such railroads in continuing the operation thereof during the period of such control. Neither the act of Congress in question nor the proclamation of the President issued in pursuance thereof, nor any order of the Director General of Railroads made in assuming control of such railroads, undertakes to exactly define the relation between those corporations and their officials and employees thus continuing the operation of such railroads and the Director General of Railroads after the assumption by him of such control. Nor have any decisions of courts to which we have been referred undertaken definitely so to do. The nearest approach to such definition which has been called to our attention is that announced in the case of *Dahn v. McAdoo* (D. C.) 256 Fed. 549, wherein that court suggests that:

"The peculiar relationship created by the act of Congress and the proclamation of the President is somewhat analogous to the relationship of master and servant,"

—while in the case of *Vaughn v. State*, 17 Ala. App. 35, 81 South. 417, it is said:

"The apparent theory of general order No. 50 is that, while carriers are operating under federal control, they are mere agents of the government, and, if liability for their torts and the torts of their employees exist, it is against the government and not against the carrier, and therefore actions for such torts should be against the Director General of Railroads and not against the carrier."

Adopting the view that the relationship between the Director General of Railroads and the codefendant, Southern Pacific Company, was in the nature of an agency on the part of the latter, it would follow that the averments of plaintiffs' amended complaint as to acts of negligence on the part of the Southern Pacific Company sufficient to state a cause of action against it would also sufficiently state a cause of action against its principal, the Director General of Railroads, under the general rule that the negligence of the agent is imputed to the principal. A reading of General Orders 50 and 50a of the Director General of Railroads shows that they were drawn in harmony with these views, since these provide that in actions instituted since December 30, 1917, based upon a cause of action arising from the operation of any railroad, the pleadings may, upon application, be amended by substituting the Director General of Railroads for the carrier company as a party defendant and releasing the company from liability thereof. It would thus appear that the mere substitution of the name of the Director General of Railroads as a party defendant in an ac-

tion already begun against a railroad, based upon its alleged negligence, would suffice to make him a party to such action, and to justify a judgment against him without any other or further amendment of the pleadings so as to separately charge him with negligence. *Peacock v. Detroit, etc., Ry. Co.*, 208 Mich. 403, 175 N. W. 580, 8 A. L. R. 964; *Palvo v. Northern Pacific Co.*, 144 Minn. 398, 175 N. W. 687; *Elliott v. C. M. & St. P., etc., Ry. (Mo. Sup.)* 236 S. W. 17; *Adams v. Quincy, etc., R. Co. (Mo. Sup.)* 229 S. W. 790. We are therefore of the opinion that the amended complaint in this action which sufficiently set forth a cause of action against the Southern Pacific Company for having negligently caused the death of the decedent was also sufficient to hold the Director General of Railroads responsible for such negligence through its averment that at the time of the injury complained of said railroad was being operated under his control.

[2] The next contention of said appellant is that his motion for nonsuit should have been granted for the reason that the contributory negligence of the decedent had been established by the plaintiffs' evidence as a matter of law. This contention is based upon the proposition that the decedent approaching the railroad crossing at which the collision occurred was bound to stop and look and listen for approaching trains, and that had he done this he would have observed the approaching train in time to have avoided the accident. The appellant cites a large number of well-known cases supporting his said contention, and it is not questioned by the respondent that they so decide. This conceded rule, however, is predicated upon the assumption that the decedent knew, or should in reason have known, that he was approaching a railroad crossing, but in this case the evidence upon this point is in sharp and substantial conflict. There is evidence showing that the spur track of the railroad upon which the cars which caused the accident were being operated took off from the regular line of the railroad track at a point several hundred feet away from the railroad crossing where the decedent was killed, and at said point was about 300 feet distant from the said regular line of tracks; that there was no sign or other visible warning to indicate the existence of a track or railroad crossing at that point, and that the track itself was so concealed by the earth along and between its rails as not to be visible, or at least to be easily observed by those approaching it along Orange avenue. There was also evidence that the lands to the north and south of the crossing were occupied with the yards of certain oil companies which were surrounded by high picket fences, commonly known as "stockades," which shut off the view of the line or course of this spur track from those approaching the vicinity of this

particular crossing. There was also evidence that the decedent had resided but about two weeks in El Centro, and there was nothing in the way of evidence showing or tending to show that he was or should have been aware of the existence of said spur track or of said crossing prior to the moment of his approach to it immediately before the collision. There was also evidence showing that the train of cars which collided with his machine was approaching noiselessly, or, as stated by the engineer, was "drifting into this siding," and that no whistle was blown or bell rung or other warning given of its approach, and that there was no brakeman or flagman or other person upon the rear end of the train thus backing down this spur track, to give warning of its proximity. In the presence of such evidence this court is unable to say as a matter of fact that the decedent knew or should in reason have known of the existence of this crossing or of the approach of this train so as to have been bound to stop and look and listen before essaying this crossing, and hence we cannot say that as a matter of law the decedent was guilty of contributory negligence in failing so to do. Under such conditions the question of contributory negligence would be one to be submitted to the jury under proper instructions of the court.

What has heretofore been said disposes also of appellant's contention that the verdict of the jury was not supported by the evidence in the case.

[3] The appellant's next contention is that the trial court committed prejudicial error in giving the following instruction:

"You are instructed that it is the duty of the defendants to have a bell on its locomotive and to ring the same at a distance of at least 80 rods from the place where the railroad crosses any street, and to keep the same ringing until the locomotive crosses said street, and that if you find from the evidence that the bell on the locomotive attached to the train which caused the accident complained of in this action was not ringing at the time of the accident, then such omission constitutes negligence per se, and the defendant is liable for all damages sustained by the plaintiff, unless you find further from the evidence that the deceased failed to exercise ordinary care for his own protection."

It is the contention of the appellant that the vice in this instruction consists in the omission therefrom of the statement "that the accident was due to such failure" or of such similar statement as would indicate to the jury that it must also find that such failure was the proximate cause of the accident. There can be no doubt that this court has uniformly held that instructions relating to the failure of a defendant to perform a duty imposed by statute as constituting actionable negligence should embrace the limitation that the omission must have contributed directly to the injury *McKune v. Santa*

Clara, etc., 110 Cal. 480-486, 42 Pac. 930; *Fresno Traction Co. v. A., T. & S. F., etc., Ry. Co.*, 175 Cal. 358, 361, 165 Pac. 1013; *Eaton v. S. P. Co.*, 22 Cal. App. 461, 473, 134 Pac. 801, and cases cited. It follows necessarily that the foregoing instruction was defective in the omission of this qualifying clause or statement; but the question yet remains as to whether under all the circumstances of this case it was such prejudicial error as would compel a reversal of the case. It is a conceded fact in the case that the train of cars which was being backed down this siding and which caused this collision consisted of 11 gondola cars, with engine attached to the further end thereof. The average length of these cars was about 40 feet each, which would place the engine at a distance of over 450 feet from the point of collision. The evidence of witnesses who were nearest the point of collision preponderate in the showing that they heard no ringing of an engine bell. On the other hand, the evidence of those in charge of the train was to the effect that the engine bell was ringing at the time, and was rung automatically when the engine was in action. The ringing of an engine bell at that distance from a spur tracks crossing and in the direction of the main line tracks might well have escaped the notice of persons at or approaching such crossing, and, this being so, even if the evidence had been undisputed that the engine bell was ringing, that fact would not have compelled the conclusion that the decedent was negligent in failing to hear and observe its distant warning. The evidence otherwise clearly shows that those in charge of the operation of said train of cars upon said spur track at the time of the occurrence of this accident were guilty of culpable negligence directly contributing thereto. The testimony of every eyewitness to the accident, other than the brakeman himself, who should have been stationed either upon the crossing or upon the nearest end of the approaching train, is to the effect that he was at neither place, but was at some distance down the line of cars, too far away from the crossing to give warning to the decedent of their approach. The evidence also shows that the train was being operated at a rate of speed which carried its last car, which had struck decedent's machine, 175 feet beyond the point of contact and after the engineer had been given the stop signal at the moment of the collision. There was no flagman at the crossing, nor was there maintained there any signal or "stop, look and listen" signs, or other warning signs or signals indicating the presence or dangers of the crossing. The evidence further shows that the premises on both sides of the point of intersection of the west line of Orange avenue with this single spur track are occupied by the yards of oil companies which are surrounded with tall stockades, which

greatly obstruct, if they do not entirely obscure, vision along the line of said track on the part of those approaching the crossing until they are practically upon it. In view of all these circumstances clearly showing that those in charge of this train were culpably negligent in several particulars directly contributing to this accident, entirely aside from the question as to whether the engine bell was or was not ringing, we are unable to say that the error in the foregoing instruction was sufficiently prejudicial to justify a reversal of the case. It appears to us that the jury, as reasonable men, would naturally regard the fact as to whether said engine bell was or was not ringing at such a distance from the actual point of collision as an immaterial consideration in the case.

[4] The next instruction of which the appellant complains is an instruction setting forth the relationship of the plaintiffs to the decedent as his widow and minor child and their right to recover damages based upon such relationship. The portion of said instruction particularly complained of is its concluding clause, whereby the jury was instructed that it had a right to take into consideration, among other facts, "the pecuniary condition of said minor child and widow of the deceased in determining the amount of damages." In the case of *Steinberger v. California Electric, etc., Co.*, 176 Cal. 386, 389, 168 Pac. 570, 572, this court said:

"It seems to be the rule, supported by a long line of decisions in this state and elsewhere, that evidence of the plaintiff's poverty is inadmissible in an action to recover damages for personal injuries"—citing many cases.

It follows that the foregoing portion of said instruction was erroneous, and would have been prejudicially so if there had been any sufficient evidence in the case touching the plaintiffs' wealth or poverty. The record, however, shows that when, during the trial, an inquiry was attempted to be made as to what, if any, property the plaintiffs had, it was met with a prompt objection, which the court as promptly sustained. No other direct evidence touching the subject was offered or admitted, and the only bit of testimony which the appellant relies upon in urging its contention is the statement of the widow of the decedent, admitted without objection, that the latter was an able, strong man, sober and industrious, and was receiving \$125 a month wages, and that "Mr. Lawrence and myself lived together all the time, and he supported us." In this state of the record we are of the opinion that the appellant was not prejudicially affected by this erroneous clause in an otherwise correct instruction, which was predicated upon no sufficient evidence in the case upon which the jury could have based a finding as to the

plaintiffs' wealth or poverty. A judgment will not ordinarily be reversed for an erroneous instruction which has no support in the evidence in the case. *Satterlee v. Bliss*, 36 Cal. 489.

As to both of the foregoing instructions, which we have held erroneous, but not sufficiently prejudicial to justify a reversal, we are of the opinion that section 4½ of article 6 of the Constitution can properly be given application, in view of all the other facts and circumstances of this case. We do not think "that the error complained of has resulted in a miscarriage of justice."

The judgment as to the Southern Pacific Company is reversed.

The judgment as to the Director General of Railroads is affirmed.

We concur: SHAW, C. J.; WASTE, J.; LENNON, J.

I concur in the judgment: MYERS, Justice pro tem.

189 Cal. 421

BELL v. SOUTHERN PAC. CO.
(S. F. 10082.)

(Supreme Court of California. Aug. 14, 1922.)

1. Railroads $\S$ 5½, New, vol. 6A Key-No. Series—Substitution of federal Director General as defendant held improperly denied.

In an action against a railroad for damages done while the railroad was under federal control, in accordance with Act Cong. March 21, 1918 (U. S. Comp. St. 1918, U. S. Comp. St. Ann. Supp. 1919, §§ 3115¼a-3115¼p), it was error to deny motion of defendant, requesting a substitution of the Director General of Railroads in its stead, in accordance with General Order No. 50, issued by the Director General.

2. Railroads $\S$ 5½, New, vol. 6A Key-No. Series—Company not liable for injuring animals during federal control.

Civ. Code, § 485, requiring railroad companies to fence their tracks, and making them liable for injuring or killing animals, resulting from absence of or defects in fences, though construed to impose liability on a lessor company, is not operative to fix liability on the railroad companies for injuries arising during federal control.

3. Railroads $\S$ 5½, New, vol. 6A Key-No. Series—Order substituting Director General after judgment held improper.

Substitution of Director General of Railroads after rendition of judgment against railroad company, without further proceedings, would be improper, as depriving the government of its day in court.

4. Evidence $\S$ 11—Court judicially knows that in January, 1918, the railroads were in the control of the federal government.

A finding that defendant railroad company was negligent in failing to maintain fences on

January 28, 1918, as a result of which plaintiff's horses were killed, does not require affirmation of a judgment for damages, since the court must take judicial notice that on such date the railroad was controlled by the Director General of Railroads.

5. Railroads $\approx 5\frac{1}{2}$, New, vol. 6A Key-No. Series—Neglect to fence before federal control held not to impose liability for injuries occurring during such control.

That a railroad company failed in 1917 to comply with Civ. Code, § 485, as to construction and maintenance of fences, was not the proximate cause of the killing of horses on January 28, 1918, after the beginning of federal control, so that the railroad company was not liable therefor.

In Bank.

Appeal from Superior Court, Santa Clara County; W. A. Beasley, Judge.

Action by James Bell against the Southern Pacific Company. From a judgment for plaintiff, defendant appeals. Reversed.

Louis Oneal, of San Jose, for appellant.

E. M. Rea and Rea, Cassin & Caldwell, all of San Jose, for respondent.

MYERS, Justice pro tem. Upon further consideration we are satisfied with, and hereby adopt, as part hereof, the following opinion herein of the District Court of Appeal for the First District, written by Mr. Justice Waste:

"This is an appeal by the defendant from a judgment of the lower court awarding plaintiff \$1,000 damages, and costs, for the killing of certain horses. The cause of action was based upon the alleged failure of the defendant to maintain good and sufficient fences along its right of way, by reason of which the animals were allowed to go on the track of the railroad, where they were struck and killed by a train, operated, so the plaintiff alleged, by the servants and employees of the defendant. The action was brought directly against the Southern Pacific Company as sole defendant. In its answer the company denied that it was operating the railroad at the time of the accident, and alleged that the road and fences along its right of way were under the jurisdiction, and in charge of the United States Railroad Administration, and that all persons employed on the train were in the service of the administration, which had exclusive control over them. It further alleged that at the time all persons engaged in such operative work, and in maintaining the roadbed and appurtenances thereto, were acting as servants, agents, and employees of the United States government. It disclaimed all responsibility for the claim of the plaintiff, which, it asserted, was a liability of the Railroad Administration.

[1] "In due course the defendant made a motion for the substitution of the Director General of Railroads as defendant in its place and stead, which was denied. Upon denial of the motion there was presented a bill of excep-

tions, which appears in the transcript and as part of the judgment roll. The motion for substitution should have been granted. On December 26, 1917, the President of the United States issued a proclamation by which the Secretary of War was authorized and directed to take possession and assume control of all railroads within the boundaries of the United States on December 28th following. On March 28, 1918, an act to provide for the operation of transportation systems while under federal control was approved (U. S. Comp. St. 1918, U. S. Comp. St. Ann. Supp. 1919, §§ 3115 $\frac{3}{4}$ a-3115 $\frac{3}{4}$ p), and on March 29th the President issued his proclamation, directing the Director General of Railroads to exercise the powers conferred by that act. The Director General thereupon issued General Order No. 50, providing that all actions thereafter brought for loss or damage to property caused by the operation of railroads, arising during federal control after December 31, 1917, should be brought against the Director General direct. The order also provided that in those actions already brought, for a cause of action accruing after December 31, 1917, but arising under federal control, the defendant company might, on motion, have the Director General of Railroads substituted in its place, and be itself dismissed from further proceedings.

"The cause of action here sued upon arose after December 31, 1917, and the action itself was brought on November 4, 1918, after the promulgation of General Order No. 50. At the time the motion for substitution was made Walker D. Hines was the Director General of Railroads, and should have been substituted in the place and stead of the defendant Southern Pacific Company, which ought to have been dismissed from the action. Missouri Pac. R. R. v. Ault, 256 U. S. 554, 41 Sup. Ct. 593, 596, 65 L. Ed. 1087; Nash v. Southern Pacific Co. (D. C.) 260 Fed. 280, 287; Western Union Tel. Co. v. Poston, 256 U. S. 662, 41 Sup. Ct. 598, 599, 65 L. Ed. 1157. In the first of these cases the Supreme Court of the United States critically analyzed the exact situation presented by the instant case, and definitely decided that under the Federal Control Act, supra, as a matter of law, the government or its agency for the operation of the railroad could be sued, as, under the statute, the legal person in control of the carrier was responsible for its acts. The title by which suit should be brought—the person who should be named as defendant—not being designated in the act, 'it was perhaps natural,' said the court, 'that those wishing to sue the carrier should have named the company as the defendant when they sought to hold the government liable. * * * All doubt as to how suit should be brought was cleared away by General Order No. 50, which required that it be against the Director General by name.' The court held that application of the railroad company that it be dismissed from the action should have been granted, and the judgment against it was reversed.

[2] "Notwithstanding this clear definition of the sole liability of the Director General of Railroads in such cases, the respondent seeks to maintain the action against the defendant as owner of the railroad, under the provisions

of section 485 of the Civil Code. That section requires a railroad corporation to make and maintain a good and sufficient fence on both sides of its track and property, failing in which the company must pay for cattle or other domestic animals killed by its engine or cars, unless the injury occurred through the neglect or fault of the owner of the animals killed. Construing that action, the Supreme Court held that, even though a railroad company had leased its road and rolling stock to another company, it remained liable for cattle killed by the train of the lessee on the unfenced portions of the lessor's railroad. *Fontaine v. Southern Pacific Co.*, 54 Cal. 645, 652. Respondent attempts to apply the effect of that decision to the appellant in the instant case. The effort must fail. No divided, but complete, possession and control were given the United States for all purposes as to the railroads dealt with by the Federal Control Act. The Railroad Administration does not exercise its control through supervision of the owner company of the railroad, but by means of a Director, through 'one control, one administration, one power, for the accomplishment of the one purpose, the complete possession by governmental authority to replace for the period provided, the private ownership theretofore existing.' *Missouri Pac. R. R. v. Ault*, supra; *Northern Pacific Ry. Co. v. North Dakota*, 250 U. S. 135, 148, 39 Sup. Ct. 502, 63 L. Ed. 897.

[3] "The respondent asks that this court, without any further proceedings, make an order substituting the Director General of Railroads as defendant in the action, in the place and stead of the Southern Pacific Company, and then affirm the judgment. If that were done, it would, in effect, be affirming a judgment against a party who has not had a day in court. A judgment binding upon the government under such circumstances could not be obtained. *Nash v. Southern Pacific Co.*, supra (D. C.) 260 Fed. 286."

It is earnestly urged that the District Court opinion failed to give due consideration to the decision of this court in the *Fontaine Case*, supra, and virtually overrules it. But there is a clear ground of distinction between the two cases, in this: That in the *Fontaine Case* the defendant, by leasing its railroad, had voluntarily disabled itself to perform the duty of maintaining fences, imposed upon it by law, whereas in the instant case the defendant was so disabled by the act of government, without the defendant's act, fault, or consent. The *Fontaine Case* is but an application of a well-recognized principle of law to the effect that a party upon whom rests an affirmative duty imposed by law for the protection of others cannot escape liability for the nonperformance

thereof merely by showing that he has delegated another to perform it for him. The instant case, on the other hand, is an application of the converse of that rule, namely, that the nonperformance of such a duty is always excused by a showing that performance thereof was prevented, either by an "act of God" or by the intervention of vis major, without the act, fault, or consent of the party sought to be charged.

[4] But it is said the trial court found as a fact that the defendant was negligent in failing to maintain its fences on January 28, 1918, and that this finding cannot now be questioned, because there is no specification of insufficiency of evidence to support it. We think that it is so attacked by specifications No. 1 and No. 2. But, even if it were unassailed, this finding would be of no avail to the plaintiff. Courts take judicial notice of the public and private official acts of the legislative, executive, and judicial departments of the United States. Code Civ. Proc. § 1875, subd. 3. It is not necessary to allege or prove facts which are so noticed, from which it follows that allegations, or proofs, or findings to the contrary thereof must be disregarded by the court. *French v. Senate*, 146 Cal. 604, 607, 608, 80 Pac. 1031, 69 L. R. A. 556, 2 Ann. Cas. 756; *People v. Mayes*, 113 Cal. 618, 625, 45 Pac. 860.

[5] The case of *Bryson v. Hines* (C. C. A.) 268 Fed. 290, 11 A. L. R. 1438, is not in point here. That action was predicated upon the affirmative negligence of the railroad company in constructing "a grossly and obviously unsafe track," knowing it was to be used for the transportation of troops, which affirmative negligence was the proximate cause of the injury. In the instant case, if it be conceded, as claimed, that the railroad company was negligent in failing to properly maintain its fences at some time in 1917, there is no causal connection shown between such failure and the subsequent failure of the government to maintain them in 1918, after it had taken control. The failure to maintain fences in 1917, though a violation of law, conferred no right of action upon plaintiff. It was the injury to his horses on January 28, 1918, due to the absence of fences on that date, which gave rise to his cause of action.

The judgment is reversed.

We concur: SHAW, C. J.; SLOANE, J.; LENNON, J.

189 Cal. 353

VAN LANDINGHAM v. UNITED TUNA PACKERS. (L. A. 6816.)(Supreme Court of California. Aug. 1, 1922.
Rehearing Denied Aug. 31, 1922.)

1. Corporations $\hookrightarrow$ 617(2)—Corporation whose charter forfeited, and powers and functions suspended, held not to continue de facto, so as to give validity to acts and contracts.

A de jure corporation, whose charter has been forfeited for failure to pay a license tax, and whose powers and functions have been suspended, under either St. 1915, p. 422, or St. 1917, p. 371, amending and reframing the former act, or under both of such acts, does not continue to function as a de facto corporation, so as to give validity to its acts and contracts entered into during period of its forfeited charter and suspended powers; the act of 1915 declaring such acts and contracts to be unlawful, and the act of 1917 expressly declaring them void.

2. Corporations $\hookrightarrow$ 29(2)—Statute denying collateral inquiry as to de facto existence after due incorporation held not to apply to acts of corporations whose charters are forfeited and acts declared unlawful.

Civ. Code, § 358, denying collateral inquiry in a private suit as to de facto existence after due incorporation, applies only to corporations not forbidden by positive law to do business as de facto corporations, but not to attempted acts of corporations whose charters have been forfeited, and whose acts thereafter have been expressly made unlawful by the terms of the statute declaring such forfeiture.

On Rehearing.

3. Corporations $\hookrightarrow$ 34(8)—Equitable estoppel held inapplicable in favor of one suing on contract made during period of forfeited charter.

The doctrine of equitable estoppel cannot be applied in favor of one suing a corporation for breach of contract entered into during the period of its forfeited charter and suspended powers, where, while the facts in relation to the forfeiture were actually unknown to all parties concerned, the means of knowledge thereof were equally available to all, and it further appears plaintiff did not expend any money or services, or change his situation in any respect, in reliance on the contract, and defendant has not received and retained any benefit accruing therefrom.

Shaw, C. J., dissenting.

In Bank.

Appeal from Superior Court, Los Angeles County; Lewis R. Works, Judge.

Action by C. E. Van LANDINGHAM against the United Tuna Packers. From a judgment for defendant, plaintiff appeals. Affirmed. Rehearing denied; Shaw, C. J., dissenting.

Gibson, Dunn & Crutcher, and Norman S. Sterry, all of Los Angeles, for appellant.

P. B. D'Orr and A. L. Abrahams, both of Los Angeles, for respondent.

RICHARDS, Justice pro tem. This is an action to recover damages for the breach of a contract alleged to have been entered into between the plaintiff and the defendant on the 7th day of March, 1918, by the terms of which the defendant agreed to employ the plaintiff to act as its exclusive agent or broker in the sale of its entire pack of canned fish and fish products during the term of five years from April 1, 1918, and up to and including March 31, 1923, and for which the plaintiff was to receive certain stipulated commissions from the net price of the product thus sold. It was alleged that the defendant had refused to perform and had repudiated said contract, to the plaintiff's damage in the sum of \$4,000. The defendant, in its answer, denied having entered into or executed any such contract, or employed the plaintiff in any capacity whatever, or agreed to pay plaintiff any commissions whatever, or delivered to the plaintiff, for sale or otherwise, any of its fish product whatever. The answer contains certain other specific denials not material to the inquiry in this case.

Prior to the trial of the action, the parties entered into a stipulation as to the facts of the case, which by agreement was to constitute the findings of fact in the case, and which was adopted by the court as such, and which stipulation reads as follows:

"(1) C. E. Van LANDINGHAM is, and at all times mentioned in plaintiff's complaint was, doing business under the fictitious name of C. E. Van LANDINGHAM Company, and at all times has complied with all of the provisions of the law with respect to doing business under a fictitious name.

"(2) That United Tuna Packers is a corporation duly organized and existing under and by virtue of the laws of the state of California, and that said corporation was duly organized on September 23, 1913, and since said time has been engaged in catching and canning fish and fish products, and owned and operated, and now owns, a cannery for that purpose.

"(3) That the articles of incorporation and by-laws of said corporation provide, and at all times have provided, that there shall be five directors of said corporation, and that three directors shall constitute a quorum and may act as the board of directors, and that, where a vacancy occurs on the board of directors, the remaining directors may elect any duly qualified person to fill said vacancy. That during the year 1917, up to March 3, 1917, the directors of the United Tuna Packers were A. D. Pearce, W. Von Bergen, F. H. Johnson, Bertha V. Johnson, and Arthur J. Abbott.

"(4) That the annual license tax required under the laws of the state of California was not paid by said United Tuna Packers upon the 1st day of January, 1917, nor paid at all during said year, and at 6 o'clock p. m. on March 3, 1917, said tax became delinquent.

"(5) That in the month of April, 1917, the secretary of state of California filed with the county clerk of Los Angeles county a duly cer-

tified copy, as required by law, of the record in said secretary's office showing as follows:

Name of corporation.....United Tuna Packers
Corporate number74618
Place of businessLos Angeles
Charter forfeited to state (section 10, chapter 190,
Statutes 1915) at midnight March 3, 1917.

"(6) That prior to May 25, 1917, the said plaintiff had no connection with or interest in said defendant, and did not, at any time prior to the alleged execution of the contract herein sued upon, have any knowledge or notice that the corporation had forfeited its charter or franchise, or that the annual license tax required by the laws of the state of California had not been duly paid for the year 1917.

"(7) That during the interim between March 3, 1917, and March 7, 1918, meetings of the persons who composed the board of directors on said March 3, 1917, and the persons purported to be duly elected as their successors in once as hereinafter recited, were from time to time held, and business was carried on in the name United Tuna Packers in exactly the same manner as though said license tax had been duly paid.

"(8) That no new directors were elected, or any of the directors purported to be changed, until May 25, 1917. That on said May 25, 1917, a meeting was held by said A. D. Pearce, W. Von Bergen, F. H. Johnson, Bertha V. Johnson, and Arthur J. Abbott; said persons purporting to act as directors of the said defendant. That at said meeting A. D. Pearce tendered his resignation as a director, and his resignation was accepted by the other persons acting as directors, to wit, W. Von Bergen, F. H. Johnson, Bertha V. Johnson, and Arthur J. Abbott. That after the resignation of said A. D. Pearce had been accepted, John Tweeddale was elected as a director by the other persons purporting to act as directors, to wit, W. Von Bergen, F. H. Johnson, Bertha V. Johnson, and Arthur J. Abbott. Thereupon the said W. Von Bergen tendered his resignation as a director, and the other persons purporting to act as directors, to wit, F. H. Johnson, Bertha V. Johnson, Arthur J. Abbott, and John Tweeddale, accepted his resignation and elected one Ward as a director in the place and stead of said W. Von Bergen. That thereupon F. H. Johnson tendered his resignation as a director, and the other persons purporting to act as directors, to wit, Bertha V. Johnson, Arthur J. Abbott, John Tweeddale, and Ward, accepted the resignation of the said F. H. Johnson, and elected A. L. Abrahams as a director in the place and stead of said F. H. Johnson. Thereafter Bertha V. Johnson and Arthur J. Abbott tendered their resignations as directors, and the three persons then purporting to act as directors, to wit, John Tweeddale, Ward, and A. L. Abrahams, accepted their resignations, but did not attempt to fill the vacancies purported to be thereby created. That the proceedings to elect said John Tweeddale, Ward, and A. L. Abrahams were in all respects due and regular and valid, except as the same may have been entirely voided or affected by the fact herein recited of the nonpayment of the license tax and the declaration of the secretary of state declaring the said charter forfeited.

"(9) That thereafter meetings of the direc-

tors of said United Tuna Packers were held by the said John Tweeddale, Ward, and A. L. Abrahams, and business transacted and carried on as hereinbefore recited in paragraph 7.

"(10) That on January 29, 1918, said John Tweeddale, Ward, and A. L. Abrahams met, purporting to act as directors of said defendant corporation, and that at said meeting the plaintiff herein, C. E. Van Landingham was elected a director and president of the United Tuna Packers, and after the purported election of said C. E. Van Landingham as a director and president John Tweeddale tendered his resignation as a director.

"(11) That on March 7, 1918, a meeting was held by said Ward, Abrahams and Van Landingham as directors of said United Tuna Packers, and the said persons purporting to act as said directors elected John W. Austin and John Tweeddale as directors. Thereafter C. E. Van Landingham and Ward resigned as directors, and the other persons purporting to act as directors, to wit, said Abrahams, Austin, and Tweeddale, thereupon accepted their resignations and thereupon elected A. Boyd as a director; and thereafter said Abrahams resigned as a director, and thereupon said Austin, Tweeddale, and Boyd elected John Tweeddale as vice president and A. Boyd as secretary.

"(12) That prior to the said 7th day of March, 1918, the said plaintiff herein, C. E. Van Landingham, had purchased a majority of the capital stock of the said defendant. That on said 7th day of March, 1918, and prior to the time of his resignation, the said C. E. Van Landingham sold all of his said stock to the said John W. Austin and A. Boyd, and a transfer of the stock was made upon the books of the corporation. That after the said John W. Austin and A. Boyd had been elected as president and secretary, and on March 7, 1918, the said contract sued on herein was signed by the plaintiff as party of the second part, and the name of the United Tuna Packers was affixed by John Tweeddale as vice president and by A. Boyd as secretary. That the said persons purporting to act as directors, to wit, said John W. Austin, John Tweeddale, and A. Boyd, passed a resolution, which was entered upon the minutes of said meeting, authorizing the execution of said contract.

"(13) The defendant does not stipulate that during the period between March 3, 1917, and March 12, 1918, it was in existence, or that any business could have been, or was, legally conducted by the defendant, or that any of the meetings purported to be meetings of the directors of said corporation as set out in paragraphs 7 to 12 hereof were actually meetings of the directors of said United Tuna Packers, or that defendant was bound by them. The defendant does stipulate, however, that all of said meetings were duly and regularly called, and that the resignations of the various persons as directors, and the election of the various persons as directors to fill the vacancies created as set out in paragraphs 7 to 12, were in conformity with the articles of incorporation and by-laws of the defendant, and were in all respects due and regular in form and substance, except as the said meetings and the resignations of purported directors, and election of other purported directors, may have

been affected or entirely nullified by the failure to pay said annual license tax as hereinbefore recited, and the action of the secretary of state thereon; the defendant claiming that each and all of the meetings hereinbefore recited were absolutely void and were without legal force or effect, and that during the interval between March 3, 1917, and March 12, 1918, there were no directors of said corporation capable of either resigning or acting at all, and that any purported act of any person in carrying on business for said corporation was without legal force or effect whatever, and that defendant had no legal existence whatsoever during the period from March 3, 1917, to March 12, 1918.

"(14) That during the year 1917 the business of the United Tuna Packers was carried on in the name of said United Tuna Packers by its purported officers and directors, elected as officers in the way and manner hereinbefore recited.

"(15) That at the time of the execution of the instrument sued on, and claimed by the plaintiff to be a contract, none of the persons executing the same, or who were then connected with or had any interest in defendant corporation, had any actual knowledge or notice that the charter of the defendant the United Tuna Packers had been forfeited, or the license tax for 1917 had not been paid, and all the persons then purporting to act as directors of said corporation, and as officers thereof, as well as the said plaintiff herein, acted upon the belief and assumption that the said corporation was lawfully existing, and that the persons then purporting to act as its directors were duly, regularly, and lawfully acting as its directors. That neither the plaintiff, nor said Ward, A. L. Abrahams, John W. Austin, Samuel D. Weil, John Tweeddale, or A. Boyd, on or prior to March 7, 1918, had any actual knowledge or notice that said license tax for 1917 had not been paid. That since the issuance of the certificate of revivor, and the receipt thereof by the defendant, the said defendant has not recognized in any manner the said contract as its act or deed, nor has it done anything to ratify said contract, and when the plaintiff demanded performance by it of said contract it repudiated the same, and plaintiff does not claim any estoppel against the defendant by reason of any act or thing done by it subsequent to the issuance and receipt of the said certificate of revivor.

"(16) That prior to the time the annual license tax due for the year 1918 became delinquent the said persons acting as directors of said corporation, to wit, A. L. Abrahams, C. E. Van Landingham, and said Ward, caused the full amount of money due for the license tax for the year 1918 to be duly and regularly forwarded to the proper officers of the state of California for the payment of said tax. That after the execution of the said instrument set out and attached to the complaint as Exhibit A, the money so tendered as a license tax was returned to A. L. Abrahams, with the statement that the charter of said company had been forfeited for the failure to pay the license tax for the year 1917, and thereafter the said persons then acting as directors of the United Tuna Packers caused all necessary steps to be taken to have the said charter revived as stated in the next paragraph.

"(17) That, upon learning that the said license tax had not been paid for the year 1917, the said A. Boyd, John W. Austin, and John Tweeddale caused all the persons who composed the board of directors of said defendant on the 3d of March, 1917, to wit, said A. D. Pearce, W. Von Bergen, F. H. Johnson, Bertha V. Johnson, and Arthur J. Abbott, to sign the necessary application to have the said franchise revived, and the said A. Boyd, John W. Austin, and John Tweeddale caused to be forwarded with the said application the necessary and sufficient money to the secretary of state to revive the charter of said corporation, and on the 12th of March, 1918, a certificate of revivor was duly issued by the controller of the state of California, and said defendant ever since has been, and now is, existing and doing business under the laws of the state of California, and all annual license taxes thereafter have been duly and regularly paid.

"(18) That, upon the said certificate of revivor being received, the said A. Boyd, John W. Austin, and John Tweeddale caused the meeting to be held on the 13th day of March, 1918, by the said persons who had been directors on the 3d of March, 1917, to wit, A. D. Pearce, W. Von Bergen, F. H. Johnson, Bertha V. Johnson, and Arthur J. Abbott, and at said meeting each of said persons successively tendered his or her resignation as a director, and, as each resignation was accepted, first the said John W. Austin, then John Tweeddale, then A. Boyd, were elected directors of said corporation, and thereafter the said business of said corporation has been duly and regularly conducted and carried on by said directors.

"(19) That there was no change or sale of any of the capital stock of said defendant corporation during the interim between the said 7th of March, 1918, when said plaintiff transferred all his stock and interest to said John W. Austin and A. Boyd, and the said 13th of March, 1918, when the said John W. Austin, John Tweeddale, and A. Boyd were elected directors as hereinbefore recited.

"(20) Between the 1st day of April, 1918, and the commencement of this action, there was packed by said defendant canned fish and fish products to the value of \$305,576.40, and that of the fish and fish products canned \$109,955.50 was the value of standard tuna.

"(21) That neither the government of the United States of America, nor any duly authorized agent of said government, has confiscated or commandeered, or otherwise taken, the fish or fish products mentioned, but the same have been sold by the defendant through agents other than plaintiff in the open market or are in the hands of the defendant in marketable condition.

"(22) That the plaintiff has demanded performance of said purported contract, but that defendant, believing and relying upon the defense that the nonpayment of said annual license tax rendered said contract not its act or deed, refused to carry out the same, and has delivered and sold its said fish and fish products through other brokers.

"(23) That there was a market for all the canned fish and fish products of said defendant canned between the 1st day of April, 1918, and the commencement of this action, and that the same could have been sold by said C. E. Van Landingham, if delivered to him, for the

value of said fish and fish products as set out in paragraph 20. That the cost and expense to said plaintiff of selling the said product would have been $3\frac{1}{2}$ per cent. of the entire value of the fish and fish products canned by said defendant, and that said plaintiff would have realized a net profit of $1\frac{1}{2}$ per cent. on \$109,955.50 of tuna canned by defendant, and of $2\frac{1}{2}$ per cent. on the balance of the fish and fish products canned by defendant.

"(24) It is expressly understood and agreed that the agreed cost, to the plaintiff for marketing the said fish of $3\frac{1}{2}$ per cent. is without prejudice to any other suit by plaintiff against the defendant for any loss of profits occurring after the commencement of this suit, and that, should plaintiff bring any subsequent suit for loss of profits or damages sustained subsequent to the bringing of this action, the stipulation contained herein of a cost of $3\frac{1}{2}$ per cent. to the plaintiff for selling said fish and fish products shall not be admissible in said action for or against either party.

"(25) The defendant further stipulates that it has no defense to this action, except its contention that the nonpayment of the license tax for 1917, as hereinbefore recited, rendered the defendant incapable of making any contract whatever until after the issuance of the certificate of revivor, and that solely because of the failure to pay the said tax and the action of the secretary of state thereupon as hereinbefore set out, and not otherwise, this defendant did not exist at the time of the execution of said contract, and said A. L. Abrahams, Ward, John Tweeddale, John W. Austin, C. E. Van Landingham, and A. Boyd were not, at any of the times referred to in paragraphs 7 to 12 hereof, elected directors of said corporation, and that solely because of the failure to pay said license tax and the action of the secretary of state thereupon, as hereinbefore recited, and not otherwise, the said election of said A. L. Abrahams, John W. Austin, John Tweeddale, and A. Boyd was utterly void, and that at the time of the execution of the agreement sued on herein said John W. Austin, John Tweeddale, and A. Boyd were not directors of said corporation, or officers thereof, and that the act of said John Tweeddale and A. Boyd in signing said contract as vice president and secretary of said corporation was not the act or deed of the said corporation, nor was the act of the purported directors in authorizing said contract the act of said corporation, and the contract was not the act or deed of said corporation.

"(26) No recitals of the defense relied on by the defendant in the foregoing paragraph, or in any other paragraph of this stipulation of facts, shall be deemed or construed as any admission or concession by the plaintiff herein that the said contract was not the contract of said defendant, or that it was incapable of making or executing a contract, or that it was not bound by the acts of the persons who, as herein recited, purported to act as directors and officers of said corporation, or that the meetings hereinbefore set forth were not directors' meetings of said corporation."

Upon the foregoing findings of fact the court rendered its judgment in the defendant's favor, that the plaintiff take nothing

by his action. It is from such judgment that the present appeal has been taken.

[1] The sole question presented upon this appeal is as to the validity of said contract between the parties hereto, in view of the fact that it was purported to have been made and entered into on the part of said defendant at a time when its charter as a corporation was in a state of forfeiture for the nonpayment of its license tax, due January 1, 1917, under the provisions of the act of the Legislature entitled "An act prescribing terms and conditions upon which corporations may transact business in this state, and providing penalties and forfeitures for noncompliance," approved May 10, 1915. Stats. 1915, p. 422. This act was amended and practically re-framed by an act of the Legislature approved on May 11, 1917 (Stats. 1917, p. 371), which amendatory act contains certain changes in verbiage from the former act, hereafter to be noted. It is the contention of the appellant herein that, notwithstanding the forfeiture of the charter and suspension of the powers of said corporation under either or both of these acts, it continued to act and function as a corporation de facto subsequent thereto and as shown by the stipulated facts herein, and that in the capacity of such de facto corporation it made and entered into the contract in question, and that such contract was and is valid as the act and contract of such defendant corporation.

The question thus presented is this: Can a de jure corporation, whose charter has been forfeited, and whose powers and functions have been suspended under either or both of the foregoing acts of the Legislature, continue to function as a de facto corporation, so as to give validity to its acts and contracts entered into during the period of its forfeited charter and suspended powers? We are of the opinion that this question must be answered in the negative. The act of the Legislature of 1915 states in its title that its purpose is that of "prescribing terms and conditions upon which corporations may transact business in this state." It provides in section 3 of said act that:

"No corporation heretofore or hereafter incorporated under the laws of this state, or any other state, territory, or foreign country, shall do or attempt to do any intrastate business within this state by virtue of its charter, or certificate of incorporation, without a state license therefor."

By section 4 of the act it is made the duty of every such corporation "to procure annually from the secretary of state a license authorizing the transaction of such business in this state, and pay therefor the license tax prescribed herein." The act then proceeds to fix the basis upon which the said corporate licenses shall be computed and then provides that:

"Said license tax shall be due and payable to the secretary of state on the first day of January of each and every year. Such license tax shall be paid on or before the hours of six o'clock p. m. on the first Monday of February of each year and if not so paid shall at said hour become delinquent."

By section 7 of said act it is provided that:

"Sec. 7. At the hour of six o'clock p. m. of the Saturday preceding the first Monday in March of each year the charters of all corporations organized under the laws of this state and which have failed to pay the license tax and penalty prescribed by section four of this act shall be forfeited to the state of California, and the right of all foreign corporations to do intrastate business in this state, which have failed to pay said license tax and penalties shall be likewise forfeited."

Section 12 of said act provides:

"Sec. 12. It shall be unlawful for any corporation, either domestic or foreign, which has not paid the license tax, as in this act prescribed, to exercise the powers of such corporation, or to transact any intrastate business in this state, after six o'clock p. m. of the Saturday preceding the first Monday in March next following the delinquency. Each and every person who exercises any of the powers of a corporation which has forfeited its charter or right to do intrastate business in this state, or who transacts any business for or in behalf of such corporation, after such forfeiture, shall be guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not less than one hundred dollars and not exceeding one thousand dollars, or by imprisonment in the county jail not less than fifty days or more than five hundred days, or by both such fine and imprisonment."

By section 13 of said act it is provided:

"Sec. 13. In all cases of forfeiture under the provisions of this act, the directors or managers in office of the affairs of any domestic corporation, whose charter may be so forfeited, or of any foreign corporation whose right to do business in this state may be so forfeited, are deemed to be trustees of the corporation and stockholders or members of the corporation whose power or right to do business is forfeited and have full power to settle the affairs of the corporation and to maintain or defend any action or proceeding then pending in behalf of or against any of said corporations, or to take such legal proceedings as may be necessary to fully settle the affairs of said corporation, and such directors or managers, as such trustees, may be sued in any of the courts of this state by any person having a claim against any of said corporations."

In section 14 of said act the manner is provided by which a corporation which has suffered the forfeiture prescribed in the act may be restored to its former corporate status and have reissued to it a license entitling it to do intrastate business in this state. This section contains the following proviso:

"Provided, however, that no corporation organized under the laws of this state which suffers * * * forfeiture shall be relieved from the effect thereof, nor shall such license be issued, in the event that subsequent to the date of forfeiture its corporate name, or a name so closely resembling said name as will tend to deceive, has been adopted and is in use by another domestic corporation."

The foregoing provisions of the act of 1915 were re-enacted in substance from the act of 1905 (Stats. 1905, p. 493), which act has been repealed in 1913 (Stats. 1913, p. 680). This court has had occasion in several recent cases to discuss the foregoing features of this and the earlier act, and their effect upon the existence and powers of corporations, which have suffered the forfeiture of their charters under its terms. In the case of *Crossman v. Vivienda Water Co.*, 150 Cal. 575, 89 Pac. 335, this court held that a corporation which had been dissolved under the provisions of the Code of Civil Procedure relating to the voluntary dissolution of corporations had its existence so far terminated as a legal entity as to render it incapable of suing or being sued as a corporate body or in its corporate name. The court says (150 Cal. 580, 89 Pac. 337):

"It is dead, and can no more be proceeded against as an existing corporation than could a natural person after his death. There is no one who can appear or act for it, and all actions pending against it are abated, and any judgment attempted to be given against it is void. As to this, all the text-writers agree, and their statement is supported by an overwhelming weight of authority"—citing many cases.

In the case of *Newhall v. Western Zinc Mining Co.*, 164 Cal. 380, 128 Pac. 1040, an action had been brought against the defendant corporation for goods sold and delivered. The defendant appeared and answered as a corporation, its answer being verified by one of its directors. The answer admitted, but failed to deny, the corporate capacity of the defendant. The action was tried upon the pleadings as thus framed, and a judgment rendered against the corporation for a considerable sum of money. Thereafter a stockholder of the corporation appeared and moved to set aside such judgment, upon the ground that prior to the commencement of said action the charter of the corporation had been forfeited under the act of 1905 by its failure to pay its license tax, which motion being denied, he appealed to this court, which decided that the motion should have been granted, holding, upon the authority of *Crossman v. Vivienda Water Co.*, supra, that a corporation whose existence has been terminated, whether by judicial decree or by forfeiture of its charter under the act of 1905, cannot be sued and cannot exercise any corporate powers. The court says:

"For that act clearly and unmistakably declares and provides for a forfeiture not dependent upon judicial determination and decree, but a forfeiture which is self-acting and operating. The language of the act does not even permit a doubt upon this question. It not only declares the day and the hour when the forfeiture shall arise, but it makes it a penal offense for any officer or agent thereafter to exercise any corporate powers on behalf of the corporation, and, finally, it provides that the winding up of the corporate affairs is imposed upon the directors or managers of the corporation who 'are deemed to be trustees of the corporation * * * whose power or right to do business is forfeited.' These trustees, and not the corporation, may sue or 'may be sued in any of the courts of this state by any person having a claim against said corporation.'"

In that case it was argued that the corporation, having acted as such defending the action, was estopped and hence its stockholders were also estopped from setting up its nonexistence in an attack upon the judgment. But the court said:

"To this it must be replied that the law authorizes the directors, and not one of them, to act as trustees. It empowers them as trustees to sue and be sued, but not to answer suits in the name of the defunct corporation. Brangier's answer was therefore, not only without authority of law, but in direct violation of the law. And finally, if, notwithstanding these plain violations of the law, assent be given to the statement of respondent that 'the business of the Western Zinc & Mining Corporation was continued by defending this suit in its name,' it must inevitably result that the trustee who thus did continue the business of the Western Zinc Mining Company, not only did so in violation of his powers and of the express mandate of the statute, but made himself criminally liable for his conduct, under section 9 of the amended act." 164 Cal. 383, 384, 128 Pac. 1041.

This subject again came before this court in the case of *Aalwyn's Law Institute v. Martin*, 173 Cal. 21, 159 Pac. 158. The plaintiff, alleging itself to have been a stockholder in the Ocean Shore Railway Company, a corporation, prior to the forfeiture of its charter under the act of 1905, sought, on behalf of said corporation, to have the title to certain of its property quieted as against certain persons who were formerly its directors, but who had become trustees of the defunct corporation upon the forfeiture of its charter. This court denied the plaintiff that relief, holding that:

"When a corporation has failed to pay its license tax, and a forfeiture of its charter has been declared, it ceases to be a corporation. *Newhall v. Western Zinc Mining Co.*, 164 Cal. 380, 128 Pac. 1040. The title to the property formerly owned by the corporation vests in the former directors as trustees. The complaint in the case at bar does not seek to have the title of the trustees quieted, but, on the contrary, asks that the title of the Ocean Shore Railway Company be quieted, and the whole ac-

tion is based upon the alleged ownership of the property by the said company. But the company is dead and may not own property. Even if we concede the plaintiff's capacity to sue, it is seeking relief upon a false theory, and a general demurrer to its complaint will lie."

In the case of *Rossi v. Caire*, 174 Cal. 74, 161 Pac. 1161, the question of the effect of the forfeiture of the charter of a corporation under the act of 1905, and also under the amendment thereto in 1907 (Stats. 1907, p. 746), upon the ownership and administration of its property, came up for consideration, this court holding that the corporation having ceased to exist under the provisions of said acts it was no longer capable of holding the title or possession of its former property, which thereafter belonged to the persons who were its stockholders at the time it ceased to be a corporation. In the later case of *Rossi v. Caire* (Cal. Sup.) 199 Pac. 1042, the court went somewhat more fully into the question of the status of a corporation which had suffered the forfeiture of its charter under the act of 1905 and the acts amendatory thereto, and in so doing said:

"The status of a corporation whose charter is forfeited under the License Tax Act referred to is well settled by decisions of this court. The penalty imposed by the act for nonpayment of the license tax prescribed was exceedingly severe, and the consequence doubtless often disastrous. But in view of our constitutional provisions the absolute power of the state over corporation charters was such, and the intention of the act to accomplish this end was so clearly and unambiguously shown thereby that there could not be any well-founded difference of opinion as to the result. The Governor's proclamation having been duly made, and the corporation having failed to pay within the specified time thereafter, the corporation simply ceased to exist, just exactly as in the case of a forfeiture for cause by judicial decree, without any existing provision of law for rehabilitation as a corporation."

In the case of *National Supply Co. v. Flack*, 183 Cal. 124, 190 Pac. 634, the status of corporations which had failed to pay their license tax under the act of 1915 arose, and this court, citing as authority therefor the foregoing cases, held that the failure to pay a license tax ipso facto terminated the corporate existence, and that a judgment rendered against a corporation after the forfeiture of its charter was void.

Thus far in the foregoing line of decisions the court has been dealing with the status of corporations under the act of 1905 and the several acts amendatory thereto, and in the latter case applied the same doctrine to the status of corporations whose charters had been forfeited under the act of 1915. The *United Tuna Packers Corporation*, defendant herein, had, as we have seen, suffered the forfeiture of its charter in March, 1917, and under the terms of this later act.

Thereafter, and during the year or more which followed, according to the agreed statement of facts and findings of the trial court, the persons who had formerly constituted its board of directors undertook to continue to function as such, notwithstanding the forfeiture of the charter of the corporation. In the month of May, 1917, at a purported meeting of said board of directors of said defunct corporation, by successive resignations and elections, the entire membership of said board of directors was changed, all of its former members resigning, and in their place and stead three other persons being elected directors of the corporation, and two vacancies being left unfilled. These acts were done prior to the adoption of the act of the Legislature of 1917 (Stats. 1917, p. 371), which effected certain changes in the act of 1915, the effect of which will be hereinafter considered. These attempted changes in the personnel of the board of directors of the defunct corporation were therefore done, or attempted to be done, while the corporation was, as to its status, in the condition described by the language of the decisions of this court above quoted. Subsequent to the taking effect of the act of 1917, above referred to, it was these persons, together with two others who had been added to their number by the same method of election, who assumed as directors of said corporation to enter into and execute the contract with the plaintiff, which forms the basis of this action. The question has arisen in the case as to the effect of the enactment of certain provisions of the act of 1917, which, while it purports to be an amendment, amounts to a revision, of the act of 1915, upon the status of this corporation at the date of said contract. Under section 7 of the act of 1915 the charters of all corporations which failed to pay their license tax were declared to be "forfeited to the state of California." Under section 11 of the act of 1917 it was declared that:

"The corporate rights, privileges and powers of every domestic corporation which has failed to pay," etc., "shall * * * be suspended and incapable of being exercised for any purpose or in any manner" (except for certain limited purposes).

The act further declares that after such suspension "every person who attempts or purports to exercise any of the rights, privileges or powers of any delinquent domestic corporation except as permitted by this act, or, who transacts or attempts to transact any intrastate business in this state in behalf of any forfeited foreign corporation, shall be guilty of a misdemeanor," and further provides that "every contract made in violation of this section is hereby declared to be void." There is some discussion in the briefs of counsel herein as to the effect of the foregoing changes in the verbiage of the law affected by the adoption of the act of 1917,

but in view of our conclusions herein we do not think these verbal changes in the law material to the matter in controversy here, particularly in view of what was said by this court in the case of *Ransome-Crummey Co. v. Superior Court* (Cal. Sup.) 205 Pac. 446, wherein these changes in the language of the law were noted and discussed. In that case the suspension of the powers of the corporation had occurred under the act of 1917 and the court significantly says:

"During the time its taxes were unpaid, petitioner was shorn of all rights save those expressly reserved by the statutes. The right to institute or maintain actions is not included in this reservation, but is denied to corporations as a part of the penalty."

And the court further declares:

"Furthermore, we are of the opinion that the subsequent revival of the corporate rights, powers, and privileges did not have the effect of validating the acts attempted during the period of suspension. The revival is not made retroactive by the statute. The suspension of the rights, powers, and privileges is a disability imposed on a corporation as a penalty, and it would tend to deprive the statute of its force and encourage a corporation in default to postpone payment of its taxes indefinitely, if it were held that, by subsequent payment of the delinquent taxes, all the benefits of the attempted acts denied to the corporation could be secured. That it was not intended that the acts, during the time of the suspension, should have any effect whatever is shown by the fact that both the sections of the Political Code and the Statutes of 1917, above referred to, make the performance of such acts by any person on behalf of the corporation a misdemeanor."

In view of the language of the foregoing decisions of this court, and of the terms of the statute under which the charter of this corporation had been forfeited for the non-payment of its license tax, we are of the opinion that during the period of such forfeiture of its charter said corporation could not become, be, or act as a corporation de facto, so as to permit the execution of or give any validity to the contract upon which the plaintiff herein relies as the basis of this action. The corporation, when it had failed to pay its license tax and the forfeiture of its charter had resulted, ceased to be a corporation. It was dead. It had no longer a board of directors, or other body of officers or agents. The persons who had been its directors prior to its decease ceased to be such, and became the trustees of an express trust, with such powers only as were expressly conferred by the statute declaring the forfeiture of its charter, but with no power to select, appoint, or authorize others to take their places or perform their duty as such trustees. Under the express terms of the statute it was declared to be unlawful for such a defunct corporation to transact any intrastate business whatever, and every attempt of any of its former officers to exer-

cise any of the former powers of the corporation, or to transact any such business for or on behalf of such corporation, after and during the period of such forfeiture of its charter was made a misdemeanor. Under the terms of the statute of 1915, the contracts of such a corporation were not expressly declared to be void; but such we think was the effect of the language of the statute making them unlawful. However, under the statute of 1917, section 11, the omission to expressly so declare was supplied by the express statement that "every contract made in violation of this section is hereby declared to be void."

It is to be noted that the contract upon which the appellant herein counts and relies was entered into after the statute of 1917 had come into effect, and that it was attempted to be made and entered into on behalf of such defunct corporation by a set of persons who were not its directors at the time of its demise, but who had attempted to be made such by the members of its former board of directors, whose powers to act as such had ceased, and who at the time of such purported change possessed only the limited powers of trustees of an express trust under the terms of the statute in which the power to choose others to administer their trust was not embraced. To hold that such a corporation could, after its death, after it had ceased to have officers, directors, agents, or attorneys, after it had been stripped of all its property, after it had become incapable of suing or being sued or of having judgments obtained against it, after its every attempted act in the way of the transaction of any intrastate business had been expressly made unlawful, and after those of its former officers or agents who attempted to do or transact any act of business on its behalf during the period of such forfeiture of its charter had been declared guilty of crime, still function as a corporation de facto, would be to practically nullify both the language and intent of the statute under which the forfeiture of its charter and powers had been declared, and would be, in effect, to cast upon the state the burden of instituting judicial proceedings in the nature of quo warranto against every such corporation to have decreed the forfeiture which the statute had itself expressly declared.

The appellant herein, however, cites section 358 of the Civil Code as supporting his contention, and also strongly relies upon the cases of *McCann v. Children's Home Society*, 176 Cal. 359, 168 Pac. 355, and *First National Bank, etc., v. Pennig*, 28 Cal. App. 267, 151 Pac. 1153, as sustaining his claim that the respondent, having continued to act as a corporation after the forfeiture of its charter, and having entered into this contract while purporting so to act, is estopped to deny its corporate existence and powers in this action. He also cites cases from other jurisdictions

to the same effect. It is to be noted that the cases upon which the appellant relies are in no instance cases in which the acts of the corporation relied upon to sustain its de facto status in relation to the particular transaction sued upon were acts done or attempted to be done, or powers exercised or sought to be exercised, in express violation of law. They are, without exception, cases where, through some defect or oversight in attempting to organize or continue to do business as a corporation de jure, the institution had nevertheless in good faith assumed to act as such in entering into the particular transaction. Such a state of things is well illustrated by the case of *McCann v. Children's Home Society*, supra, in which, manifestly, the institution purporting to act as a corporation was violating no express statute in so doing, but was merely assuming to do de facto and in good faith that which it could have done de jure, but for the defect in its attempted organization or exercise of corporate powers. But that is not this case, since the law has expressly declared that a corporation, the charter of which has been forfeited under the terms of the statute in relation to the payment of license fees cannot do any act either de jure or de facto, and that any attempt whatever so to do is unlawful, and that those of its former officers or agents making such attempt shall be guilty of a crime.

[2] As to section 358 of the Civil Code it must be held to have application only to such corporations as are not forbidden by positive law to do business as de facto corporations, and cannot be given application to the attempted acts of corporations whose charters have been forfeited, and whose acts thereafter have been expressly made unlawful by the terms of the statute declaring such forfeiture.

The judgment is affirmed.

We concur: WILBUR, J.; LAWLOR, J.; LENNON, J.; SLOANE, J.; WASTE, J.

I dissent: SHAW, C. J.

On Application for Rehearing.

PER CURIAM. [3] The application for a rehearing is denied. While the facts in relation to the forfeiture of the corporate charter were actually unknown to all the parties concerned, the means of knowledge thereof were equally available to all. It further appears that the plaintiff did not expend any money or services or change his situation in any respect in reliance upon the contract, and that the defendant has not received and retained any benefit accruing therefrom. There is, therefore, no basis here for the application of the equitable doctrine of estoppel.

MYERS, Justice pro tem., WASTE, J., RICHARDS, Justice pro tem., LENNON, J., concur.

58 Cal. App. 499

OSCAR HEYMAN & BRO. v. BATH et al.
(Civ. 4309.)

(District Court of Appeal, First District, Division 2, California. July 11, 1922. Hearing Denied by Supreme Court Sept. 7, 1922.)

Counties 150(2)—Repayment of illegal tax not contract obligation incurred in excess of constitutional limitation.

The obligation of a county to repay an illegal tax paid under protest is an obligation imposed by law, and not one implied in fact, so that an application for mandamus to compel the levy of a tax to pay a judgment for the refund of the illegal tax does not seek to compel the county to incur an indebtedness exceeding its income, contrary to Const. art. 11, § 18.

Application for mandamus by Oscar Heyman & Bro. a corporation, against Edwin C. Bath and others, to compel the Board of Supervisors of the City and County of San Francisco to levy and collect a tax sufficient to pay a judgment for taxes paid under protest. Writ granted.

Jacob Samuels and Joseph H. Mayer, both of San Francisco, for petitioner.

George Lull, City Atty., and Maurice T. Dooling, Jr., Asst. City Atty., both of San Francisco, for respondents.

NOURSE, J. This is an original proceeding in mandamus to require the respondents, as members of the board of supervisors of the city and county of San Francisco, to take the appropriate proceedings for the levy and collection of a tax sufficient to pay a judgment which the petitioner holds against the said city and county. The judgment involved the legality of a tax previously assessed and paid by petitioner under protest. It was a final determination of the illegality of the tax and of the obligation of the city to make repayment.

In this proceeding the respondents filed a general demurrer, and in argument rely upon the provisions of section 18 of article 11 of the Constitution, which provides that "no county * * * shall incur any indebtedness or liability in any manner or for any purpose exceeding in any year the income and revenue provided for such year. * * *". It is said that by judicial decisions this section has been interpreted as applying only to actions *ex contractu*, and not to actions *ex delicto*, or to obligations directly imposed by statute, such as salaries of public officers. In support of the position that the obligation to pay taxes illegally collected comes within the terms of the section, respondents argue that this obligation is one based upon an implied contract, because, the taxpayer having been given the option to either pay under protest or to suffer seizure, the pay-

ment must be deemed to be a voluntary one.

We are satisfied that the payment of the tax involved here was involuntary, and that the judgment is evidence of an obligation imposed by law, rather than one implied in fact. Such being the case, the city is not asked to "incur" an indebtedness in excess of its income and revenue, but is asked to provide the necessary income and revenue sufficient to meet an indebtedness imposed upon it by law. All other points urged were determined in *Metropolitan Life Ins. Co. v. Deasy*, 41 Cal. App. 667, 183 Pac. 243.

Let a peremptory writ issue as prayed.

I concur: STURTEVANT, J.

58 Cal. App. 786-790

WILSON et al. v. ROLPH et al.,
and four other cases.
(Civ. 4317-4321.)

(District Court of Appeal, First District Division 2, California. July 11, 1922. Hearing Denied by Supreme Court Sept. 7, 1922.)

Five original applications for mandamus by Frederick A. Wilson and others, by Mary E. Chilton and others, by Alexander D. Keyes and others, by Albert G. Luchsinger, and by Herbert W. Erskine against James Rolph, Jr., and others, to compel the Board of Supervisors of the City and County of San Francisco to levy and collect a tax sufficient to pay a judgment for taxes paid under protest. Writ granted in each case.

Keyes & Erskine, of San Francisco, for petitioners.

George Lull, City Atty., and Maurice T. Dooling, Jr., Asst. City Atty., both of San Francisco, for respondents.

PER CURIAM. Let a peremptory writ issue as prayed, on the authority of *Oscar Heyman & Bro., a Corporation, v. Edwin C. Bath et al.* (No. 4309; Cal. App.) 208 Pac. 981.

58 Cal. App. 785

SOUTHERN PAC. CO. v. BOYLE, Auditor,
et al. (Civ. 4312.)

(District Court of Appeal, First District, Division 2, California. July 11, 1922. Hearing Denied by Supreme Court Sept. 7, 1922.)

Original application for mandamus by the Southern Pacific Company against Thomas Boyle, as Auditor, and others, to compel the Board of Supervisors of the City and County of San Francisco to levy and collect a tax sufficient to pay a judgment for taxes paid under protest. Writ granted.

E. J. Foulds and H. W. Hobbs, both of San Francisco, for petitioner.

George Lull, City Atty., and Maurice T. Dooling, Jr., Asst. City Atty., both of San Francisco, for respondents.

PER CURIAM. Let a peremptory writ issue as prayed, on the authority of Oscar Heyman & Bro., a Corporation, v. Edwin C. Bath et al. (No. 4309; Cal. App.) 208 Pac. 981.

58 Cal. App. 541

HENDERSON v. VERNALIS FARMING CO.
(Civ. 4111.)

(District Court of Appeal, First District, Division 2, California. July 18, 1922. Hearing Denied by Supreme Court. Sept. 14, 1922.)

Brokers $\Leftrightarrow$ 65(1)—Consideration for agreement to pay commissions held to have failed, because of broker's fraud.

There is failure of consideration for contract of landowner to pay a broker commissions for selling the land preventing recovery thereon, the broker having induced the owner to make the sale by false and fraudulent representations as to the financial ability of the purchasers to make payments and perform the conditions of their contract, as to all of which they failed.

Appeal from Superior Court, City and County of San Francisco; James M. Troutt, Judge.

Action by J. W. Henderson against the Vernalis Farming Company. Judgment for defendant, and plaintiff appeals. Affirmed.

J. W. Henderson, of Eureka, and Fabian D. Brown, of San Francisco, for appellant.

W. G. Irving, of Riverside, and Philip C. Boardman, of San Francisco, for respondent.

NOURSE, J. Action to recover commissions under a contract between plaintiff's assignor, one W. C. Walker, and defendant. Judgment went for defendant in the trial court, and plaintiff appeals.

The contract, which is made a part of the answer, provides as follows:

"Whereas, said Vernalis Farming Company has agreed with said Walker that upon the sale by said Walker, or through his efforts, of a certain tract of farming land belonging to said Vernalis Farming Company to F. M. Cale and Theodore Schieve, the said Vernalis Farming Company will pay said Walker a commission of $2\frac{1}{2}$ per centum upon the purchase price of said land, which $2\frac{1}{2}$ per centum amounts to fifty-four hundred and sixty (\$5,460) dollars, and a like commission of $2\frac{1}{2}$ per centum, amounting to fifty-four hundred and sixty (\$5,460) dollars, to Estelle Nelson Avery, it is hereby agreed that, in the event that such sale shall be concluded, the said Vernalis Farming Company will pay said commission to said Walker, as follows: \$460.00 thereof in the promissory note of said Vernalis Farming Com-

pany, payable six months after date, with interest thereon at the rate of 6 per cent. per annum; and \$5,000 thereof in one year from the date of such sale to said Cale and Schieve, with interest thereon at 6 per cent. per annum, provided said Cale and Schieve shall within said period of one year pay to said Vernalis Farming Company the sum of \$60,000 on account of said purchase price. If, however, said Cale and Schieve shall default in said payment of \$60,000, and by reason of such default said Vernalis Farming Company shall take those certain pieces of real estate which have been conveyed to it by said Cale and Schieve as security for the payment of said first installment of \$60,000, then and in that event, and in lieu of the said cash commission to said Walker, the said Vernalis Farming Company will convey to said Walker an undivided one-half interest in that certain real estate situate in the city and county of San Francisco, state of California, on the corner of Fourth avenue and Hugo street, more fully described in the deed of said Cale and Schieve to Vernalis Farming Company, said property to be subject to the mortgage now existing thereon, and said Walker will return to said Vernalis Farming Company said sum of \$460, with interest thereon at 6 per cent. per annum."

On the same day that this contract was executed (July 30, 1913) Cale and Schieve entered into a written agreement with defendant for the purchase of the property described in the commission agreement. By its terms Cale and Schieve agreed to pay for the property \$218,400 in the following manner: \$60,000 within one year from the signing of the contract, with interest on the whole amount of the purchase price from the date of the contract at the rate of 6 per cent. per annum net, interest to be payable semi-annually; one-half of all moneys emanating from any contract sales of said lands, and any advance payments made by the prospective purchasers of said lands during said year; \$60,000 annually thereafter, and interest on the remaining unpaid portions of said purchase price; and one-half of all moneys from land sales as above mentioned, until the principal sum of \$218,400 and interest shall be fully paid and satisfied. In addition they agreed, at their own cost and expense, within 6 months from the date of the contract, to commence the actual reconstruction of the broken levee on said premises, and to complete the reconstruction of the levee system on the river side of said property and place the property in a watertight condition within one year from date thereof; also that they would, within 6 months from date thereof, at their own cost and expense, install and complete a second pumping plant in addition to the one then on said premises, and lay main and lateral pipe lines of sufficient capacity and extent to cover all portions of said land not then covered by the existing irrigation system. The contract provided that Cale and Schieve

should have immediate possession of the land, and the right at their own cost and expense to farm and cultivate the same during the continuance of the contract; that they would pay all taxes and assessments that might thereafter be levied against said property; also that they would pay the Pacific Gas & Electric Company all sums of money thereafter to become due under the provisions of a power contract between defendant and that company, obligating defendant to pay a minimum charge for power of \$1,200 per annum. Cale and Schieve were given the right to negotiate sales by contract or otherwise of such parts or portions of said land as defendant might designate, 50 per cent. of all moneys arising in any manner from such contract sales to be immediately paid over to defendant. The contract then provided:

"And as security for the performance of all the conditions and terms of this agreement, the parties of the first part [Cale and Schieve] agree that, within 18 days from the date hereof, they will cause to be executed deeds of conveyance of the property hereinafter described in which the party of the second part herein [defendant] shall be named as grantee, said deeds being sufficient to convey the title in fee, subject to existing incumbrances, and will place said deeds in escrow with the Mercantile Trust Company, of the city of San Francisco, with escrow instructions to said trust company to hold said deeds during the lifetime of this contract, and, if default be made in any of the terms of this contract by the parties of the first part, then and in that event to deliver said deeds to the party of the second part, as fixed, settled, and liquidated damages for the breach of this obligation. The equities in the lots or pieces of property hereby agreed to be so conveyed are of the value of eighty-one thousand dollars (\$81,000) over and above incumbrances, and, should their valuation fall below that amount when appraised under direction of the second party, the first party agrees to deed additional property to bring the valuation up to said \$81,000. [Here followed a description of the properties referred to, including the Hugo street property, together with the amount of the income, if any, derived therefrom, the owner's valuation, the amount of the incumbrance thereon, and the owner's equity therein.] And upon final payment being made covering the full purchase price of the said 2,730 acres, together with all accrued interest thereon, the said party of the second part agrees to execute a good and sufficient deed of conveyance in favor of the parties of the first part, covering the above-described 2,730 acres, more or less. Time is of the essence of this contract, and in the event of a default in any of the terms and conditions hereof by the parties of the first part this contract shall cease and determine, and in addition to the delivery of the escrow deeds hereinbefore provided for as liquidated damages, the parties of the second part shall retain for their own use and benefit all pumping plants, pipe lines, improvements, and works and structures of every kind and character which may have been placed upon said premises by the parties of the first

part, and all contracts of sale made in respect to said 2,730 acres, or any part thereof, shall be freed and discharged of and from any and all claims of the said parties of the first part, or either of them, and the parties of the first part will immediately vacate and surrender the possession of all the premises described in this agreement to the party of the second part. The said party of the second part shall be allowed fifteen (15) days from the date hereof in which to complete the examination and appraisal of the properties herein described, as owned by the parties of the first part."

Cale and Schieve executed and deposited with the Mercantile Trust Company the deeds provided by the agreement to be escrowed as security for its performance on their part. They then took possession of the Vernalis ranch in pursuance of the terms of the agreement, and remained in possession for about a year, but failed to further perform its terms. While so in possession they defaulted in the payment of the interest which became due January 30, 1914, 6 months from the date of the contract, and also in other particulars which they had agreed to perform within 6 months from its date—the completion of a second pumping plant, etc. About February 7, 1914, defendant notified Cale and Schieve that they had forfeited their right to the property because of such default and demanded immediate possession. They, however, continued in possession for several months thereafter, but failed to repair the broken levee or to pay the taxes, the bills of the Pacific Gas & Electric Co. for electricity furnished to the ranch, or the first installment of \$60,000 on the purchase price, or to do any of the things which they had agreed to do other than as above stated. Pursuant to its escrow instructions, and in accordance with the provisions of the sale contract, about February 15, 1914, the Mercantile Trust Company delivered to defendant the deeds escrowed with them as security for performance by Cale and Schieve. The trial court found as a conclusion of law that the covenant referred to in the sale contract provided for a penalty and was void. About March 5, 1914, defendant, for the purpose of satisfying the terms of the commission contract, offered to deliver to plaintiff's assignor a deed running from the former to the latter and purporting to convey a one-half interest in the Hugo street property, which was refused on the ground that it was insufficient to convey title. April 3, 1914, Cale and Schieve brought suit against defendant herein to compel it to reconvey these properties to them. July 22, 1914, the owner of one of the incumbrances on the Hugo street property commenced foreclosure proceedings, making defendant herein, Cale Schieve, and others defendants in that action. On or about September 1, 1915, defendant voluntarily deeded all the property referred to which it had received from Cale and Schieve, including the Hugo street prop-

erty, to the nominee of Cale and Schieve, and neither of the actions mentioned were ever prosecuted to judgment.

Respondent's theory, and the theory upon which, from the findings, it appears the trial court rendered judgment in its favor, is that appellant's assignor (Walker) induced defendant, by means of false and fraudulent representations as to the financial ability of the prospective purchasers, to enter into the contract of sale, and that by reason of the default of the purchasers in carrying out its terms there was a total failure of consideration for the commission contract, and that, assuming that appellant's assignor was entitled to the commission provided in the contract, this obligation was discharged by respondent's offer to deliver to Walker a deed of an undivided one-half of the Hugo street property. The trial court found:

"The said W. C. Walker, plaintiff's predecessor in interest, prior to the 30th day of July, 1913, and for the purpose of inducing the defendant herein to enter into the said agreement of sale with the said Cale and Schieve, represented to the said defendant that the said F. M. Cale and the said Theo. Schieve were men of large financial means, and were amply able to make the payments in said agreement of sale on their part to be made, and to perform all the other conditions and covenants therein contained and on their part to be performed. The said defendant, believing said representation and relying thereon, was induced thereby to make and enter into said agreement of sale with the said Cale and Schieve. In truth and in fact the said Cale and Schieve were not at the time said representations were made by the said Walker, and were not at any time thereafter, financially able, and had not at any time whatsoever the financial means, or any means whatsoever, sufficient to enable them to make the payments required to be made by them in accordance with the provisions of said agreement of sale, which fact was at all times, and at the time said representations were made, well known to the said W. C. Walker. Had it not been for said false and fraudulent representations of said W. C. Walker, the said defendant would not have entered into the said agreement of sale with said Cale and Schieve. The said defendant received no consideration whatsoever for the execution of said commission contract."

There is no doubt that plaintiff's assignor made the representations found, and there is some evidence to support the finding that they were false and fraudulent. This supports the conclusion of the trial court that the sale contract was void, because procured by fraud. From this follows the finding of failure of consideration for the commission contract, all of which precludes recovery by appellant.

Judgment affirmed.

We concur: LANGDON, P. J.; STURTEVANT, J.

58 Cal. App. 791

NOYES v. VERNALIS FARMING CO.
(Civ. 4103.)

(District Court of Appeal, First District, Division 2, California. July 18, 1922. Hearing Denied by Supreme Court. Sept. 14, 1922.)

Appeal from Superior Court, City and County of San Francisco; James M. Troutt, Judge.

Action by F. R. Noyes against the Vernalis Farming Company. Judgment for defendant, and plaintiff appeals. Affirmed.

J. W. Henderson, of Eureka, and Fabian D. Brown, of San Francisco, for appellant.

W. G. Irving, of Riverside, and Philip C. Boardman, of San Francisco, for respondent.

NOURSE, J. Judgment in this action was rendered in favor of defendant, and plaintiff appeals.

Plaintiff sued as assignee of Estelle Nelson Avery for the specific performance of a contract between Estelle Nelson Avery and defendant, dated July 30, 1913, providing as follows:

"Whereas, said Vernalis Farming Company has agreed with W. C. Walker that, upon the sale by said Walker, or through his efforts, of a certain tract of farming land belonging to said Vernalis Farming Company to F. M. Cale and Theodore Schieve, the said Vernalis Farming Company will pay said Walker a commission of $2\frac{1}{2}$ per centum upon the purchase price of said land, which $2\frac{1}{2}$ per centum amounts to fifty-four hundred and sixty (\$5,460) dollars, and a like commission of $2\frac{1}{2}$ per centum, amounting to fifty-four hundred and sixty (\$5,460) dollars, to Estelle Nelson Avery, it is hereby agreed that in the event that such sale shall be concluded, the said Vernalis Farming Company will pay said commission to said Estelle Nelson Avery as follows:" The balance of the agreement is in the exact language of the corresponding portion of the agreement between Walker and defendant, quoted in the decision filed this day in an action by Walker's assignee against this defendant, numbered 4111, and entitled "J. W. Henderson, Plaintiff and Appellant, v. Vernalis Farming Co. (a Corporation), Defendant and Respondent," 208 Pac. 982, except that, where the name Walker appears therein, the name Estelle Nelson Avery is substituted in this agreement.

The parties herein stipulated to facts similar to those set out in the statement of that case, and in addition stipulated that, at the time of the making of the agreement between Cale and Schieve and defendant, the property referred to therein as escrowed by the former as security for their performance of the agreement, was of the clear value of \$15,000. The evidence in this case is such that what has been said in the decision in the Henderson Case applies equally here, and for the same reasons there given the judgment is affirmed.

We concur: LANGDON, P. J.; STURTEVANT, J.

58 Cal. App. 466

TAYIAN v. YERETZIAN. (Civ. 4189.)

(District Court of Appeal, First District, Division 1, California. July 5, 1922.)

1. Set-off and counterclaim §49(3) — Maker entitled to set off agreed value of his services against payee's assignee after maturity.

Where payee of a note agreed to pay maker a stated sum for rendering designated services, which services maker performed, and subsequently payee assigned the note after maturity, maker was entitled to set off against assignee the agreed value, and not merely the reasonable value, of his services.

2. Appeal and error §984(5) — Trial court's allowance of attorney's fees scaled down.

While the action of the trial court in allowing attorney's fees will not ordinarily be reviewed on appeal, where the note sued on was assigned after maturity, plaintiff had notice of defendant's counterclaim, defendant made an effort to adjust the claim, and only a balance of \$51 was due, an allowance of \$50 as attorney's fees was scaled down to \$20.

3. Appeal and error §122(2) — Appellate court cannot supplement findings of trial court.

The appellate court cannot supplement the findings of the trial court.

Appeal from Superior Court, Fresno County; D. A. Cashin, Judge.

Action by Harry Tayian against Arsen Yeretzian. Judgment for plaintiff, and defendant appeals. Reversed, unless a stipulation is filed for reduction of the judgment as stated.

Arsen Yeretzian, of Fresno, for appellant.
K. Ohanian, of Fresno, for respondent.

PREWETT, Justice pro tem. This action is founded upon a promissory note in the sum of \$333, executed by appellant to one Lillian, and by him assigned after maturity to the respondent. The appellant admits the execution of the note, and he makes no pretense that he has liquidated it by direct cash payments. He claims, however, that he has certain counterclaims thereto, aggregating nearly the sum due on the note. He brought a suit in the justice's court against said Lillian on these counterclaims, and recovered therein a judgment against him in the sum of \$286.50. Lillian thereupon appealed from the judgment of the justice, and it was stipulated that the two actions should be consolidated and tried as one, and that the justice's court proceedings and judgment should be deemed and treated as a sufficient plea based upon said counterclaims.

The findings show that the sum of \$333 and an attorney's fee of \$50 were due on the promissory note, and that appellant was entitled to a credit of \$251 on account of his

counterclaims. The court further found that all the alleged items of counterclaim were due, save and except that the reasonable value of the services of appellant in making a trip from Fresno to Modesto was but \$25, instead of the sum of \$50, claimed by appellant. It is seen that this leaves a balance of \$261.50, in which sum the appellant should have credit.

[1] Appellant further claims that he should have been credited with the full sum of \$50 for the Modesto trip, in view of the fact that that sum was agreed upon prior to the rendition of the service; also, he insists that the respondent should not receive an attorney's fee of \$50. Both these contentions must be sustained. As to the trip to Modesto, the evidence is clear and uncontradicted that Lillian and another were partners; that these partners, through the other, contracted with appellant to make the trip to Modesto, agreeing to pay him \$50 for the service; and that upon the dissolution of the partnership Lillian agreed to assume and pay all the partnership debts, one of which was this item of \$50. Under this state of facts, the appellant was clearly entitled to credit for the full sum of \$50.

[2] As to the attorney's fee of \$50 allowed by the court to the respondent for services of his attorney in this suit, it should, under the circumstances of the case, be scaled down to \$20. It is true that the action of the trial court in allowing or scaling attorney's fees will not ordinarily be reviewed by a court on appeal, but in this case the note was assigned after maturity, and the attorney for the respondent was informed, weeks before the action was commenced, that the appellant had certain defenses to the note. There is much in the record to suggest that the respondent is merely an assignee for purposes of collection. The respondent is entitled to a balance of but \$51.50. He should have brought his action in a justice's court, and before so doing he should have made at least some effort to ascertain the amount due to him. The evidence shows that the appellant made efforts to adjust the differences with the attorney for the respondent, but the matter never reached a conference. Crediting the respondent with the \$358 for principal, interest, and attorney's fees, and the appellant with the full amount of his counterclaim, \$286.50, there remains a balance in favor of the respondent in the sum of \$71.50, in which sum he should have judgment.

[3] The court cannot on appeal supplement the findings of the trial court, and the judgment must accordingly be reversed, unless the respondent shall see fit to remit the excess. If the respondent shall within 30 days file in this court a stipulation to the effect that the judgment may be modified, by reducing the amount thereof to \$71.50, the

judgment, when thus modified, is affirmed; otherwise, the judgment is reversed. The appellant shall recover his costs on this appeal.

We concur: TYLER, P. J.; RICHARDS, J.

58 Cal. App. 478

MEYROSE v. PACIFIC ACCEPTANCE CORPORATION et al. (Civ. 3927.)

(District Court of Appeal, Second District, Division 1, California. July 5, 1922.)

Corporations — §503(3) — Corporation, sued with nonresident individual defendants in county where obligation arose, held not entitled to change of venue.

The joinder with a corporation of individual defendants, who made no demand for a change to the residence of either, and who did not show where they resided, other than that they did not reside in the county where the corporation was sued and where the obligation arose, did not take away the privilege of suing it in that county, pursuant to Const. art. 12, § 16, and the court was not warranted, on the showing made by the individual defendants, in granting a motion for a change to the county wherein corporation's principal place of business was situated.

Appeal from Superior Court, Kern County; J. W. Mahon, Judge.

Replevin by Grover Meyrose against the Pacific Acceptance Corporation and others. From an order denying a motion for change of venue, certain defendants appeal. Affirmed.

Brownstone & Goodman, of San Francisco, Kaye & Simon, of Bakersfield, and L. E. Nathan, of Los Angeles, for appellants.

Merriam, Rinehart & Merriam, of Pasadena, for respondent.

JAMES, J. Plaintiff brought this action to recover possession of an automobile, alleging that defendants wrongfully took the property from his possession on the 4th day of August, 1921, at a place in the county of Kern, and that defendants refused, upon the demand of the plaintiff, to return it to him. There was the usual allegation also that plaintiff was at all times the owner and entitled to the immediate possession of the property. To that complaint a demurrer was filed on behalf of the corporation defendant and defendants Dalton and Russell, which defendants at the same time made written demand for change of place of trial, and gave notice of a motion for an order to transfer the cause from the county of Kern to the superior court of the city and county of San Francisco. The motion was based on the files in the case and an affidavit of the secretary of the defendant corporation. In de-

nying the motion the court made the following order:

"This action came on regularly for hearing of motion for defendants for change of place of trial of cause from the county of Kern to the city and county of San Francisco, and it appearing that the defendant Pacific Acceptance Corporation is a corporation, and has its principal place of business in the city and county of San Francisco, and from an affidavit on file herein that defendants Dalton and Russell do not reside in the county of Kern, it nowhere appearing from affidavit or otherwise in what counties said defendants Dalton and Russell do reside, or that they reside at all within the state of California, it is therefore ordered that said motion for change of venue be and the same is hereby denied."

The defendants hereinbefore named have appealed from the order refusing to change the place of trial.

It was a fact, as recited in the court's order, that the place of residence of the defendants Dalton and Russell was not made to appear. As to these individual defendants the affidavit presented to the court showed only that they were not residents of the county of Kern at the commencement of the action. It did appear by the affidavit that the principal place of business of the corporation defendant was at the city and county of San Francisco. If the matter be considered for the moment as though the corporation had been the only defendant, it is clear enough that the order denying the change of place of trial was proper to be made. The Constitution (section 16, art. 12) provides that a corporation may be sued "where the obligation or liability arises," or in the county where the principal place of business is situated. By the allegations of the complaint it appeared that the obligation of that defendant arose immediately upon its having taken possession of plaintiff's automobile, which act occurred, as alleged, in the county of Kern. *Trezevant v. Strong Co.*, 102 Cal. 47, 36 Pac. 395; *Cook v. Ray Manufacturing Co.*, 159 Cal. 694, 115 Pac. 318.

Appellants insist, however, that because of the joinder of the individual defendants, who were not residents of the county of Kern, the privilege accorded to the plaintiff by the Constitution to bring this action in the county where the obligation arose was taken away, and the cases of *Brady v. Times-Mirror Co.*, 106 Cal. 56, 39 Pac. 209, *Griffin & Skelly Co. v. Magnolia & Healdsburg Fruit Cannery Co.*, 107 Cal. 378, 40 Pac. 495, and *Sourbis v. Rhodes* (Cal. App.) 194 Pac. 521, are cited as sustaining this proposition. Those decisions upon examination will show that the court determined only that the right of individual defendants, resident in a county other than that in which the action was commenced, to have the place of trial changed to the county of their residence (Code Civ.

Proc. § 395), could not be affected by the fact that a corporation had been joined with them as party defendant. The individual defendants in this case made no demand upon the court that it should change the place of trial to the residence of either of them. They made no showing as to where they resided, beyond that they did not reside within the county of Kern. *Strassburger v. Santa Fé Land Improvement Co.* (Cal. App.) 200 Pac. 1065. The defendant corporation could not complain of the order, because of its effect upon the right of the individual defendants, and the showing made by the latter was insufficient, for the reason stated, to warrant the court in granting the motion for the change.

The order is affirmed.

We concur: CONREY, P. J.; SHAW, J.

58 Cal. App. 420

In re PERRY'S ESTATE. (Civ. 4215.)

(District Court of Appeal, First District, Division 1. California. July 1, 1922. Hearing Denied by Supreme Court Aug. 28, 1922.)

1. Marriage ⚭40(1)—Presumed legal.

Where a marriage has been duly solemnized, there is a strong presumption that it is legal.

2. Marriage ⚭40(5)—Burden of proving invalidity on contestant.

A party claiming that a second marriage of another is void because of a prior marriage has the burden of proving that the prior marriage was not ended before the second marriage.

3. Marriage ⚭50(1)—Evidence held to support finding of desertion by first husband.

In an action contesting the validity of a wife's second marriage on the theory of a prior existing marriage, evidence and divorce decree held to support finding that first husband deserted his wife.

4. Marriage ⚭50(1)—Findings sustaining validity of second marriage supported by evidence of absence of first husband for statutory period.

Where a husband had been absent from his wife for 15 years, a finding of the trial court sustaining the validity of the wife's second marriage, under Civ. Code, § 61, subd. 2, providing that, where a husband or wife is absent and not known to the other spouse to be living for 5 years immediately preceding the second marriage, the latter marriage is valid until adjudicated invalid, held sustained by the evidence, notwithstanding that during the 5 years in question the wife commenced and prosecuted a divorce proceeding, and testimony that first husband visited wife's attorney, and admissions by wife while testifying.

5. Marriage ⚭11—Wife not required to search for long absent husband before marrying again.

Where a husband deserted his wife and remained absent for 15 years, the wife, having no knowledge of his whereabouts, is under no duty to make inquiries and search for him before marrying again.

Appeal from Superior Court, Mendocino County; H. L. Preston, Judge.

In the matter of the estate of Frank Perry, deceased. From an order granting letters of administration to Minnie Perry, and an order denying letters of administration to Mary Ella Crabtree, the latter appeals. Affirmed.

W. D. L. Held, of Ukiah, for appellant.

Will Van Dyke and Hale McCowen, Jr., both of Ukiah, for respondent.

KNIGHT, Justice pro tem. On July 22, 1921, the superior court of Mendocino county made its order appointing the respondent, Minnie Perry, as administratrix of the estate of Frank Perry, deceased, upon the ground and for the reason that she was the surviving widow of said deceased, and by the same order denied the application for letters of administration of Mary Ella Crabtree, a daughter of said deceased by a former marriage. Mary Ella Crabtree has appealed.

On August 27, 1887, the respondent, Minnie Perry, who is the issue of a marriage between a white man and an Indian woman, at the age of 13 years married one Charles Wathen, with whom she lived, in Sierra City, until about November 1, 1888. Wathen at that time left his wife, intending, as he stated, to go to Brown's Valley to pasture some stock, but instead of doing so went to Chico. Failing to return, Mrs. Wathen, about December 1, 1888, left Sierra City and returned to her folks at Covelo, in Round Valley. Before she left, however, she wrote to Wathen, stating where she was going and where he might find her upon his return. Within a few days after receiving that letter Wathen returned to Sierra City, but, finding that his wife had already gone, gathered his belongings and returned to Chico. Wathen and his wife did not thereafter see each other until subsequent to the death of Perry, when Wathen was produced as a witness in this proceeding. Neither did they correspond with each other after their separation, except that Wathen claims he wrote to his wife once or twice within 6 months or a year after their separation.

On October 11, 1903, 15 years subsequent to the date of the desertion of Mrs. Wathen by her husband, she assumed the relation of wife with Perry, and continued to live with him, as his wife, until his death. In September, 1904, while living with Perry, the respondent consulted an attorney concerning

her marital status with Wathen, with the result that an action for divorce was commenced by her against Wathen upon the ground of desertion. The summons was served by publication, and on October 22, 1906, respondent obtained an interlocutory judgment of divorce. Respondent claims that a year later, in November, 1907, her attorney exhibited to her a document which she understood was the final judgment of divorce, and said:

"You and Frank (meaning Perry) go ahead and get married; you are all right now."

The truth of this testimony could not be corroborated by respondent, for the reason that said attorney died some 6 years prior to the date on which the present proceeding was tried. Respondent and Perry did not marry, however, until 18 months after she was shown said document, to wit, on May 8, 1909, at which time they were married by a minister of the gospel, under a license duly issued by a special United States Indian agent.

As a matter of fact, the document shown respondent by said attorney in November of 1907 was not the final judgment of divorce, because the judgment roll in the divorce proceeding shows that said final decree was not rendered or entered until November 30, 1909, a period of about 6 months subsequent to the date of the marriage of respondent to Perry. There is no proof in the record showing that respondent ever knew, prior to Perry's death, of the entry of said final decree, other than the statement made to her by her attorney in 1907.

[1, 2] The sole question presented by the appeal is whether or not there is sufficient evidence in the record to support the finding of the trial court that Perry's marriage to respondent was legal. It is conceded that said marriage to Perry was regularly and duly solemnized. There is, therefore, a presumption, "a very strong one," as the Supreme Court has said (*Wilcox v. Wilcox*, 171 Cal. 770, 155 Pac. 95), that said marriage is legal. Furthermore, it is the well-established law that "the burden is cast upon the party asserting guilt or immorality to prove the negative—that the first marriage had not ended before the second marriage." *Wilcox v. Wilcox*, supra.

[3, 4] Subdivision 2 of section 61 of the Civil Code provides:

"A subsequent marriage contracted by any person during the life of a former husband or wife of such person, with any person other than such former husband or wife, is illegal and void from the beginning, unless: * * * 2. Unless such former husband or wife is absent, and not known to such person to be living for the space of five successive years immediately preceding such subsequent marriage, or is generally reputed or believed by such person to be dead at the time such subsequent marriage was contracted. In either of which

cases the subsequent marriage is valid until its nullity is adjudged by a competent tribunal."

If, therefore, Wathen was absent from respondent, and was not known to her to be living for the space of 5 successive years immediately preceding her marriage to Perry, her marriage to Perry is valid.

The legality of the Perry marriage is attacked by appellant upon two principal grounds: First, upon the ground that Wathen was not "absent" from respondent, within the meaning of the Code section quoted, for the reason, as appellant contends, that the desertion was committed by respondent, and not by Wathen; secondly, upon the ground that the evidence offered and received in the present proceeding proves that "respondent must have known her husband to be living for the space of 5 successive years immediately preceding her marriage to Frank Perry."

The answer to the first contention is to be found in the terms of the judgment for divorce itself, wherein it is decreed that it was Wathen, and not respondent, who was guilty of desertion, and again, in the evidence in the present proceeding, from which it would appear that in the fall of 1888 Wathen, without cause, left his wife, then only 14 years of age, among strangers, and went away without informing her how long he was going to be gone, or when he would return. After waiting 6 weeks for his return, she notified him by letter that she intended to go back to her folks at Covelo and requested him to come for her there. He did not return to Covelo, however, for 20 years, and then only temporarily, and did not see respondent. Neither did she see him or know he was there, or had been there. In fact, Wathen did not see respondent for approximately 32 years from the day he left her, although he knew, at all times, where she was and where he might find her. This evidence is amply sufficient, we think, to support the conclusion reached by the trial court that the desertion was committed by Wathen.

Appellant's second contention, to the effect that respondent must have known, within 5 years next before she married Perry, that her husband was living, is based upon three points, viz.: The commencement and prosecution of the divorce proceeding, and the testimony given by respondent therein; the admissions made by respondent while testifying in the present proceeding; and the asserted fact that Wathen visited and conversed with respondent's attorney within said 5-year period. Opposed to appellant's contention is the positive testimony of respondent, given in this proceeding, to the effect that for five years next preceding her marriage to Perry she knew nothing of Wathen's whereabouts, or whether he was dead or alive. Upon this conflicting evidence the trial court found adversely to appellant's

contention, and there is sufficient evidence before us, we believe, to fully support the trial court's conclusions.

So far as the divorce proceedings are concerned, the trial court may well have concluded, as it doubtless did, that respondent, being uncertain as to her marital status with Wathen, consulted her attorney, and that it was upon the advice and suggestion of her attorney that a divorce should be obtained simply as a precautionary measure to legally establish respondent's status as a single person. It may be, as contended by appellant, that the one or two excerpts from the affidavit for publication of the summons, and from the testimony given by respondent in support of her suit for divorce, might, if standing alone, imply that respondent entertained a belief that Wathen, at that time, might be living; but, when the affidavit and the testimony are read in their entirety, we do not think that either is fairly susceptible of such construction. It is stated in the affidavit, in plain terms, that for over a year every effort had been made to obtain service on Wathen, but without avail; that the summons had been sent for service to the sheriff of Butte county, and also to two constables in other localities, but Wathen could not be found. Furthermore, we are unable to say whether or not the trial court gave any weight at all to said affidavit, for the reason that respondent testified that she neither read said affidavit nor knew its contents before she signed it; that it was presented to her for signature by her attorney, and she signed it without question. And, whatever conflict there may have been in respondent's testimony in the divorce proceeding, she did positively testify therein

"We came back to Sierra county and stayed a month or two, and one day he left and said he was going to Brown's Valley; but he did not go there, and I never heard of him since."

[5] Concerning the testimony given by respondent in the present proceeding, appellant contends that it shows that respondent was possessed of sufficient knowledge of the whereabouts of Wathen to place her upon inquiry, and that, had she pursued those inquiries and searched for him, she would have discovered that he was alive. We do not understand that under the circumstances here shown, and in view of the fact that Wathen deserted respondent, the law imposed any such duty upon her. In *Estate of Harrington*, 140 Cal. 244, 73 Pac. 1000, 98 Am. St. Rep. 51, the same contention was made under a quite similar state of facts, and the court said:

"Counsel's principal claim in this respect is that it does not appear from the evidence that appellant, previous to her marriage with Carley, made any endeavor to ascertain the whereabouts of Harrington. This she was not required to do. It was the duty of the latter to keep her advised of his whereabouts, and she

had a right to believe, as she testified she did, from silence for 10 years, that he was dead. *Jones v. Zoller*, 39 N. Y. 285."

Neither do we find any force in the argument of appellant that, because Wathen, during the course of the divorce proceedings, conversed with respondent's attorneys unknown to respondent, the latter is charged with the knowledge of her attorney. Appellant sought to prove that conversation by the testimony of Wathen; but the court, on account of Wathen's conduct toward respondent, may not have believed him. Even if Wathen's testimony is to be accepted as true, we are not prepared to say that the situation presented is one which calls for the application of the doctrine of constructive notice.

After fully and carefully examining the record, disclosing, as it does, a conflict on the vital point at issue, we are not prepared to say that the trial court's conclusions on the question of the Perry marriage are erroneous. In fact, we believe, from the evidence presented, that its decision was just and in accordance with the expressed policy of the law, which is to uphold, if possible, the legality of marriage. In *McKibbon v. McKibbon*, 139 Cal. 448, 73 Pac. 143, the trial court, in speaking of a situation like the one presented here, said:

"I am inclined to take the view that proof of solemnization, aided by the presumption that the solemnization was regular, would overcome the presumption of bigamy that would result if she had two husbands."

With these views the Supreme Court agreed. The doctrine of *McKibbon v. McKibbon* has since been expressly approved in *Wilcox v. Wilcox*, supra. In each of those cases the court quotes approvingly from 1 Bishop on Marriage and Divorce, §§ 946-948, as follows:

"Every intendment of the law leans to matrimony. When a marriage has been shown in evidence, whether regular or irregular, and whatever the form of proof, the law raises a strong presumption of its legality—not only casting the burden of proof on the party objecting, but requiring him throughout, in every particular, to make plain, against the constant pressure of presumption, the truth of law and fact that it is illegal and void."

The technical objections made by appellant against the validity of the judgment of divorce upon the grounds that neither the complaint nor the affidavit on which constructive service of summons was based stated a cause of action, are immaterial, in view of the fact that the legality of the Perry marriage in no wise depends upon the validity of the divorce proceeding.

For the reasons above stated, the order appealed from is affirmed.

We concur: TYLER, P. J.; KERRIGAN, J.

58 Cal. App. 488

SNIDER v. DUNN et ux. (Civ. 3862.)

(District Court of Appeal, Second District, Division 2, California. July 6, 1922.)

1. Husband and wife — 233/4—Finding that owner's wife was not authorized to contract for sale of realty supported by evidence.

The trial court's finding that owner of realty had no knowledge of any contract between his wife and the alleged purchaser for the sale of his realty, and that owner's wife had no authority to make such a contract, held supported by the evidence.

2. Appeal and error — 1011 (1)—Findings supported by conflicting evidence not disturbed.

Where there is a direct conflict in the evidence, the findings of the lower court will not be disturbed on appeal.

3. Husband and wife — 21—Failure of wife as agent to collect rents did not estop husband to deny her agency to sell the property rented.

Where husband left the control of his realty to his wife, except as to alienation, and wife without his knowledge or consent contracted with lessees to sell them the leased realty, the husband under Civ. Code, § 2317, providing that ostensible authority is such as a principal, intentionally or by want of ordinary care, causes a third person to believe the agent to possess, was not estopped, by the wife's failure for about a year to collect rent, from claiming that the contract to sell was unauthorized.

Appeal from Superior Court, Los Angeles County; Albert Lee Stephens, Judge,

Ejectment by George W. Snider against Frank P. Dunn and wife. Judgment for plaintiff, and defendants appeal. Affirmed.

Fred N. Arnoldy, of Los Angeles, for appellants.

Kemp, Mitchell & Silberberg and Alex W. Davis, all of Los Angeles, for respondent.

ORRIG, J. This action is one of ejectment to recover possession of a house and lot. Plaintiff is the owner of the property in question, and the defendants originally entered thereon under a month to month tenancy. The monthly rental was \$20. This was paid until April 6, 1919. At this date defendants discontinued the payment of rent. They allege that they then entered into an agreement for the purchase of the premises for the sum of \$2,500, to be paid on or before May 4, 1921, and that they thereafter continued in possession under this contract, which was an oral one.

[1] The trial court found that the plaintiff did not at any time make a contract for the sale of the premises to the defendants. The evidence showed without contradiction that whatever arrangements were made by defendants to buy, were negotiated solely with Johanna Snider, the wife of plaintiff. How-

ever, defendants insist that Johanna Snider was the authorized agent of plaintiff, and that, if it be held that she did not have actual authority to sell the property, she at least was his ostensible agent for that purpose. The trial court found to the contrary on both of these propositions. Appellants urge as ground for reversal that such findings are not supported by the evidence. Finding 8 reads as follows:

"That on or about May 20, 1920, the defendants notified plaintiff that they claimed to be in possession of said premises under a contract to purchase the same for twenty-five hundred (\$2,500.00) dollars, and that they would continue in possession thereof under such alleged contract, and denied that plaintiff had any rights in said premises, other than the right to receive the sum of twenty-five hundred (\$2,500.00) dollars as the purchase price thereof and the interest thereon. That prior to the receiving of said notice plaintiff had no knowledge that the defendants claimed to hold possession of said premises under such alleged contract, or any contract for the purchase of said premises, and at no time acquiesced in the said claim, and immediately on obtaining knowledge of such claim plaintiff gave notice to the defendants that no such agreement existed, and demanded of defendants that they pay rent for the use of said premises. That defendants refused to pay said rent, and denied that they were in possession of said premises as tenants of the plaintiff, and refused, and ever since have refused, to quit possession of said premises, and ever since have continued and are now in possession thereof, and have claimed to hold said premises under such alleged contract of purchase, and have withheld the possession of said premises from the plaintiff."

There is no dispute concerning the truth of the above finding or that it is supported by the evidence, except that part which states that the plaintiff had no knowledge of the defendants' claims, or that the defendants had made any agreement with any one to purchase the property in question. Concerning that matter the plaintiff testified on direct examination that he knew the Dunns moved upon the property; that he made no objection to their doing so; that he did not know of his own knowledge that they paid rent; that he had heard they were paying \$20 a month; that at no time did he have any conversation with them in which arrangements were made concerning their occupying the property. On cross-examination he testified that he had had no discussion with Mrs. Snider about the defendants buying the property, except as follows:

"Q. But you did have a discussion with your wife at about that time, about April 1, 1919, in regard to selling this property to the Dunns, did you not? A. Yes, sir.

"Q. Now, what was that discussion? A. She said they wanted to buy the property, and I said, 'Well, we will figure it up and see what it

has cost us,' and she made it about \$3,800, and I made it \$4,200.

"Q. Now, is that all that was said? A. There was something about the payments, and I said, 'Whatever arrangements you make, we must have interest on \$4,200.'

"Q. And is that all? A. That is all there was said about it.

"Q. Did you have any further conversation with your wife during that month, or the month of May, 1919, in regard to selling this property to the Dunns? A. No, sir.

"Q. Did you have any talk with Mrs. Dunn in the month of May, in regard to the sale of this property and purchase of it by them? A. No, sir."

[2] It is true that other witnesses contradicted George W. Snider, but the doctrine is too well settled to require the citation of authorities that, where there is a direct conflict in the evidence, the finding of the lower court will not be disturbed upon appeal. If the agreement was made by defendants with Johanna Snider, and if the plaintiff had no knowledge of the execution of such a contract, clearly he cannot be bound by its terms, unless he had authorized Johanna Snider to sell the property, or clothed her with an ostensible agency to sell it. The trial court found that Johanna Snider assumed to act as the agent of the plaintiff "without any authority of the plaintiff so to do." This finding is supported by the testimony of the plaintiff, who declared that he had not authorized his wife to sell the property, except as discussed in the conversation above quoted.

[3] Appellant relies principally on the provisions of section 2317 of the Civil Code, which reads as follows:

"Ostensible authority is such as a principal, intentionally or by want of ordinary care, causes or allows a third person to believe the agent to possess."

The trial court found that the plaintiff's wife, Mrs. Snider, "at all times mentioned, and until the 20th day of May, 1920, assumed and had full charge, management, and control of said real property, with the knowledge, consent, and approval of the plaintiff," except as to the alienation of the property. Appellant argues that she therefore, as her husband's agent, had power to collect the rents, and that if the defendants discontinued paying rent April 6, 1919, the plaintiff must be deemed to have had notice of that fact, and that, because he made no objections to their remaining in possession without paying rent until May 20, 1920, by such failure to object he became estopped to assert that he did not know of the agreement entered into by his wife and the defendants.

The situation presented falls far short of creating an estoppel. Respondent, as the owner of the property, owed no duty to the

appellants to compel them to pay rent or require them to vacate. The ordinary care referred to in section 2317 of the Civil Code clearly refers to the care required by the law concerning matters having to do with agency. The fact that respondent permitted appellants to remain in possession for a year without paying rent has no relevancy to the question of the scope of Mrs. Snider's agency in dealing with the property.

There is testimony in the record from which it may be inferred that the plaintiff and respondent is an old man; that his wife is the mother of Mrs. Dunn, a daughter by a former husband. It appears that the Dunns did not discuss the transaction with Mr. Snider, although there seems to be no sufficient reason why they should not have done so; that they dealt entirely with Mrs. Snider in their alleged purchase of the property, although they knew it was the separate property of Mr. Snider, and as far as they knew, Mrs. Snider had no authority to alienate it. The trial court observed the witnesses on the stand, and no doubt gave serious consideration to their appearance and demeanor in arriving at its conclusions as to the truthfulness of their testimony and their probable conduct. The findings to the effect that the plaintiff had no knowledge of any contract between his wife and the defendants, and that his wife had no authority from him to make such a contract, have substantial support in the evidence, and it can serve no good purpose to review portions of the transcript in which George Snider's testimony is contradicted.

The judgment is affirmed.

We concur: FINLAYSON, P. J.;
WORKS, J.

58 Cal. App. 411

BORGERSON v. BORGERSON. (Civ. 4212.)

(District Court of Appeal, First District, Division 1, California. July 1, 1922. Rehearing Denied July 31, 1922. Hearing Denied by Supreme Court Aug. 28, 1922.)

1. Divorce — 312—Conclusions of trial court relating to custody of minor children will not be disturbed.

The custody of minor children is a matter within the discretion of the trial court, and his conclusions will not be disturbed on appeal, in the absence of evidence showing an abuse of the discretion.

2. Divorce — 303(3)—Evidence held insufficient to show abuse of discretion in awarding custody of minor child.

On hearing of defendant husband's motion to modify divorce decree relating to the custody of a minor child, evidence held insufficient to show an abuse of discretion by the court in awarding custody of the child to plaintiff wife.

Appeal from Superior Court, City and County of San Francisco; James M. Troutt, Judge.

Suit for divorce by Hazel Borgerson against Oscar Borgerson. From an order denying defendant's motion to modify the final judgment of divorce, defendant appeals. Order affirmed.

Dahlin & Jackson, of San Francisco (Ivan T. Crase and L. W. Perley, both of San Francisco, of counsel) for appellant.

Arthur A. Chazel, of San Francisco, for respondent.

KNIGHT, Justice pro tem. This is an appeal by the defendant Oscar Borgerson from an order denying his motion to modify a final judgment of divorce with respect to the custody of a minor child of the age of five years, the issue of the marriage of plaintiff and defendant. The motion was based upon the alleged misconduct of the plaintiff. The grounds of appeal are that the trial court erroneously excluded certain material evidence offered by appellant and that it abused its discretion in denying defendant's motion.

It should be stated in the beginning that the record on this appeal is, unfortunately, incomplete and unsatisfactory, and does not allow us full opportunity to fairly and intelligently review either of the questions presented by the appeal. Explanatory of the condition of the record, appellant, in his opening brief, says:

"Here, we desire to say a word about the reporter's transcript. The hearing in the lower court covered a portion of two days, June 30th and July 1st. During the hearing on the first day, it was impossible to get a court reporter, and, although notes of the testimony were taken and we have endeavored to have counsel stipulate as to the testimony for the purpose of assisting this court in its decision, it has been impossible to get anything that happened on the first day into the transcript."

The record on appeal was prepared pursuant to section 953a of the Code of Civil Procedure, and consequently the reporter's transcript covers only the evidence and proceedings reported on the second day of the hearing. We are therefore unable to ascertain what occurred during the first day of the hearing, and we are consequently not informed upon what facts and circumstances the trial court finally acted in denying defendant's motion.

[1] It has been repeatedly held that the matter of the award of the custody of children, in divorce proceedings, is addressed to the sound discretion of the trial court, and that on appeal interference will be justified only where there is shown to be clear instances of an abuse of such discretion. In *Crater v. Crater*, 135 Cal. 633, 67 Pac. 1049, it is said:

"The good of the child is regarded as the controlling force in directing its custody, and the courts will always look to this rather than to the whims and caprices of the parties. The morals of the parents, their financial condition, their subsequent marriage, the age of the child, and the devotion of either parent to its best interests, are all factors to be weighed and considered by the court. All such applications are addressed to the sound legal discretion of the court below, and its conclusion will not be disturbed here, except it should clearly appear that its discretion has been abused."

It must therefore be presumed, on this appeal, in the absence of any evidence showing to the contrary, that the trial court fully and fairly inquired into all such elements, that it was at all times mindful of the welfare of the child, and that its final conclusions were reached only after it had duly considered the entire situation before it. With those conclusions we are not permitted to interfere. *Bancroft v. Bancroft*, 178 Cal. 352, 173 Pac. 582.

[2] The incomplete condition of the record likewise makes it quite impossible for us to declare that the exclusion of the evidence offered by defendant on the second day of the hearing, concerning the previous relations of plaintiff with a man named Balin, was prejudicial, for the reason that evidence on that point may have been received and considered by the court, so far as the record discloses, on the first day of the hearing. It vaguely appears from the reporter's transcript that plaintiff was legally married to Balin on the first day of the hearing on this motion, and that the consummation of said marriage doubtless prompted the trial court, in some degree, at least, to refuse, on the second day of the hearing, any further inquiry by the defendant into the previous conduct of plaintiff. However that may be, enough appears in the record to show that the trial court was aware of the conditions which defendant sought to prove by the excluded evidence, and that, notwithstanding those conditions, it was its best judgment that the welfare of the child demanded that it should continue to remain in the care of its mother. That being so, it would necessarily follow, we think, that the defendant suffered no prejudice by the exclusion of such evidence.

There was very little testimony, if any, taken on the day on which the proceedings were reported. The record consists mainly of discussions between court and counsel, and the expression of the court's views upon the question of the welfare of the child. From the clerk's transcript, however, it appears that plaintiff's grounds for divorce were extreme cruelty and that the defendant defaulted. The interlocutory and final judgment of divorce awarded the child to plaintiff. Subsequently, on stipulation, it was

given into the custody of plaintiff's mother. After defendant served and filed this motion, to modify the final decree so as to allow him the custody of the child, and pending the hearing thereof, the custody of the child was again awarded to plaintiff. Although these decrees and orders were rendered and made by another department of the same court, the entire record of the case was evidently taken into consideration by the trial court before it ruled upon this motion.

From the fragmentary parts of the evidence presented, we are not prepared to say that there has been an abuse of discretion shown in denying defendant's motion, or that prejudicial error was committed in the exclusion of evidence. The order appealed from is therefore affirmed.

We concur: TYLER, P. J.; KERRIGAN, J.

58 Cal. App. 415

STONE v. STONE. (Civ. 2478.)

(District Court of Appeal, Third District, California. July 1, 1922.)

1. Divorce ⚭255—Intrinsic fraud by wife in her divorce complaint held not ground to attack decree in her favor.

A fraudulent allegation by the wife in her divorce complaint that there was no community property constituted intrinsic fraud, and was not ground for an attack on the judgment in an action by the husband to determine his rights in the community property.

2. Divorce ⚭254—Default divorce decree affecting community property held not void, as granting relief beyond that asked.

A default divorce decree affecting community property in favor of the wife is not void, under Code Civ. Proc. § 580, providing that the relief to be granted plaintiff, where no answer is filed, cannot exceed that demanded in the complaint, where the complaint alleged that there was no community property, and prayed for a decree of divorce and for general relief, and where the husband had knowledge of the allegations of the complaint 1 month after entry of interlocutory decree, and 11 months prior to entry of final decree, but the husband's remedy was a proceeding under section 473, providing that, where defendant has not been served personally, the court may allow him to answer to the merits within 1 year after rendition of the judgment.

Appeal from Superior Court, Tulare County; J. A. Allen, Judge.

Action by Horace M. Stone against Rose A. Stone. From a judgment of dismissal, plaintiff appeals. Affirmed.

Peter J. Crosby and Robert M. Ford, both of Oakland, and Power & McFadzean, of Visalia, for appellant.

Guy Knupp, of Porterville, for respondent.

FINCH, P. J. The defendant's demurrer to the amended complaint was sustained, with 10 days' leave to plaintiff to amend. On plaintiff's failure to amend within the time allowed, judgment was entered in favor of defendant. From this judgment the plaintiff appeals. The sole question presented is whether the amended complaint states a cause of action.

The complaint alleges that prior to December 17, 1919, the parties were husband and wife; that at the time of the commencement of the action for divorce, hereinafter referred to, the parties owned community property, "consisting of money in bank and bonds and securities and other property, all of which was, at all times herein mentioned, well known to defendant"; that such money was "deposited in a joint bank account of the said parties, * * * payable to either of said parties"; that "at some time subsequent to April 1, 1918, the exact time or times being unknown to this plaintiff, defendant herein, * * * without the knowledge or consent of plaintiff herein, * * * willfully and wrongfully withdrew the whole of the said community property and funds * * * and converted the same to her own use and converted the same into other forms of property, or deposited or placed the same in another bank or in other banks," and mingled the same with other funds belonging to the defendant, "so that defendant herein then and there constituted herself in appearance the absolute owner of the said total sum"; that July 23, 1918, defendant commenced an action for divorce against plaintiff; that in her complaint she alleged "that there is no community property belonging to the parties herein"; that the prayer of the complaint was for a decree of divorce, and "for any further relief that this court may deem meet"; that plaintiff herein was not served personally in that action, but that service was made by publication; that plaintiff had no notice, and was without knowledge of the allegations contained in the complaint therein, "until about the month of January, 1919"; that the defendant omitted to mention such community property in her divorce complaint, "with intent then and there to cheat and defraud plaintiff herein * * * of his right and interest in and to" such community property; that defendant was granted an interlocutory decree of divorce December 3, 1918; that in the divorce action the court found "that all the allegations and averments of the complaint are true"; that the divorce was granted on the ground of extreme cruelty; that "the disposition of the community property * * * was not made

a part of, or determined by, either the interlocutory decree or the final decree made and entered in said action"; and that the respective rights of the parties in and to such community property has never been settled by agreement or otherwise. The prayer is for an adjudication of the rights of the parties in and to the community property and for other relief incidental thereto.

[1] The alleged fraudulent allegation that there was no community property constituted intrinsic and not extrinsic fraud. *Benning v. Nevis* (Cal. App.) 204 Pac. 866, and cases cited therein. Since intrinsic fraud is not ground for the attack upon the judgment, the allegation of such fraud may be eliminated from consideration. In *Brown v. Brown*, 170 Cal. 1, 147 Pac. 1168, and *Brown v. Brown*, 170 Cal. 8, 147 Pac. 1171, the court held that where the complaint in an action for divorce alleges that there is no community property, and the defendant, after personal service, makes default, and final judgment is rendered dissolving the marriage, but making no order, direction, or even mention of property or other right, such judgment operates as an adjudication that at the time the action was begun there was no community property. In that case the service on the defendant was personal; in this it was by publication, and the defendant had no actual knowledge of the contents of the complaint until a month after the interlocutory decree was entered. In the *Brown Case* the divorce was granted on the ground of willful neglect; in this, on that of extreme cruelty. In other respects the two cases are identical in principle.

[2] Appellant relies on the provision of section 580 of the Code of Civil Procedure that "the relief granted to the plaintiff, if there be no answer, cannot exceed that which he shall have demanded in his complaint," and *Staacke v. Bell*, 125 Cal. 309, 57 Pac. 1012, to the effect that the prayer for general relief cannot "enlarge the power of the court to grant relief not prayed for against a defaulting defendant." In *Cohen v. Cohen*, 150 Cal. 99, 102, 88 Pac. 267, 269 (11 Ann. Cas. 520), it is said:

"Section 580 of the Code of Civil Procedure * * * does not make the judgment void in a case where the relief given is within the terms of a prayer for general relief and is germane to the cause of action stated, although it may not be authorized by the facts alleged. In such cases the judgment may be erroneous as to the excess and subject to reversal or modification on appeal, but it is not void, nor subject to collateral attack on that ground. * * * It can be modified in the lower court only by proceedings under section 473 of the Code of Civil Procedure, or by proceedings in equity. It has indeed frequently been held that a judgment for more relief than is prayed for is not void as to such excess, and cannot be attacked in collateral proceedings, although there is no prayer for general relief."

In this case the plaintiff is not seeking to have the judgment in the divorce case, or any part thereof, set aside; but he is asking for a decree establishing his alleged interest in property which, under authority of the *Brown Cases*, has been judicially determined in the action for divorce not to be community property and his attack upon the judgment therein is clearly collateral. His complaint is based upon the assumption that the judgment is void in so far as it adjudges that there was no community property at the time the action was commenced. Plaintiff had knowledge of the allegations of the complaint, and presumably of the terms of the interlocutory decree, within a month after that decree was entered, and 11 months prior to the entry of the final decree. He had full opportunity to seek relief from the judgment under the provisions of section 473 of the Code of Civil Procedure. That section provides:

"When from any cause the summons in an action has not been personally served on the defendant, the court may allow, on such terms as may be just, such defendant or his legal representative, at any time within one year after the rendition of any judgment in such action, to answer to the merits of the original action."

Under this provision, the trial court, on proper application by defendant, would have been authorized—

"to set aside the judgment as to him and allow him to answer to the merits at any time within one year after the rendition of the original judgment against him, even though the proceedings by publication were entirely regular, and the judgment, therefore, valid on its face." *Fox v. Townsend*, 149 Cal. 659, 661, 87 Pac. 82, 83.

Had the defendant made such application on the grounds alleged in his complaint, the court doubtless would have set the judgment aside and permitted the defendant to answer. Having failed to make such application, the defendant, in the language of the Supreme Court in the first of the *Brown Cases*—

"is presumed to have acceded to the proposition embraced in the complaint and to have consented that plaintiff should obtain the relief therein prayed for, upon the conditions and facts set forth in the complaint."

The case of *Lang v. Lang*, 182 Cal. 765, 190 Pac. 181, cited by appellant, is not in point. In that case there was no allegation relative to community or other property and the prayer was simply for a decree of divorce.

The fact that the summons was served by publication, rather than personally, is not material under the facts of this case. "The presumption in support of a judgment of a court of general jurisdiction is not made to

depend upon the way in which a summons is required to be served." *McHatton v. Rhodes*, 143 Cal. 275, 279, 76 Pac. 1036, 1038 (101 Am. St. Rep. 125). Appellant contends, however, that his allegation that the service of summons was by publication is at least a defective and informal allegation that the defendant in the action for divorce was a non-resident, and that therefore the court was without jurisdiction to adjudicate the property rights of the parties, citing *De La Montanya v. De La Montanya*, 112 Cal. 101, 44 Pac. 345, 32 L. R. A. 82, 53 Am. St. Rep. 165. Whether or not the fact of nonresidence is material in such a case, the allegation in question cannot be construed as the averment that defendant was a nonresident. Section 412 of the Code of Civil Procedure provides for the service of summons by publication where the defendant—

"resides out of the state; or has departed from the state; or cannot, after due diligence, be found within the state; or conceals himself to avoid the service of summons."

The court cannot presume that publication of summons was ordered by reason of non-residence or absence from the state rather than upon the other grounds justifying such publication. The presumption is that the plaintiff pleaded all the facts which would tend to support his cause of action. He filed a complaint and an amended complaint, and was granted leave to again amend. If he in fact was absent from the state or a nonresident at the time of service of summons in the action for divorce, he would not have failed to so allege, in view of his contention as to the effect of such absence or nonresidence.

There being no difference in principle between this case and the *Brown Cases*, the decisions in those cases must control in this.

The judgment is affirmed.

We concur: BURNETT, J.; PREWETT, Justice pro tem.

58 Cal. App. 524

GAMBRILL et al. v. DWORACK et al.
(Civ. 2475.)

(District Court of Appeal, Third District,
California. July 14, 1922.)

1. Alteration of instruments ⚡29 — Finding that words in assignment were not inserted after it was signed supported by evidence.

Finding that words in an assignment of a mortgage, to the effect that the assignment was not only as security for one debt, but as additional security for another debt, were written in the assignment before it was signed, and not fraudulently caused to be inserted therein by the assignee after the signing, without assignors' knowledge, held supported by sufficient evidence.

2. Bills and notes ⚡370—Defense of want of consideration not available against bona fide purchaser.

Defense that a note and an assignment of another note and its mortgage security as collateral security for the first note were without consideration is not available as against a purchaser for value, without notice of any infirmity, before maturity, of the first note, with its collateral security.

3. Estoppel ⚡17—Mortgagor estopped to assert no title at time of execution.

A mortgagor is estopped to assert, as against holder of the mortgage, that at time of executing it he had no title, or that there was an outstanding title.

4. Alteration of instruments ⚡22—One whose name is inserted in deed in place of grantee's with consent of all estopped to assert invalidity of transaction.

Under the principle of equitable estoppel, one whose name was, with consent of all interested, inserted in a deed in place of that of the grantee, whose name was erased, cannot assert invalidity of the transaction against one of the others, thereby induced to change his position to his disadvantage.

Appeal from Superior Court, Madera County; J. J. Trabucco, Judge.

Action by A. L. Gambrill and another against Charles A. Dworack and another. Judgment for plaintiffs, and defendants appeal. Affirmed.

Everts, Ewing & Wild and J. R. Fitch, all of Fresno, for appellants.

Conley & Conley, of Madera, and Roy B. Maxey, of Modesto, for respondents.

BURNETT, J. On November 23, 1918, Chas. A. Dworack and Adelia Dworack, his wife, deeded to Chas. Van B. Wright certain properties in the city of Madera, this state, and as payment therefor received a note for the sum of \$16,000, due on or before two years after date, with interest at the rate of 7 per cent. per annum, payable annually, secured by a mortgage upon said properties. The properties covered by said deed and mortgage were described in the instrument as lots 2, 3, 4, and 5 in block 23 of the Floto Tract, but, through a mutual mistake of fact, lots 6 and 7 of said block were omitted, both in the deed and in the mortgage. On the 14th day of October, 1918, one Frank M. Harris and Olive G. Harris, his wife, made, executed, and delivered to one A. L. Gambrill a certain deed to lot 6 and the west half of 7 in block 11 in the city of San Jacinto, county of Riverside. On said 23d day of November following Gambrill sold to Chas. A. Dworack this property for the sum of \$14,000, and in making the transfer the former, with the consent of his grantor, Frank M. Harris, and the said Dworack, erased his (Gambrill's) name as grantee, and inserted therein the name of

Chas. A. Dworack. In consideration thereof Dworack and his wife assumed a mortgage in the sum of \$6,000 and existing against the said San Jacinto property, executed and delivered to the said Gambrill a certain promissory note for the sum of \$8,000, secured by a second mortgage on the San Jacinto property, and it is the claim of respondents that said purchasers agreed, as further security for the payment of said promissory note of \$8,000, to make an assignment of the said \$16,000 note and mortgage made and executed by said Chas. Van B. Wright as aforesaid. The said deed and mortgage covering the San Jacinto property were duly recorded in the said county of Riverside. On or about the 4th day of December, 1918, the Dworacks made and delivered to A. L. Gambrill their certain promissory note in writing for the sum of \$600, the payment of which was secured by assignment of said note and mortgage for said \$16,000. Said assignment upon its face purports to be—

"for and in consideration of the sum of \$600, and other advances mentioned, which may be due second party, also as additional security for the payment of an \$8,000 note given to the party of the second part (A. L. Gambrill), the receipt whereof is hereby acknowledged."

All of these transactions between Gambrill and the Dworacks were consummated at the same time, and were inseparably connected as one business affair; all of said papers being finally executed and delivered on or about December 9, 1918, at the time they were acknowledged. On or about the 5th day of March, 1919, the Dworacks conveyed said San Jacinto property to one Chas. B. Throop in exchange for an apartment house in the city of Los Angeles. On the 7th day of April, 1919, the Dworacks made and delivered to said Chas. Van B. Wright a deed of correction on the said property, situated in the said city of Madera, conveying by said deed said lots 6 and 7, which had been omitted as aforesaid, and at the same time said Wrights made and delivered to the said Chas. A. Dworack a promissory note in the sum of \$16,419 and as security for the payment of the same executed and delivered to said Dworacks a certain mortgage of said real property in the city of Madera. Said last-mentioned note and mortgage has never been delivered or assigned to A. L. Gambrill or to Lena Bauman.

On the 7th day of August, 1919, A. L. Gambrill, by written assignment, in consideration of the sum of \$8,000, assigned to Lena Bauman the \$8,000 note secured by said second mortgage executed by the Dworacks, and also the said \$16,000 note and mortgage executed by said Wright to Chas. A. Dworack, and assigned as aforesaid to said A. L. Gambrill. The assignee, Lena Bauman, joined, as party plaintiff, her assignor, A. L. Gambrill, in the action to reform the mort-

gage so held by her, and for the cancellation of said mortgage held by the Dworacks, for the sum of \$16,419, upon the said property in Madera, and the judgment was in her favor, from which the appeal has been taken.

We understand that the defense upon which appellants rely principally is set forth in their answer and cross-complaint as follows:

"That they did then and there deliver said \$16,000 note and mortgage to said A. L. Gambrill. That said A. L. Gambrill did thereupon present and ask said defendants to sign a certain blank form of assignment of mortgage, then and there stating to said defendants that it was merely a matter of form and in the usual course of business, and that when said money was repaid that all of said papers would be delivered to them. That defendants are informed and verily believe, and so state the fact to be, that between the 4th day of December, 1918, and the 9th day of December, 1918, said plaintiff Gambrill, without the consent or knowledge of said defendants, fraudulently caused to be inserted in said assignment of mortgage the following words and figures: 'Also as additional security for the payment of an \$8,000 note given to the party of the second part'—and that thereafter and at some time subsequent to the 20th day of December, 1918, said plaintiff Gambrill caused the following to be inserted in said assignment of mortgage, without the knowledge or consent of said defendants: 'The 23d day of November, 1918, and recorded on the 20th day of December, 1918, in Book 29 of Mortgages, at page 328.' That at the same time said plaintiff Gambrill caused the date to be inserted in said assignment of mortgages as the 6th day of December, 1918."

[1] Indeed, while the trial was in progress, counsel for appellants said:

"The real issue in this case, boiled right down: Was this \$600 note secured? Was the mortgage of \$16,000 given to Gambrill as security for the note of \$600, or for \$600 with the additional security of this \$8,000?"

After some discussion the court said:

"The whole thing is whether or not there was any flim-flam on the 4th or 9th day of December with that assignment; were those words 'additional security' inserted in there or not?"

Counsel for respondents thereupon stated:

"Yes; that is the only question and we are perfectly satisfied, 'as additional security for the payment of an \$8,000 note,' if that is the understanding."

With that the cause proceeded upon said theory as to the only issue in the case and the court's finding upon conflicting evidence in reference to it was in favor of plaintiffs. That said finding is sufficiently supported cannot be gainsaid. It will answer the purpose to quote from the testimony, first, of A. L. Gambrill, and, second, of R. G. Cornell, the notary, as follows:

"Q. Were the words 'also as additional security for the payment of \$8,000 note given to' in this instrument at the time it was signed by Chas. A. Dworack and Adelia Dworack? A. Yes, sir. Q. Did you prepare this instrument? A. Yes, sir."

"Q. Do you recall another entry in the book (the notarial book) on December 9, 1918, 'Charles A. Dworack to A. L. Gambrill, assignment of mortgage, consideration of \$600, December 6, 1918, special remarks of \$16,000, mortgage, etc., also security of \$600 and \$8,000, legal fees fifty cents'? Was that written by you in this book at that time, Mr. Cornell? A. It was. Q. I will ask you if the next entry, December 9, 1918, 'Charles A. Dworack to A. L. Gambrill of mortgage \$8,000, November 23, 1918, San Jacinto property building, legal fees \$1.00,' if you wrote that in there also? A. I did. Q. At that time? A. I did. * * *

"The Court: Where did you get your data from that you inserted in your notarial record? A. I got it from these papers. Q. You got it at that time? A. Yes."

There is other evidence in support of the finding, but the foregoing is ample.

[2] Appellants in their brief herein also attack the validity of the \$8,000 note and the assignment of the \$16,000 note and mortgage on the ground of the want of consideration between the original parties. As to this, it would be sufficient to say that Lena Bauman was a purchaser for value, without notice of any infirmity, before maturity, of said note and its collateral security, and under the familiar rule such defense would not be available against her. Moreover, the evidence is sufficient to negative the contention of appellants that the original transactions were void.

[3] The point made as to the \$8,000 note and mortgage is that the title to the San Jacinto property had not been conveyed to Charles A. Dworack by reason of the irregularity in changing the deed as we have before stated. But the rule is well settled that a mortgagor is estopped to assert that he had no title at the time of executing the mortgage or that there is an outstanding title in a third person. *Stewart v. Powers*, 98 Cal. 514, 33 Pac. 486; 21 Corpus Juris, p. 1068, No. 27, 2.

[4] Besides, the method pursued in substituting Dworack as grantee for Gambrill was by consent of all parties interested, including the grantor, and none of them would be permitted to urge the invalidity of the transaction against one of the others, who had thereby been induced to change his position to his disadvantage. It would be clearly a case for the principle of equitable estoppel. Section 3543, Civ. Code; *Bigelow on Estoppel* (4th Ed.) 445; *Scott v. Jackson*, 89 Cal. 258, 26 Pac. 898; *Dolbeer v. Livingston*, 100 Cal. 617, 35 Pac. 328.

It is also the contention of respondents, citing *Stiles v. Probst*, 69 Ill. 382, *Abbott v. Ab-*

bot, 189 Ill. 488, 59 N. E. 953, 82 Am. St. Rep. 470, 2 Corpus Juris, § 113, p. 1238, and *Sill v. Reese*, 47 Cal. 294, that if another grantee is substituted in a deed after delivery, with consent of all the parties, and again delivered after the change, the deed will vest the title in the substituted grantee; but we deem it unnecessary to consider the soundness of this position.

In reference to the consideration for the assignment of the \$16,000 note and mortgage, it is only necessary to recall that the execution of the various instruments constituted virtually one transaction and created the necessary reciprocal rights and obligations. Besides, Mr. Gambrill testified that the Dworacks agreed that they would give him—

"a second mortgage on the purchase of the San Jacinto property, and put this \$16,000 mortgage up as additional security, if I would let them have \$600 to move down there with."

It is a fair inference that the assignment was made in pursuance of this agreement. We deem no further comment advisable.

The judgment is affirmed.

We concur: FINCH, P. J.; HART, J.

58 Cal. App. 501

BRUSH v. PACIFIC ELECTRIC RY. CO. (Civ. 3859.)

(District Court of Appeal, Second District, Division 2, California. July 11, 1922. Hearing Denied by Supreme Court Sept. 7, 1922.)

1. Appeal and error §668—No extrinsic evidence may be received on appeal.

The record on appeal, properly certified, is conclusive evidence of the facts stated therein, and no extrinsic evidence may be received to supplement or contradict it.

2. Courts §116(3)—Court has inherent power to correct its records, so as to cure clerical misprisions.

Any error or defect in a record, occurring through acts of omission or commission of the clerk in entering of record the judgment or proceedings of the court, may be corrected at any time by the court on its own motion, or on the motion of an interested party.

3. Appeal and error §933(1)—Presumption in favor of correction of court records by order of judge.

Where the record shows a minute entry, "Defendant's motion for a new trial is granted," and a later entry that the grounds on which the order was made were inadvertently omitted from the first entry, and the order was corrected to read "that defendant's motion was granted on the ground of the insufficiency of the evidence to support the verdict," the appellate court will presume that the clerk through a clerical misprision failed to state

the grounds in the first entry, as required by Code Civ. Proc. § 657, and that the court directed the entry of the second order to correct the first entry, in the absence of evidence to the contrary in the record.

4. New trial ⚡71—Court may grant new trial on ground of insufficient evidence, though evidence is conflicting.

Where the trial judge is satisfied that the verdict is against the weight of the evidence, he may and should grant a new trial, though there be a substantial conflict in the testimony, and though on the same conflict an appellate court would be bound by the verdict.

5. New trial ⚡72—Court may grant new trial on ground of contributory negligence of plaintiff.

The trial court has the same discretionary power to grant a new trial, on the ground that the preponderance of the evidence shows plaintiff to be guilty of contributory negligence, that it has with respect to any other issue of fact.

6. Appeal and error ⚡999(3)—Province of appellate court is to pass on questions of law.

It is the province of the appellate court to pass on questions of law, and not questions of fact, and hence that court may not set aside a verdict on the ground of plaintiff's contributory negligence, unless from the undisputed facts it can see that the plaintiff has not exercised such care as men of common prudence usually exercise in positions of like exposure and danger.

Appeal from Superior Court, Los Angeles County; Louis W. Myers, Judge.

Action by Harrison Brush against the Pacific Electric Railway Company. Verdict for plaintiff. From an order granting defendant's motion for a new trial, plaintiff appeals. Order affirmed.

E. B. Drake, of Los Angeles, for appellant.

Frank Karr, R. C. Gortner, and W. R. Millar, all of Los Angeles, for respondent.

FINLAYSON, P. J. This is an appeal from an order granting a new trial in an action for damages alleged to have been sustained by plaintiff through the negligence of defendant. The answer pleads contributory negligence. A verdict for \$15,500 in favor of plaintiff was returned by the jury, and judgment was entered accordingly. Thereafter defendant gave notice of its intention to move for a new trial on the ground, among others, that the evidence is insufficient to support the verdict. In due time defendant presented its motion; the motion was granted and a new trial ordered; and plaintiff now appeals from the order.

Respondent, claiming that the record shows that the new trial was ordered on the ground of the insufficiency of the evidence to support the verdict, in that it appears from the preponderance of the evidence that the plaintiff was guilty of contributory negligence, contends that the order must be affirmed, unless

it shall be made to appear that the lower court, in granting the new trial, committed a manifest abuse of its discretion. The record on appeal contains copies of two minute entries of the order granting a new trial, made, respectively, on March 18, 1921, and March 28, 1921. The first, that of March 18, 1921, reads:

"Defendant's motion for a new trial is granted."

The second, dated March 28, 1921, is as follows:

"It appearing that in the minute entry of the order granting a new trial on the 18th day of March, 1921, the statement of the grounds on which said order was made was inadvertently omitted, and for the purpose of correcting said inadvertent omission, said order is hereby amended and corrected, nunc pro tunc, as of March 18, 1921, to read as follows: Defendant's motion for a new trial is hereby granted, on the ground of the insufficiency of the evidence to support the verdict, in that it appears from the preponderance of the evidence that the plaintiff was guilty of contributory negligence."

Appellant, contending that the second minute entry was unauthorized and that the first is the only existing valid record of the order granting a new trial, claims that, because the first minute entry does not specify that the new trial is granted on the ground of the insufficiency of the evidence to support the verdict, it must be presumed here that insufficiency of the evidence was not the ground on which the order was based, citing section 657 of the Code of Civil Procedure whereby it is provided that—

"When a new trial is granted upon the ground of the insufficiency of the evidence to sustain the verdict, the order shall so specify; otherwise, on appeal from such order, it will be presumed that the order was not based upon that ground."

[1] Both sides have filed in this court affidavits wherein the affiants purport to set forth some of the circumstances under which the two minute entries were made. These affidavits may not be considered by us. They are not a part of the record on appeal. This court must be governed by the record on appeal, duly authenticated in the mode prescribed by law.

That record, properly certified, is conclusive evidence of the facts stated therein, and no extrinsic evidence may be received to supplement or contradict it. *Boston v. Haynes*, 31 Cal. 107; *Satterlee v. Bliss*, 36 Cal. 489, 521; *Hanna v. De Garmo*, 140 Cal. 172, 174, 73 Pac. 830.

[2] The record on appeal discloses no lack of authority in the trial court to direct the making of the second minute entry. That court has the inherent power to correct its records so as to cure clerical mis-

prisions. Any error or defect in a record occurring through acts of omission or commission of the clerk in entering of record the judgment or proceedings of the court may be corrected at any time by the court on its own motion, or on motion of an interested party.

"Every court of record," says our Supreme Court in *Kaufman v. Shain*, 111 Cal. 19, 43 Pac. 394, 52 Am. St. Rep. 139, "has the inherent right and power to cause its acts and proceedings to be correctly set forth in its records. The clerk is but an instrument and assistant of the court, whose duty it is to make a correct memorial of its orders and directions; and whenever it is properly brought to the knowledge of the court that the record made by the clerk does not correctly show the order or direction which was in fact made by the court at the time it was given, the authority of the court to cause its records to be corrected in accordance with the facts is undoubted [citing authorities]. In the exercise of this power the court is not, however, authorized to do more than to make its records correspond to the actual facts, and cannot, under the form of an amendment of its records, correct a judicial error, or make of record an order or judgment that was never in fact given. * * * The court is not precluded from correcting the entry merely because the 'record' does not show that it is itself incorrect. The rule at common law, that the record can be amended only when there is something in the record to amend by, was applied when it was sought to amend a judgment at a term of the court subsequent to that in which it had been signed and enrolled, but it has no application to the amendment of matters that do not form a part of the judgment roll or 'record.' Until the entry of the judgment the record was in the breast of the court. Afterward it was in the roll. It was only the 'record' thus made up which imported absolute verity. * * * Mere entries in the minutes of the court are not, properly speaking, matters of record. *Weed v. Weed*, 25 Conn. 344. They become so only by being incorporated into bills of exception, and thus made a part of the judgment roll. * * * This power of a court to amend its records so that they may correspond with the fact, and correctly express what was done by the court, may be exercised at any time."

[3] Appellant's claim that the lower court exceeded its authority in entering the nunc pro tunc order of March 28, 1921, is based upon the assumption that the omission from the original minute entry of any statement that the new trial was granted on the ground of the insufficiency of the evidence was a judicial and not a clerical error; that is, it is gratuitously assumed by appellant that, when the trial judge announced that a new trial would be granted, who made no mention of the ground upon which it was ordered, and that therefore the failure of the first minute entry to specify that the new trial was granted upon the ground of the insufficiency of the evidence to support the verdict was not a mistake of the clerk but an error of the judge.

Aside from the two minute entries, there is nothing whatever in the record on appeal to show any of the circumstances under which either entry was made. There is nothing in the record on appeal to show that, in ordering the new trial, the trial judge did not specifically direct the clerk to specify in his minute entry of the order that it was made on the ground of the insufficiency of the evidence to support the verdict. This being the condition of the record, we must presume that the trial judge did direct the clerk to specify in the original minute order that the new trial was granted on the ground of the insufficiency of the evidence to support the verdict, or that he in some way communicated to the clerk the fact that insufficiency of the evidence to support the verdict was the ground upon which the order was made. We must presume that, though clerical misprision, the clerk failed to make the entry as directed, or to make it in conformity with the judge's announcement, and that it was for that reason that the court, in the exercise of its inherent power to cause its acts to be correctly recorded, directed the entry of the second order. An appellate court never indulges in presumption to defeat an order or a judgment. On the contrary, every intendment is in favor of the validity and regularity of the order or judgment appealed from. The burden of overcoming this presumption is upon the appellant, and where the record is silent it will be presumed that what ought to have been done was not only done, but rightly done. *Niles v. Gonzalez*, 155 Cal. 359, 362, 100 Pac. 1080. Thus, in *Hamilton v. Seitz*, 25 Pa. 226, 64 Am. Dec. 694, the court, addressing itself to the regularity of an amendment made by the court below to its proceedings, used this language:

"We are bound to presume that the amendment permitted in the numbers of the lots sold was founded upon satisfactory evidence that a mistake was made in that part of the description of the levy, and that the true numbers of the lots, really levied upon and sold were 3 and 4 instead of 2 and 3."

What we have said is a sufficient reply to appellant's claim that the second minute entry was made without notice to him. Where there is nothing in the record to amend it by, there may be some question as to a judge's right to resort to his recollection, and, ex mero motu, direct the clerk to correct the entry of an order or judgment. But assuming, without deciding, that notice was essential in this case, the record on this appeal does not show that notice was not given. To uphold the validity of the order, we must indulge every presumption not controverted by the record. The Supreme Court of Nebraska, in *Brownlee v. Davidson*, 28 Neb. 785, 45 N. W. 51, held that, in the absence of a showing to the contrary, it will be presumed, on appeal, that notice was duly

served on the opposite party of an application to correct a defect in the entry of the judgment, occurring through the clerk's mistake or neglect.

Our conclusion is that, upon this appeal, we must treat the second minute entry as a correct record of the order as originally announced by the trial judge, and since that entry specifically states that the order is granted "on the ground of the insufficiency of the evidence to support the verdict, in that it appears from the preponderance of the evidence that the plaintiff was guilty of contributory negligence," the order must be affirmed unless we can say that in granting the new trial the court abused its discretion.

[4] Upon the issue of contributory negligence there was some conflict in the testimony. But, while an appellate court will not review a verdict where the evidence shows a substantial conflict, the trial court is guided by very different considerations. If the trial judge, notwithstanding a conflict in the testimony, is satisfied that the verdict is against the weight of the evidence, he may, indeed he should, grant a new trial, although upon the same conflict an appellate court would be bound by the verdict. And even though there be no conflict in the testimony, the probative force and effect of the evidence is ultimately for the determination of the trial judge upon the hearing of a motion for a new trial. *Meimberg v. Jordan*, 29 Cal. App. 762, 157 Pac. 1005, 1007. The judgment of the trial judge is not based upon the cold record which comes to an appellate court. He hears the evidence, and has ample opportunity to observe the demeanor and manner of the witnesses, and to judge their credibility. If, therefore he is dissatisfied with the verdict, and is of the opinion that it clearly is against the weight of the evidence, he may set it aside and grant a new trial, even though there be substantial evidence to support the verdict. He—

"is in a position to determine between the apparent and the real, to detect the fallacy of specious testimony which may have misled the jury, but which his wider experience enables him to readily comprehend. * * * It is for these and other reasons which might be mentioned that a wide discretion is accorded to trial courts in the disposition of motions for new trials." *Bates v. Howard*, 105 Cal. 178, 38 Pac. 715.

Though the parties are entitled to the judgment of the jury in the first instance, they are, upon a motion for a new trial, equally entitled to the independent judgment of the judge as to whether such verdict is supported by the evidence. *Green v. Soule*, 145 Cal. 102, 78 Pac. 337.

[5] If we rightly understood appellant's position, his claim is that the principles just announced by us are not applicable where contributory negligence is the issue. In support of that contention we are referred to

Schneider v. Market Street Ry. Co., 134 Cal. 482, 66 Pac. 734. The claim is wholly fallacious. Without doubt, the trial court has the same discretionary power to grant a new trial upon the ground that the preponderance of the evidence shows the plaintiff in a negligence case to be himself guilty of contributory negligence that it has with respect to any other issue of fact. Our Supreme Court has given frequent recognition to the power. Thus, in *Weisser v. Southern Pacific Railway Co.*, 148 Cal. 426, 83 Pac. 439, 7 Ann. Cas. 636, it was held that, notwithstanding there may be some conflict in the testimony upon the issue of contributory negligence, it is the duty of the trial judge to grant a new trial on the ground of the insufficiency of the evidence to support the verdict, if he is convinced that the preponderance thereof shows the plaintiff to have been guilty of contributory negligence; and the trial judge's action in that regard will not be disturbed by the appellate court, unless it appears that there has been a manifest abuse of the discretion confided to him.

[6] The cases cited by appellant are in entire harmony with these views. In *Schneider v. Market St. Ry. Co.*, supra, the trial court had denied defendant's motion for a new trial. In that case the Supreme Court held that, to justify an appellate court in disturbing the verdict, it must affirmatively appear to that court, as a matter of law, from the undisputed facts, that the plaintiff was guilty of contributory negligence. This is so because it is the province of an appellate court to pass on questions of law, not questions of fact; and that court, therefore, may not set aside a verdict on the ground of the plaintiff's contributory negligence unless, from the undisputed facts, it can see that the plaintiff has not exercised such care as men of common prudence usually exercise in positions of like exposure and danger. But, as we have seen, the trial judge possesses a much wider power. He cannot rest upon a conflict in the evidence, but must weigh and consider the evidence introduced by both sides and determine for himself the just conclusion to be drawn therefrom. *Green v. Soule*, supra.

It would subvert no useful purpose to state at length the facts of the case as they are shown by the record. After carefully reading the evidence touching the question of contributory negligence, we are convinced that fair and impartial men might reasonably differ in their deductions from the evidence, and we therefore cannot say that there is basis for the claim that the trial judge abused the discretion which the law has wisely vested in him.

The order appealed from is affirmed.

We concur: WORKS, J.; CRAIG, J.

58 Cal. App. 471

GOLD v. PHELAN et ux. (Civ. 3909.)

(District Court of Appeal, Second District, Division 1, California. July 5, 1922. Rehearing Denied Aug. 1, 1922. Hearing Denied by Supreme Court Aug. 31, 1922.)

1. Vendor and purchaser — 191—Right of purchaser to immediate possession must be expressed, or inferred from subsisting legal agreement or surrounding circumstances.

The intention of the parties that the purchaser shall have the right to immediate possession must be expressed, or be plainly inferable from some term of a subsisting legal agreement or the surrounding circumstances.

2. Brokers — 96—Real estate broker cannot execute binding agreement, or accept deposit from purchaser.

The authority of a real estate broker is only to produce a purchaser who is willing, able, and ready to contract on the terms prescribed, and the broker has no authority to execute any agreement binding on either of the parties, nor has he the right to accept a deposit from the purchaser, and when the purchaser pays money into his hands, the broker holds it as agent of the purchaser, and any misappropriation thereof is at the loss of the purchaser.

3. Brokers — 94—Authority to do acts other than assigned will not be inferred.

Authority of a real estate broker to do acts other than those assigned to him will not be inferred, though the seller has used such terms as "for sale" or "to sell" in employing the broker.

4. Brokers — 96—Vendor not bound by unauthorized acts of broker in selling property and collecting deposit.

Where plaintiff vendor authorized a real estate agent merely to sell her property, and the agent, without knowledge of plaintiff, sold the property to defendants, and collected a deposit, plaintiff was not bound by the acts of the broker, nor did she confirm any act of the broker by later signing a contract to sell the property to defendants.

Appeal from Superior Court, Los Angeles County; Charles S. Crail, Judge.

Action by Bessie Gold against Grover C. Phelan and wife. Judgment for plaintiff, and defendants appeal. Affirmed.

Merriam, Rinehart & Merriam, of Pasadena, for appellants.

Hocker & Austin, of Los Angeles, for respondent.

JAMES, J. This is a summary proceeding, brought to obtain possession of a house and premises which plaintiff alleged she was the owner of, and which she alleged defendants forcibly detained in the manner described in section 1160, Code of Civil Procedure. By the judgment possession of the property was directed to be delivered to plaintiff, and it was provided that the defendants pay damages in the sum of \$224.14, with costs. From

that judgment the defendants have appealed.

The main contention urged on this appeal is that the findings of the court are not sustained by the evidence. It appears from the testimony set forth in the record that early in the month of April, 1921, Ted Elliot was a real estate broker doing business in the city of Pasadena. There were several salesmen attached to his office. One of these, Randall, was known to the plaintiff as a customer in her husband's store. Plaintiff was the owner of a house and lot. The house was furnished and rented to a tenant. There was a mortgage incumbrance against the property of \$1,200. Plaintiff testified that she told Randall, about two months before the making of the alleged sale hereinafter referred to, to "sell the property"; that the price was \$3,500, and that the conditions were that at least \$1,000 in cash should be paid by the purchaser, and that the remaining amount (\$1,300) might be paid in installments of \$30 per month, the purchaser to assume the mortgage indebtedness of \$1,200. She testified that about the 12th of April a man named Holway, who was another salesman attached to the Elliot office, came to her place and said: "Don't you know, Mr. Randall, he sold your house." Plaintiff accompanied Holway to Elliot's office, where she met the two defendants and Ted Elliot. Elliot's office had already accepted checks from the proposed purchasers (defendants) in the amount of \$1,000. At this meeting of the parties an alleged contract of sale was drawn up. This writing was awkwardly phrased and quite indefinite in many of its statements. For the purposes of this decision it may be treated as sufficiently expressing the intent of the parties and binding terms. Plaintiff and the defendants attached their signatures to the document as approving its contents, although the plaintiff testified that she could not read it, as she did not know how to read. It may be assumed, however, that she was made to understand the contents of the agreement, in so far as an intelligent person might be able to construe the contract. The preliminary portion of the agreement was as follows:

"We, the undersigned, as agents, have this date received from Grover C. Phelan and Emma H. Phelan the sum of one thousand (\$1,000.00) dollars, lawful money of the United States, being a deposit and part payment on account of a bargain and sale made from Bessie Gold, hereinafter known as the seller, to G. C. Phelan and E. H. Phelan, hereinafter known as the buyer, of a certain lot, tract, or parcel of land lying, situate, and being in the city of Pasadena county of Los Angeles, state of California, bounded and particularly described as follows, to wit: No. 245 Penn. St., Pasadena, California."

After setting forth the terms, which included the statement "\$1,000 cash," the agreement proceeded to recite the following:

"Seller agrees to give a good title to the hereinafter described property or no sale. Taxes for the current years to be paid by buyer. Buyer agrees to pay all assessments levied subsequent to date hereof. The deposit received this date will be deposited in escrow to the credit of said seller. We, the undersigned, demand the Ted Elliot Co. of Pasadena to act as escrow agents, and the buyer and seller agree to give said Ted Elliot Co. of Pasadena, their written escrow instructions within three (3) days from date hereof. Seller agrees to pay Ted Elliot Co. 3 per cent. of purchase price dollars commission. If the remaining payments be not made according to this agreement and contract, the above-mentioned deposit will be forfeited, without recourse. If the title proves defective, or in case this contract is not fulfilled by the seller, said deposit to be returned."

Plaintiff, immediately after signing the contract, deposited with Elliot some papers, presumably a certificate of title and possibly a deed (as to which the record does not show clearly). Elliot collected the \$1,000 paid by the defendants, by depositing checks given by them, to his account, and within a few days thereafter absconded and embezzled this money. Plaintiff was immediately advised by Randall to place her papers in escrow elsewhere, but after taking legal advice she took the documents away from the Elliot office and retained them in her own custody, where they thereafter remained. The defendants had timely notice both of the fact that Elliot had embezzled the \$1,000 and of the fact that plaintiff had taken away the papers, which she had deposited in pursuance of the escrow agreement. The contract of sale contained another term which has not been quoted hereinbefore. That term, referring to the payment of the remainder of the purchase price amounting to \$1,300, provided that the "buyer gives a trust deed mortgage to (\$1,300) to Bessie Gold payable at \$30 or more per months interest at 7% included and \$1,200 mortgage." Being fully advised of all these matters, and without offering to make any payment whatsoever to the plaintiff, or to execute a mortgage or trust deed, the defendants went to the house which they proposed to purchase of the plaintiff, and, finding that the tenants had moved out, they entered through a rear door and took possession. The furniture of plaintiff, with which the house was supplied, they stacked in one room, and several months later caused it to be transported to a warehouse.

Whatever the authority of Elliot as agent may be said to have been, that authority was plainly revoked when, after the embezzlement of the money occurred, plaintiff withdrew her papers from the office of the escrow holder. After Elliot left, for a period of about a month, the attachés continued to maintain the office, paying the rent out of

their own pockets; but it is plain enough that the business conducted by them was not the business of Ted Elliot. However, with full notice of the conditions which have been referred to, these defendants, after taking possession of plaintiff's house, delivered to Holway several checks for \$30 each, which they claimed were in payment of the installments as they became due on the purchase price of the property. Two of these checks were offered to the plaintiff, who refused to accept them. Upon learning that the defendants had, without her consent, moved into the house, plaintiff made demand for possession of the house and premises, which demand was refused. Defendants continued to occupy the house, and this action was brought in September, 1921. The rental value was shown to be about \$50 or \$60 per month.

[1] No question is made as to the damages awarded being of a proper amount, assuming the right of the plaintiff to recover in the action. The appeal of defendants rests wholly upon the claim that a vendee, under an agreement of sale affecting real property, is given the right to take possession on the execution of the agreement. A number of authorities are cited as supporting this contention. These decisions proceed upon two assumptions, both of which must be present in order that the conclusion announced shall be sustained: (1) That a subsisting legal agreement to sell and purchase has been made; (2) that the intent of the parties that the buyer shall have the right to immediate possession shall be expressed or be plainly inferable from some term of the contract or the surrounding circumstances shown in evidence. In this case the plaintiff denied that she consented to give the defendants possession pending the conclusion of the sale, or that that matter was the subject of conversation between them. The alleged contract of sale contains no language indicating that possession was to be delivered to the buyer in advance of the performance of all of the acts necessary to complete the escrow.

[2,3] There is another reason which is conclusive against any right in the defendants to have possession of the property. The \$1,000 which was agreed to be paid as the initial payment never passed into the hands of the plaintiff, nor into the hands of her agent. The authority of a real estate broker is only to produce a purchaser who is willing to contract with the seller upon the terms prescribed. Such a broker has no authority to execute any agreement binding either of the parties to the transaction, nor has he the right to accept money offered by the purchaser to conclude the sale. And when the purchaser pays money into the hands of the broker in such a case, the broker holds it as the agent of the purchaser, and not the sell-

er, and any misappropriation thereof would necessarily be at the loss of the former and not the latter. *Mechem on Agency* (2d Ed.) vol. 1, §§ 797, 814. And authority to do acts other than have been assigned to the broker will not be inferred, even though the seller has used such terms as "for sale" or "to sell" in employing the agent. *Jones v. Howard*, 234 Ill. 404, 84 N. E. 1041; *Armstrong v. Lowe*, 76 Cal. 616, 18 Pac. 758; *Duffy v. Hobson*, 40 Cal. 240, 6 Am. Rep. 617; *Grant v. Ede*, 85 Cal. 418, 24 Pac. 890, 20 Am. St. Rep. 237; *Lambert v. Gerner*, 142 Cal. 399, 76 Pac. 53.

[4] Applying the settled rule announced by these decisions to the facts in this case, it must at once be concluded that up to the time that the plaintiff signed the contract of sale, which was also an escrow agreement, she had not become bound by any act of Elliot or his employees in accepting a deposit on account of the purchase price of her property. Neither did she, by the making of the contract of sale, confirm any such act. She became bound only to the extent and in the manner which that agreement described, and as its effect might be limited by the acts of performance then and thereafter made by the vendees. It could not be successfully contended that, upon the signing of the combined contract and escrow agreement, plaintiff would have had the right to demand and receive from Elliot the \$1,000 then on deposit. The transaction had not been completed. It was necessary for a deed to be made by the plaintiff, and apparently that title should be examined before the purchase price was paid. The \$1,000 then was held by the escrow holder for the benefit of, and as the agent of, the purchasers. On the general subject of the duty of escrow holders see 10 R. C. L. p. 636, par. 17. A prerequisite to the right of the vendees to insist that plaintiff complete the transaction and make a deed in their favor was that the \$1,000 should first be paid to plaintiff or her agent, or be left undisturbed in escrow. The payment of that amount of money or the existence of the deposit was essential to the keeping alive of the agreement to convey. At least, such payment should have been made or tendered within a reasonable time after the execution of the contract. The escrow holder embezzled the vendees' money, and the vendees never replaced the initial payment in the hands of any holder, nor tendered it to the plaintiff. The plaintiff's acts were such as to announce her repudiation of the agreement, and, under all the facts, would seem to have the effect of putting to an end any obligation on her part to convey the property. Under these conclusions, the acts of the defendants in taking possession of the property of the plaintiff

were the acts of strangers, without right and without justification in law.

The judgment is affirmed.

We concur: CONREY, P. J.; SHAW, J.

58 Cal. App. 453

MURPHY et al. v. SHAFFER et al.
(Civ. 2468.)

(District Court of Appeal, Third District, California. July 3, 1922. Hearing Denied by Supreme Court Aug. 31, 1922.)

1. Appeal and error ⇐1001(1)—Evidence held to sustain verdict for injured passenger of motor bus.

In an action by a passenger of a motor bus for injuries sustained when the bus overturned on an embankment on the side of a highway, verdict for plaintiff, sustained by abundant evidence, cannot be disturbed.

2. Appeal and error ⇐1060(1)—Conduct of counsel in calling jury's attention to fact that motor bus company was protected by insurance held harmless error.

In personal injury action, conduct of plaintiff's counsel in calling jury's attention to fact that defendant motor bus company was protected by insurance held harmless error, in view of evidence by plaintiff passenger, admitted without objection, that she was examined by the doctor for the insurance company.

3. Appeal and error ⇐1068(1)—Error in instruction as to nine jurors agreeing on a verdict held cured by unanimous verdict.

Any error that may have been committed by an instruction as to nine jurors agreeing on a verdict was cured by the unanimous verdict of the jury.

Appeal from Superior Court, Merced County; E. N. Rector, Judge.

Action by Cora A. Murphy and another against C. R. Shaffer and others, copartners. Judgment for plaintiffs, and defendants appeal. Affirmed.

Short, Lindsay & Woolley, of Fresno, and J. J. Griffin and H. K. Landram, both of Merced, for appellants.

E. C. Weber, of Ft. Madison, Iowa, Stutsman & Stutsman, of Los Angeles, and Everts, Ewing & Wild, and T. M. Stuart, all of Fresno, for respondents.

PREWETT, Justice pro tem. This is an appeal prosecuted from a judgment in favor of the respondents and against appellants in an action for damages for personal injuries sustained by said Cora A. Murphy, alleged to have been caused by the negligence of the defendants. The action was tried by a jury who rendered a verdict in favor of the re-

spondents for the sum of \$7,500. The accident which resulted in the injury to Mrs. Murphy occurred on the 12th day of June, 1918. At the time in question the appellants were common carriers of persons for hire between Yosemite Valley and El Portal. During the month of June, 1918, a certain insurance company was entertaining its various representatives, numbering some 300 or 400 persons, coming to California from various parts of the United States. A part of the entertainment of this body of persons included a trip to the Yosemite Valley. When the party was ready to leave the valley, the appellants provided an automobile or bus, in which Mrs. Murphy was a passenger. The road from Yosemite Valley down the canyon is very narrow and in some places rather steep. At a certain point in the canyon, where the road is but little wider than the width of the vehicles that travel over it, the driver of the bus in question ran it off the grade, causing it to overturn and injure a number of the passengers, Mrs. Murphy among them.

It is alleged in the complaint that the appellants did not exercise due care in handling the auto bus, and that it was equipped with defective steering apparatus. The evidence tends to show that the vehicle was an old truck changed into an auto bus, having seats running transversely across its body from side to side. The bus carried about 22 passengers on the day in question. It is, of course, conceded that the respondents made out a prima facie case when they showed the fact that Mrs. Murphy was carried as a passenger and that the injury resulted from the accident. The appellants seek to meet and overcome this showing by evidence tending to show that the bus was in good order and was properly handled, and that, in fact, the accident occurred through a failure of the roadway to sustain the heavy weight of the bus. The evidence shows that from a foot to 2½ feet of the outer edge of the roadway caved away at the point at which the bus went down. The respondents insist that the car was driven off the grade. The appellants claim that the embankment gave way under the rear wheels of the bus, causing the vehicle to go backward off the grade.

[1] The principal point made by the appellants is that the evidence is insufficient to justify the verdict of the jury. This point is not well taken. Whatever may be said of the showing by the appellants in this behalf, it is quite certain that there is an abundance of evidence in the record to sustain the verdict of the jury. They had the witnesses and the appellants before them, and had a very much better opportunity than an appellate court to determine their credibility.

[2] Another point made by the appellants is that the counsel for the respondents were

guilty of prejudicial misconduct in persistently calling to the attention of the jury the assumed fact that the appellants were protected by insurance. It is possible that in a very gross case a court would be compelled to set aside a verdict, where it appeared that the matter was brought to the attention of the jury in an effort to prejudice it in rendering its verdict. However, there is no question but that a litigant is entitled to a fair and unprejudiced jury. A litigant has the right to ask a juror on his examination whether or not he is a stockholder in, or otherwise interested in, an insurance company which is interested in the outcome of an action. If this were not the rule, it is manifest that a plaintiff might be compelled to accept a juror who was a stockholder in a company who had rendered itself liable for such damages as might be awarded the plaintiff. Whether the acts of the attorney for the respondents, taken in connection with the charge of the court to disregard them, amounted to error, it appears that the error was harmless. During the examination of Mrs. Murphy she was asked who arranged the exposure of her foot for the photograph thereof. In reply it was stated, without objection, that this was done by the physician for the insurance company. We think this cured any error. It does not appear from the record that the attorney for the respondents had any ulterior or sinister motives in propounding his questions to the jury.

The next point made by the appellants is that the court erred in instructing the jury as to the burden of proof. The court fully, fairly, and completely instructed the jury that the burden of proof rested upon the respondents. There is no intimation in the instructions, so far as we can find, that this burden ever shifted. The instructions to which our attention is directed do not charge the jury that the burden of proof, to exonerate themselves by a preponderance of evidence, rests upon the appellants. *Steele v. Pacific Electric Railway*, 168 Cal. 375, 143 Pac. 718.

[3] There remains but one further point to be noticed in the case, and that is the instruction of the court with reference to nine of the jurors agreeing upon a verdict. With reference to this point it is sufficient to say that the jurors in this case were unanimous in their verdict in favor of the respondents. Therefore any error that may have been committed with reference to the nine jurors and their right to agree upon a verdict was immaterial. We do not wish to be understood as intimating that the instruction complained of is erroneous as an abstract principle. We leave the point undecided.

The judgment is affirmed.

We concur: FINCH, P. J.; BURNETT, J.

58 Cal. App. 337

NEWBY v. BACON, County Recorder.
(Civ. 4095.)

(District Court of Appeal, First District, Division 1, California. June 27, 1922.)

1. Notaries — 2—Approval of bond by a single judge held sufficient.

Under Pol. Code, § 799, requiring a notarial bond to be approved by the judge of the superior court of the notary's county, the approval by a single superior court judge in a county where there is more than one such judge is sufficient.

2. Statutes — 199—The words "court" and "judge" construed synonymously.

The words "court" and "judge" will be construed synonymously, whenever necessary to carry into effect the obvious intent of the Legislature, and whether the act is to be performed by the judge or the court is to be determined by the character of the act, rather than by the designation in the statute.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Court; Judge (in Law).]

Appeal from Superior Court, Alameda County; J. J. Trabucco, Judge.

Petition for writ of mandate by W. L. Newby against G. W. Bacon, County Recorder of Alameda County. From a judgment directing the issuance of the writ, respondent appeals. Affirmed.

Ezra W. Decoto, Dist. Atty., and Donald McClure, Deputy Dist. Atty., both of Oakland, for appellant.

W. L. Newby, of Oakland, in pro. per.

TYLER, P. J. This is an appeal from a judgment directing the issuance of a writ of mandate. The case is presented upon the judgment roll alone. It appears from the petition for the writ that respondent Newby was, in September, 1921, appointed by Hon. William D. Stephens, Governor of the state of California, to act as a notary public in and for the county of Alameda; that pursuant to such appointment, and in accordance with the law, he took his oath of office before the county clerk of Alameda county and executed his official bond, which was approved by Hon. J. S. Koford, a judge of the superior court of said county. Thereafter, and subsequent to such approval, Newby tendered the bond to the county recorder, appellant herein, together with the requisite filing fee, and with the request that the same be recorded. This request was refused. Upon such refusal the petitioner instituted this proceeding, and prayed that a writ of mandate issue, commanding appellant to forthwith file and enter of record said bond, or appear and show cause why the same should not be filed. Appellant demurred to the petition. The matter came on for hearing, and a

peremptory writ issued directing appellant to forthwith file the bond for record. This appeal is from such judgment.

[1] In support of the judgment it is contended that the recorder is a purely ministerial officer, and as such it is his duty to record every instrument presented to him for that purpose, when accompanied by the proper filing fee. Appellant, on the other hand, seeks to justify his refusal to comply with the order upon the ground that the statute contemplates that the bond should have been approved by the judicial power of the county, and that such requirement is not met with by the act of a single judge, there being more than one in Alameda county. We see no force in appellant's contention. Section 799 of the Political Code, as originally promulgated by the Legislature in 1872, provided that:

"Each notary must execute an official bond in the sum of five thousand dollars, which bond must be approved by the county judge of his county."

At that time there was only one judge in each county, who was known as the county judge. Upon this condition being changed, the section was amended in 1880 by the interpolation of the words "judge of the superior court" in the place and stead of "county judge," as it originally stood. Upon the amendment of the statute the Legislature did not see fit to change the language to read "judges," as in the case of the approval of the bonds of county officers. Section 4022, Pol. Code.

[2] Under the present Constitution, whenever an act is to be performed by a judge of the superior court, and such judge is present at the place designated for the transaction of judicial business, and there assumes to transact such business, his acts may be construed as the acts of the court of which he is a judge. *Von Schmidt v. Widber*, 99 Cal. 511, 34 Pac. 109; *Carter v. Lothian*, 133 Cal. 451, 65 Pac. 962. Then, again, the Legislature often uses the words "court" and "judge" without discrimination, and such words will be construed as synonymous whenever it is necessary to carry into effect the obvious intent of the Legislature. *Sartin v. Snell*, 87 Kan. 485, 125 Pac. 47, 49, Ann. Cas. 1913E, 384; *Commonwealth v. Mathues*, 210 Pa. 372, 59 Atl. 961. Whether the term "court" is used as synonymously or interchangeably with "judge," and whether the act is to be performed by one or the other, is generally to be determined by the character of the act, rather than by such designation. *Brewster v. Ludekins*, 19 Cal. 162; *Von Schmidt v. Widber*, supra.

Here the manifest purpose of the approval of such bonds is that there shall be some means by which those interested may be assured that the bond tendered is sufficient in

form and amount, and that it is so executed as to meet the test contemplated in the requirement, and this is accomplished by the act of a single judge as efficiently as if it were approved by all of the judges of the county. Considering the conclusion we have reached, it is unnecessary to discuss the powers and duties of the officer in question.

From what we have said, it follows that the judgment should be and it is hereby affirmed.

We concur: RICHARDS, J.; PREWITT, Justice pro tem.

58 Cal. App. 480

YARBROUGH v. ROSENBERG et al.
(Civ. 3912.)

(District Court of Appeal, Second District, Division 1, California. July 5, 1922.)

Evidence —442(1)—Demurrer that written memorandum was too indefinite held properly overruled, since complete contract could be shown by parol.

A complaint alleging that defendants executed a written memorandum, "Rosenberg Co. * * * agree, for certain information regarding a 340 K. W. D. C. generator, to pay you the sum of \$800.00 if the set is bought for \$5,500.00, and to pay you the sum of \$1,000.00 if the set is purchased for less than \$5,000.00," was not demurrable on the ground that the contract did not contain the consideration to be rendered by plaintiff, in that the words "certain information" were too indefinite to describe what the service to be rendered by plaintiff was, for, as the writing was a mere memorandum, showing on its face that it did not express the whole contract, the full terms agreed on might be shown by parol.

Appeal from Superior Court, Los Angeles County; Edwin F. Hahn, Judge.

Action by C. G. Yarbrough against Barnett Rosenberg and others, doing business as Rosenberg & Co. Judgment for plaintiff, and defendants appeal. Affirmed.

Hibbard & Kleindienst, of Los Angeles, for appellants.

Turnbull, Heffron & Kelley, of Los Angeles, for respondent.

JAMES, J. Plaintiff was awarded judgment in the sum of \$800 upon an alleged contract made with the defendants. Defendants have appealed from that judgment, and here present the judgment roll, insisting that the complaint of plaintiff fails to state sufficient facts to constitute a cause of action, and that their demurrer interposed thereto should have been sustained.

In paragraph III of his complaint plaintiff alleged that on the 20th of December, 1920,

defendants executed a "memorandum" in writing wherein and whereby the terms of said agreement were set forth; said instrument being in words and figures as follows, to wit:

"Dec. 20, 1920. Mr. C. G. Yarbrough, 2019 Bay St., Los Angeles, Cal.—Dear Sir: Rosenberg Co., 336 E. 3rd St., agree, for certain information regarding a 340 K. W. D. C. generator, to pay you the sum of \$800.00 if the set is bought for \$5,500.00, and to pay you the sum of \$1,000.00 if the set is purchased for less than \$5,000.00. Yours truly, Rosenberg & Co., by F. P. Arrousez."

It is further alleged that in consideration of said agreement plaintiff furnished to the defendants the information referred to in said memorandum—

"to wit, information where and when a certain 340 K. W. D. C. generator might be purchased. That the said information so furnished by plaintiff to the defendants was the same information and all of the information referred to in said memorandum aforesaid, and was all of the information required to be furnished and asked for by the defendants."

It was further alleged that defendants did purchase the generator for a sum less than \$5,000, and that they had refused plaintiff's demand to pay for the service rendered.

Appellants insist that the written memorandum must be taken as representing the contract made between the parties, and that it is unenforceable because the consideration to be rendered by the plaintiff is not therein stated. The words "certain information," it is contended, are too indefinite to describe what the service to be rendered by the plaintiff was. The case of Talmadge v. Arrowhead R. Co., 101 Cal. 367, 35 Pac. 1000, and other decisions are cited to this point. The written memorandum (signed only by defendants) does not purport to represent fully the terms of the agreement, except that it does express the amounts to be paid by defendants in the different contingencies. The more complete terms of the contract are shown by the further allegations of the complaint, to which reference has been made. The case presented is like that considered in Kreuzberger v. Wingfield, 96 Cal. 251, 31 Pac. 109, where the court referred to a writing as a mere memorandum made by one of the parties, and held that it was competent for the opposite party to make oral proof of negotiations and conversations, and in that connection it was said:

"The rule is, of course, a familiar and salutary one that, when a contract has been reduced to writing, parol evidence is not admissible for the purpose of cutting down or adding to its terms. But, in order for this rule to have any application, the writing must be one which, by legal construction, shows upon its face that it was intended to express the whole contract between the parties. Naumberg v. Young, 44

N. J. Law, 338, 43 Am. Rep. 380; Harrison v. McCormick, 89 Cal. 327."

The demurrer was properly overruled. The judgment is affirmed.

We concur: CONREY, P. J.; SHAW, J.

58 Cal. App. 457

DONAGHUE v. HAYDEN et ux. (Civ. 2451.)

(District Court of Appeal, Third District, California. July 3, 1922.)

1. Appeal and error — 1001(1)—Conclusion of jury cannot be disturbed, if enough evidence in record to sustain verdict.

Where there is enough evidence in the record to sustain the verdict, the conclusion of the jury cannot be disturbed.

2. Highways — 176—Attempt to drive car past another while motorcycle is approaching in opposite direction held gross negligence.

Attempt to drive a car past another while a motorcycle is approaching from the opposite direction constitutes gross negligence, and renders the driver liable for resulting damages.

3. Master and servant — 301(1)—Husband's negligent driving of wife's automobile held chargeable to her.

Evidence that a wife was the owner of a fruit farm and owned an automobile, which husband drove with her at the time of an accident, that he made his home on the farm and worked thereon without wages, and that on the day of the accident he was on his way to town to procure tobacco for himself and feed for pigeons belonging to a boy on the farm, held to sustain a verdict against her for injury caused by his negligence.

4. Evidence — 215(5), 265(2)—Witnesses — 379(4), 397—Voluntary return to county assessor, showing auto to be worth \$50, held admissible as admission and in impeachment, but not conclusive.

In an action for injuries to plaintiff's car, caused by defendant, a voluntary return by plaintiff to the county assessor, showing his automobile to be worth \$50, was admissible as an admission against interest, and as impeaching evidence, but was not conclusive.

Appeal from Superior Court, Napa County; Percy S. King, Judge.

Action by John Donaghue against George W. Hayden and wife. Judgment for plaintiff, and defendants appeal. Affirmed.

E. L. Webber, of Napa, for appellants.

Clarence N. Riggins, of Napa, for respondent.

PREWETT, Justice pro tem. [1] Action for damages growing out of the collision of two automobiles and a motorcycle. It appears that the respondent was traveling in his car from Napa City toward Carneros,

when appellant Hayden, in another car, overtook him and attempted to pass on the left. At that moment a motorcycle coming down the road met them head on and collided with appellants' car. Appellant Hayden, in an effort to avoid the motorcycle, pulled over too far toward the right and engaged the left wheel of respondent's auto, overturning it and throwing it from the highway. The impact injured the respondent and his car. The jury found in favor of the respondent, and assessed his damages at the sum of \$850. The judgment runs against both appellants. They appeal on the ground that the evidence is insufficient to sustain the verdict. However, it cannot be questioned that there is enough evidence in the record to sustain the verdict, and this fact, under a well-established rule, precludes this court from disturbing the conclusion of the jury.

[2] Even the testimony of appellant Hayden shows that he was attempting to pass the respondent at a moment when another vehicle was approaching. This was a clear violation of the law. It constituted gross negligence, and it rendered the driver liable. Conceding that there is any testimony from which the jury might have found that the respondent contributed to the accident, the jury had a right to reject it, and they evidently did so.

[3] The appellants insist that Mrs. Hayden is not liable. She was the owner of a fruit farm, and was running it in her own name. She owned the automobile, the stock, and all other ranch property used with the farm. Both Mr. and Mrs. Hayden testify that he went to town that day to procure tobacco for himself and feed for the pigeons. They testify that the pigeons belong to the boy, and that he keeps them on the farm. It is shown that appellant Hayden attends to marketing the pigeons, and that they yield about \$75 per month. Appellant Hayden receives no wages from his wife. He merely lives at the farm as his home and works for her. Early in the history of the case, and evidently before he had appreciated the import of his admissions, he testified, in giving a deposition, that he went to town to procure family groceries. On the trial, however, he testified that he did not go on any business for Mrs. Hayden. But, from all the circumstances, including the care of the pigeons, the jury easily drew the inference that the car was being driven in Mrs. Hayden's interests. If he was making his home on the farm, and worked thereon, and received no wages, it is no harsh inference to say that it was her concern that he received a proper supply of tobacco. The verdict against her must be upheld.

[4] None of the instructions to which appellants object present any points open to serious debate. The same is true as to the ev-

idence of values. The respondent subscribed a voluntary return to the county assessor, showing that the car owned by him was worth only \$50. The appellants believe that the court should have instructed the jury that this voluntary return conclusively established, as against the respondent, a value of but \$50. It was voluntarily made, and it constituted an admission against interest. As such, the court received it in evidence; also it was evidence by way of impeachment and was doubtless so treated by the jury. But, at most, it was not conclusive, and the court correctly instructed the jury thereon.

There are no other points in the case that demand notice.

The respondent moves the court to assess damages for a frivolous appeal. While it is possible that the appeal presents no serious questions, we are not prepared to say that it is frivolous. It was evidently prosecuted in the utmost good faith.

The judgment is affirmed.

We concur: FINCH, P. J.; BURNETT, J.

58 Cal. App. 301

BREYFOGLE v. TIGHE et al. (Civ. 2447.)

(District Court of Appeal, Third District, California. June 23, 1922. Rehearing Denied July 22, 1922.)

1. Fixtures ⇐35(2) — Evidence supported finding that signboard was not to become part of realty.

In an action against several defendants for conversion of a combined fence and signboard erected on plaintiff's land, evidence held to support finding that the fence and signboard were erected with right of removal, and did not become part of realty.

2. Trial ⇐396(1)—Findings on material issues need not follow pleadings.

Findings of the court on material issues need not follow the pleadings; but if, taken together, they are such that the court can say the ultimate facts result therefrom, they are sufficient.

3. Trial ⇐404(1) — Findings liberally construed in support of judgment.

Findings are to be given a liberal construction in support of the judgment.

4. Fixtures ⇐1—Test as to whether personal property attached to land becomes part of realty stated.

In determining whether personal property attached to land becomes a part of the realty, there are three general tests: First, annexation; second, adaptation or application to the use or purpose to which that part of the realty to which it is connected is appropriated; and, third, intention.

5. Fixtures ⇐4—Matters from which intention to annex personal property to land is inferred.

The test of intention to annex personal property to land is to be inferred from the nature of the article affixed, the relation and situation of the party making the annexation, the structure and mode of annexation, and the purpose for which it has been made.

6. Fixtures ⇐21—Transferee of interest in land held not to be innocent purchaser without knowledge as to circumstances of signboard's erection.

Where plaintiff and defendant, as joint owners of land, permitted the erection of a combined fence and signboard, with right of removal, and defendant exchanged his interest in the land for plaintiff's interest in the corporation which erected the sign, the fact of defendant's conveyance of his interest to plaintiff did not affect the right of removal of the board; plaintiff not being in the position of an innocent purchaser, without knowledge of the circumstances under which the structure was erected.

Appeal from Superior Court, Madera County; S. L. Strother, Judge.

Action by W. R. Breyfogle against W. C. Tighe and others. From a judgment for defendants, plaintiff appeals. Affirmed.

Harry I. Maxim and J. J. Coghlan, both of Madera, for appellant.

Fee & Ring, of Madera, for respondents.

FINCH, P. J. The complaint alleges that the defendants—

"unlawfully and with force broke into and entered upon the plaintiff's land and premises (lot 2 in block 40 of the city of Madera) * * * and took down and removed therefrom a certain combined fence and signboard then and there standing on, being attached to, and a part of said real property from said land, and converted said fence and signboard to their own use, to the damage of said plaintiff in the sum of \$250, the value of said combined fence and signboard removed as aforesaid, and to the further damage to said real property in the amount of \$75."

The answer in effect admits the entry and removal of the property but denies that such entry and removal were unlawful. Defendant Tighe alleges:

"That Tighe-Breyfogle Company is now and at all times in the amended complaint mentioned it has been a corporation * * * carrying on and conducting a general mercantile business, * * * and down to about the 1st day of March, 1919, plaintiff and defendant W. C. Tighe were stockholders, officers, and directors of said corporation, and during all of said times down to about the 26th day of March, 1919, said plaintiff and said defendant Tighe were the joint owners of the said lot 2 in block 40 aforesaid. * * * That * * * said Tighe-Breyfogle Company, for the purpose of adver-

tising its goods, wares, and merchandise, caused to be erected" the signboard "which was thereafter used exclusively for said purpose by said corporation down to the time of the removal thereof." That about March 28, 1919, the corporation acquired from plaintiff all of the capital stock in the corporation then owned by him and that in consideration thereof the defendant Tighe conveyed his interest in said lot 2 to the plaintiff. "That at the time said deed of conveyance was delivered to said plaintiff by the said Tighe it was understood and agreed between the said parties that said corporation should have the right to maintain said signboard upon the said property aforesaid, to wit, lot 2 in block 40, so long as the same was mutually agreeable between the parties, or until said plaintiff desired to make use of said property for building purposes"; the corporation to pay plaintiff a monthly rental for the right "to maintain said signboard upon said lot of land aforesaid."

[1] The court found in accordance with the denials and averments of the answer, and further that the signboard was erected "with the express assent and consent of plaintiff herein and W. C. Tighe, the owners of said lot 2 in said block 40." While the evidence is conflicting, it amply supports the findings. The signboard was of galvanized iron, 48 feet in length, and, according to the various estimates of the witnesses, 8 to 12 feet in height. It was placed along the edge of the lot, which had no building upon it. It served the purpose of a fence, as well as that of a signboard. The plaintiff testified that it was erected primarily as a fence, but made higher than otherwise would have been necessary in order that it might be used as a signboard. The defendant Tighe testified that the structure was erected for use as a signboard, and not with the intention of making it a part of the realty; that he and plaintiff both consented to its being placed there by the corporation; that Tighe was at all times president and general manager of the corporation; that at the time he conveyed his interest in the lot to plaintiff the latter said "that the sign could stay there until he wanted to use the lot"; that a few weeks before the signboard was removed the plaintiff notified the corporation "that, if the sign wasn't removed in 30 days, it was Mr. Breyfogle's sign then." The signboard was not removed within the 30 days specified, but was taken away shortly after the expiration thereof. It was removed under the direction of defendant Tighe, acting in his capacity as president and general manager of the corporation, by the other defendants, who were employees of the corporation.

[2] Appellant contends that the answer does not state facts sufficient to constitute a defense. "It may be conceded that the answer is not a model of good pleading; but the plaintiff did not demur thereto, and the case was tried upon the theory that an issue was raised as to whether or not the signboard had

become a part of the realty. For like reasons objection is made to the sufficiency of the findings. The findings follow the pleadings, and it is further found that the signboard was erected upon the lot with the "express assent and consent" of both the plaintiff and Tighe. Among the conclusions of law is found the following:

"That plaintiff Breyfogle is not the owner of said combined fence and signboard and has no interest therein."

The court did not expressly find that the signboard had not become a part of the realty. "It is not necessary that the findings of the court on material issues shall follow the pleadings. If the findings, taken together, are such that the court can say the ultimate facts necessarily result therefrom, they are sufficient." *Tower v. Wilson* (Cal. App.) 188 Pac. 87.

[3] Findings are to be given a liberal construction in support of the judgment. *Price v. Occidental Life Ins. Co.*, 169 Cal. 800, 147 Pac. 1175. Giving the findings in this case a liberal construction, it necessarily results therefrom that the signboard did not become a part of the realty upon which it was placed but retained its character of personal property.

[4, 5] In determining whether personal property attached to land becomes a part of the realty, there are—

"three general tests which may be applied: * * * First, annexation to the realty, either actual or constructive; second, adaptation or application to the use or purpose to which that part of the realty to which it is connected is appropriated; and, third, intention to make the article a permanent accession to the freehold." 11 R. C. L. 1059.

"The test of intention is to be given a broad and comprehensive signification. It does not merely imply the secret action of the mind of the owner of the property, nor need it be expressed in words; but it is to be inferred from the nature of the article affixed, the relation and situation of the party making the annexation, the structure and mode of annexation, and the purpose or use for which the annexation has been made, which, obviously, suggests that the other tests are really part of this comprehensive test of intention, and that they derive their chief value as conspicuous evidence of such intention." 11 R. C. L. 1062.

Applying these tests to the facts of the instant case, it is apparent that only the first supports appellant's contention. The signboard was annexed to the realty, but it was not adapted or applied to any use or purpose to which the realty was appropriated, nor, manifestly, was it the intention to make the signboard a permanent accession to the freehold. The corporation placed the signboard on the lot under license from the owners thereof, a license revocable by them at will. It would be highly unreasonable to conclude that the corporation intended it to become a

permanent accession to the freehold when it was within the power of the owners of the lot to revoke the license immediately after the completion of the structure.

"Generally a building erected on the land of another by his consent or license does not become a part of the realty, but remains the property of the person annexing it, and may be removed by him." 11 R. C. L. 1083.

"He who has affixed improvements to land under a license from the owner is generally held to have a right to remove them within a reasonable time after the termination of the license. Bronson on Fixtures, § 106; 19 Cyc. 1056. An agreement for such right of removal is implied from the circumstances." Watterson v. Cruse, 179 Cal. 379, 382, 176 Pac. 870, 871.

[6] The fact of the conveyance by Tighe of his interest in the lot to appellant did not affect the corporation's right of removal; appellant not being in the position of an innocent purchaser, without knowledge of the circumstances under which the structure was erected.

It is claimed that the court erroneously admitted evidence of the intention and purpose with which the signboard was placed upon the lot. The contention is without merit, and no useful purpose would be subserved by a discussion of the matter.

The judgment is affirmed.

We concur: BURNETT, J.; PREWETT, Justice pro tem.

(58 Cal. App. 396)

GARRETTE et al. v. GRANGERS' BUSINESS ASS'N. (Civ. 4198.)

(District Court of Appeal, First District, Division 1, California. June 30, 1922. Hearing Denied by Supreme Court Aug. 28, 1922.)

1. Warehousemen — 34(9)—Negligence of warehousemen, storing wheat, held for the jury.

In an action against a warehouseman for loss of wheat, negligence of defendant warehouseman in not exercising proper care and inspection held for the jury, in view of the evidence.

2. Appeal and error — 1001(1)—Diligence or care required of warehouseman held a jury question, not reviewable.

In actions involving the negligence of a warehouseman, what constitutes ordinary diligence or care is a fact to be determined by the jury, where there is substantial evidence on which to submit such issue, and it becomes a question of law for the court on appeal only in the absence of such evidence.

3. Warehousemen — 34(10)—Instruction on burden of proof of negligence held not erroneous.

In an action against a warehouseman for the loss of wheat, an instruction that plaintiff must establish his case by a preponderance

of the evidence, and, if the evidence is equally balanced, the verdict must be for defendant, held not erroneous, in view of the other instructions.

Appeal from Superior Court, City and County of San Francisco; George H. Cabaniss, Judge.

Action by J. F. Garrette and others, doing business under the name of Garrette & Agnew, against the Grangers' Business Association. Judgment for defendant, and plaintiffs appeal. Affirmed.

Mastick & Partridge and Brooks Cox, all of San Francisco, for appellants.

Chickering & Gregory, of San Francisco, for respondent.

KNIGHT, Justice pro tem. The defendant, Grangers' Business Association, a corporation, was the owner of and operated a warehouse on the shores of the Carquinez Straits, at Port Costa, Cal. On September 15, 1919, plaintiffs deposited in said warehouse for indefinite storage a quantity of wheat. During the evening of that day a section of the wharf or dock upon which the warehouse was built collapsed, precipitating part of plaintiffs' wheat into the water. Plaintiffs have sued defendant on its contract as a public warehouseman for the value of the lost wheat. The action was tried by the court sitting with a jury; the issue of fact being whether or not defendant was negligent, as a warehouseman, in the care of said wheat. The verdict was for the defendant, and from the judgment entered on said verdict plaintiffs have appealed.

Two grounds are urged for a reversal of the judgment, namely, insufficiency of the evidence to support the verdict, and erroneous instructions given to the jury on the question of burden of proof. The wharf or dock upon which said warehouse rested was constructed of wooden piling, and, from what may be gleaned from the testimony in the record, extended for a distance of 1,000 feet along the shore line and was 180 feet wide, the side of which projected for some distance over the water, so as to give access to vessels loading and unloading grain. The cause of the accident was due to teredo boring into the piling and so weakening it that this particular section collapsed.

The claim of insufficiency of the evidence to support the verdict is based upon the assertion, first, that the evidence shows that the defendant unnecessarily placed the wheat in the most dangerous part of the warehouse; and, secondly, that the evidence shows that no adequate inspection was made for teredo after it was known that the warehouse supports were infected.

[1] We are of the opinion that neither of these points are available to appellants on

appeal, for the reason that they relate to the precise questions of fact which were submitted to and passed upon by the jury. The main issue before the jury was the one of the negligence of the defendant. On that issue there was a conflict of proof, and the verdict of the jury in favor of the defendant was equivalent to a finding that the defendant, as a warehouseman, exercised due care in the storage of said wheat and was free from negligence. The wheat was admittedly destroyed while it was in defendant's possession as a warehouseman, and it therefore became necessary for defendant to prove that, as a warehouseman, it had exercised such care in safeguarding plaintiffs' property as a reasonable and careful owner of similar goods would exercise. This it sought to do by offering proof as to the precautions it had taken.

The evidence shows that for several years previous to the accident it had maintained quite an extensive system of inspection; that every year it employed competent and experienced engineers to inspect the wharf and make necessary repairs; that for five years it had continuously employed a man to inspect the piling, and that he spent about one-half of his time underneath the wharf; that the teredo was a new enemy to the wharves in that vicinity; that they had never before been seen or known to exist in those parts until within a few weeks prior to the accident; that the wharf in question, and others in that locality, were built in fresh water, in which the teredo does not live, but that the drought in 1919 lowered the fresh water in the rivers, so that the salt water from the bay extended farther inland and carried the teredo with it; that in the middle of August, 1919, it was discovered by defendant that the teredo was attacking the piles, but that they were not present in dangerous numbers and were attacking only the piles in the deepest water, which was some distance from the point where plaintiffs' grain was placed. The evidence further shows that as soon as it was discovered that the piles in the deep water were being infected, defendant gave instructions to its engineers to use the necessary means to protect the wharf and make it safe. The owners of other wharves in that locality took the same precautions, but, nevertheless, several other wharves collapsed, following the accident to defendant's, all of which tended to show that the sudden attack of teredo was something that could not have been reasonably anticipated under the circumstances.

[2] Appellants contended, before the jury, as here, that certain means of inspection other than and in addition to those adopted by defendant should have been, but were not, employed by defendant in the inspection of said piles, and evidence was offered by plaintiffs to that effect. But the jury, to whom

such evidence was properly addressed, decided, in rendering its verdict in defendant's favor, that defendant was not negligent in failing to employ such additional means of inspection, and that to have required defendant to have done so would have been to exact of defendant a higher and greater degree of care than the law demanded under the circumstances.

In actions involving the negligence of a warehouseman, the usual rule applies that what constitutes ordinary diligence or care in a given case is always a fact to be determined by the jury, in view of surrounding circumstances, where there is substantial evidence upon which to submit such an issue. It is only in the absence of such evidence that it becomes a question of law to be determined by the court. 27 Rul. Case Law, p. 1004. In *Runkle v. Southern Pacific Milling Co.*, 184 Cal. 715, 195 Pac. 398, 16 A. L. R. 275, it was said by the Supreme Court, in effect, that it was idle to discuss, upon appeal to that court, the weight of evidence upon which the judgment rested, and that it was only when the facts of a given case are not in any event or in any view of the case susceptible to the inference deduced therefrom that the question of negligence becomes one for the sole consideration of the court rather than one of fact for the determination of the jury. Under the rules, and for the reasons above stated, we are not at liberty, we think, to interfere with the finding of the jury.

[3] The first instruction given to the jury, following certain preliminary remarks by the court, was the following:

"In all civil cases, what the law calls the burden of proof is upon the plaintiff. In other words, in all cases, in order to entitle himself to a verdict, the plaintiff must establish his case by a preponderance of the evidence. Putting that as correctly as I can, * * * you will proceed to consider this matter, and you will ask yourselves whether the plaintiff has established his case by a preponderance of the evidence, and, if you believe him to have done so, the verdict will be in his or its favor. If, after a full consideration, you find it equally balanced, as it were—no preponderance one way or the other, just as persuasive in behalf of the plaintiff as in behalf of the defendant—it would in that case be your duty to return a verdict in favor of defendant, as, of course, even more would it be your duty to do so if, after a full consideration of all the evidence heard here, you find that it preponderates in favor of defendant. * * *

Later the court gave the following instruction:

"You are instructed that the plaintiffs have established a prima facie case, if they have established that they delivered the wheat to the defendant and that the defendant failed to return it. The burden is then upon the defendant to establish by a preponderance of the evidence that the loss of the wheat occurred with-

out any negligence on the part of said defendant."

And still later, and in conclusion, the court instructed the jury as follows:

"* * * You will retire, and bear in mind the instructions just given you, keeping in mind more especially and particularly—not that any one instruction is to be more regarded than any other, but keeping in mind more particularly, however—all that I have said to you, and all that you have heard counsel say, bearing upon the question here, as to whether, prior to receiving the wheat, which admittedly was destroyed by the giving way of the wharf, the defendant used reasonable care and caution in protecting it against destruction. If he did, as already stated, the verdict in this case ought to be in favor of him, the defendant. If, on the other hand, you find, from a preponderance of the evidence heard in this case, that the defendant did not exercise so high a degree of care in the protection of the grain, and that its destruction was due to failure upon its part so to do, your verdict will be in favor of the plaintiff. You are to consider, as bearing upon this question of reasonable care, or lack of it, all the evidence heard here. * * *"

Appellants now contend that the court erred in giving the first instruction to the jury relating to the burden of proof, for the reason, as appellants claim, that all of the essential elements necessary for plaintiffs to prove in order to establish a prima facie case were stipulated to and admitted by the defendant, and consequently left no existing issue to which such an instruction might have been directed. Appellants argue that, although later the jury was correctly instructed as to the burden of proof on the issue of defendant's negligence, still, at the end of the charge, the court gave another instruction, which had the effect of nullifying the correct one. In support of their contention appellants cite the cases of *Howard v. Worthington* (Cal. App.) 195 Pac. 709, and *Noce v. United Railroads* (Cal. App.) 200 Pac. 819.

After examining these instructions as a whole, and considering all of them in the light of the evidence, we are of the opinion that whatever conflict there may have been, if any, was not of such a serious character as to mislead the jury, and consequently does not require a reversal of the judgment. It cannot be denied but that the first instruction given, if applicable, correctly stated the law, and it must be also conceded that its application was proper in this case, if there was any material issue at all left open to proof by plaintiffs which was not covered by the stipulation of the defendant.

In this respect it appears from the record that counsel for plaintiffs deemed it necessary for plaintiffs to prove the nature of the contract pursuant to which the delivery of the wheat was made, for the reason that defendant, while admitting the fact of delivery and value of the grain, had taken the

position that the warehouse receipt constituted the contract by which the liability of defendant was fixed, and that, since there had been no receipt delivered for the grain which was lost, there was no contract between the parties. For the purpose of proving such contract, plaintiffs offered as a witness the president of the defendant company, and examined him concerning the nature and character of the receipts usually issued by the defendant company, and some of those receipts were thereupon offered and received in evidence, and read to the jury over the objection of the defendant. Next called as a witness was one of the plaintiffs, by whom it was sought to identify certain weighmaster's certificates, which it was claimed covered the deliveries of part of the wheat in question. While this latter evidence was being given the following proceedings occurred:

"Mr. Partridge (interrupting): I don't want any misunderstanding about it.

"The Court: I don't think there is any. We can clarify it right now. You will admit, and practically have already admitted, I believe, that some of these receipts refer to some of the wheat which was not destroyed, which was on the wharf at the time certain other delivered wheat—

"Mr. Williams (interrupting): I don't know whether it was on the wharf, if your honor please.

"Mr. Partridge: I will prove it.

"The Court: Very well, go on and prove it. * * *

"Mr. Partridge: Now, if your honor please, I will offer in evidence this certificate.

"Mr. Williams: To which we urge the same objection, that it is already covered by an admission.

"The Court: Overruled. I don't think that it is. I thought so up to a moment ago."

Two certificates were thereupon offered and received in evidence, and read to the jury, over the objection of defendant. It would therefore seem obvious, we think, that there were two disputed issues connected with plaintiffs' case, upon which the parties had not agreed, and which the court and counsel for plaintiffs apparently did not consider covered by the stipulation, and therefore that it became necessary for plaintiffs to offer proof on those two points before a prima facie case could be established. That being so, it would follow that the first instruction given upon the question of burden of proof was directly applicable to the facts.

If it be conceded, however, as claimed by appellants, that all essential elements of plaintiffs' case were covered by stipulation and that said instruction was therefore not applicable, we still believe that the error could not have misled the jury, in view of the correct instruction which followed. There the jury was plainly and positively instructed that the burden of proof was upon the de-

defendant to establish by a preponderance of evidence that it was free from negligence. The situation here, we believe, is similar to the one presented in *Alloggi v. Southern Pacific Co.*, 37 Cal. App. 72, 173 Pac. 1117, and in our opinion should be controlled by the same reasoning.

We do not consider that the last instruction given by the court conflicted with the others, or that it was, indeed, erroneous. The court had already, by the second instruction, given the jury the correct rule, to the effect that the burden was upon defendant to show that it was free from negligence. That defense, then, having become an issue, was to be determined by the same rule as any other affirmative defense, namely, by a preponderance of the evidence. And the effect of the instruction complained of, as we understand it, was merely to tell the jury that, if the jury found that the evidence preponderated against such negligence, its verdict should be for the defendant; but, on the other hand, if it found that it preponderated in favor of such negligence, its verdict should be for the plaintiffs. The instruction complained of, as we read it, made no reference to the question of burden of proof.

Finding no substantial error in the record, the judgment is affirmed.

We concur: TYLER, P. J.; KERRIGAN, J.

58 Cal. App. 459

GAINER v. UNITED RAILROADS OF SAN FRANCISCO. (Civ. 4207.)

(District Court of Appeal, First District, Division 1, California. July 5, 1922. Hearing Denied by Supreme Court Aug. 31, 1922.)

1. Carriers ⇐348(14) — Instruction on last clear chance held not warranted by the evidence.

In an action by a passenger on a street car, where plaintiff, an aged woman, walked to the front exit before the car had stopped, and was warned by the motorman to wait until the car stopped, an instruction on the doctrine of the last clear chance held improper, as not supported by evidence showing that the motorman knew, or should have known, that plaintiff would attempt to alight while the car was in motion, especially where the motorman's attention was occupied with the operation of the car.

2. Negligence ⇐83 — Doctrine of "last clear chance" defined.

To make a defendant liable, notwithstanding the contributory negligence of plaintiff, it must appear that the defendant was not only aware of the danger in time to have avoided the injury, but must have known that plaintiff was oblivious of his danger and unable to avoid it, and

further that the defendant failed to exercise ordinary care to avoid the injury.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Last Clear Chance.]

3. Trial ⇐191(9)—Instruction held not objectionable, as assuming facts in issue.

An instruction that it was the duty of the motorman and conductor to make sure, by looking to see, that plaintiff had alighted from the steps of the car, and if the jury find that either or both of them neglected to perform such duty, and that as a consequence of such failure plaintiff was injured, etc., verdict should be for plaintiff, was not erroneous, as assuming that the car had come to a stop and was again started before plaintiff had alighted, especially where other instructions clearly submitted such issue to the jury.

Appeal from Superior Court, City and County of San Francisco; George H. Cabaniss, Judge.

Action by Margaret A. Gainer against the United Railroads of San Francisco. From a judgment for plaintiff, defendant appeals. Reversed.

Wm. M. Abbott, Kingsley Cannon, and Cyril Appel, all of San Francisco (Ivores R. Dains, of San Francisco, of counsel), for appellant.

John H. Crabbe, of San Francisco, for respondent.

KNIGHT, Justice pro tem. This is an appeal by defendant, United Railroads of San Francisco, a corporation, from a judgment rendered in favor of plaintiff, Margaret A. Gainer, whereby plaintiff was awarded the sum of \$5,000 damages for personal injuries received by her while alighting from a street car operated by the defendant company. Insufficiency of the evidence and erroneous instructions are the grounds upon which the appeal is taken.

The accident occurred about 8 o'clock in the evening of February 6, 1917, at the corner of Mission and Oliver streets. The car on which the accident occurred was one of the so-called suburban type; the front and rear entrances (or exits, as the case may be) on the right side being allowed to remain open, so that passengers might enter or leave the car at will without operating gates. On the left side, however, the gates were closed. Plaintiff, who at the time of the accident was 65 years of age, had been riding in the inclosed part of the car, and as it neared her stopping place she went to the front platform and requested the motorman to stop the car at Oliver street. The motorman proceeded to check the speed of the car, and, as he was bringing it to a gradual stop, plaintiff approached the steps at the front right exit.

What actually occurred thereafter is in dispute.

Plaintiff claims that, after the car came to a complete standstill, she stepped down upon the steps of the car, and was about to step to the ground, when the car started with a jerk and threw her to the ground, severely injuring her; that the car moved 3 or 4 feet, and then stopped again. She was then given assistance. Defendant claims that plaintiff attempted to alight from the car while the same was in motion, and was thereby thrown to the ground and injured. The main issue before the jury seemed to be whether or not the car was moving at the time plaintiff attempted to alight therefrom. In that state of the record the trial court gave to the jury certain instructions submitting an issue on the doctrine of the last clear chance. They were as follows:

"I instruct you that, if you find that the defendant's motorman saw the plaintiff in a position where she was in danger of falling off the car, and if you further find that the motorman realized such danger, and, by exercising ordinary care under the then existing circumstances, could have avoided injuring the plaintiff, but failed to do so, then your verdict must be for the plaintiff, Margaret A. Gainer;" and "I instruct you that one having knowledge of the dangerous situation of another, and having a clear opportunity, by the exercise of proper care, to avoid injuring another, must do so, notwithstanding the latter has placed himself in such situation of danger by his own negligence. If, therefore, you should find from the evidence, that the defendant's motorman saw the situation in which plaintiff was before the accident and appreciated the danger she was in, and had the opportunity, by the exercise of proper care, to avoid injuring the plaintiff, and failed to exercise such care, or failed to do what reasonable prudence would dictate he should have done to avoid injuring the plaintiff, the defendant is liable, and your verdict must be for the plaintiff, Margaret A. Gainer."

Appellant contends that the evidence was and is an insufficient predicate for the application of the doctrine of the last clear chance. The testimony concerning which that doctrine may be invoked, if at all, was that given by the motorman, Nelson. He testified, while testifying on direct examination as a witness for defendant, that, as the car approached Oliver street, plaintiff came out of the inclosed part of the car, turned to her right and walked over towards the steps; that she put one foot on the first step, and he looked over his shoulder and said, "Wait until the car stops, lady;" that this warning was given when the car was 100 feet from Oliver street. On cross-examination the witness testified as follows:

"Q. You could have reached out and grabbed Mrs. Gainer, and shut off your power with the other hand? A. No; I used my right hand for air and the left hand for the controller. Q. Supposing you let the air go * * * and

reached for Mrs. Gainer—you could have pulled her back? A. Yes; I could have pulled her back, but then it would not have been safe. Q. Would not have been safe for who? A. Would not have been safe to check up the car. Q. It would have been safe to let her in that position? A. As long as she was holding onto the bars on each side it would have been safe. The car was running smooth. Q. For 100 feet you were checking up? A. Yes. * * * Q. In other words, it had not impressed you that the lady was in a position of danger and she was not going to step off and you could give your attention to the car? A. Having warned her once, I did not think she would walk off the car before the car stopped. Q. Why did you warn her at all? A. I warned her when I saw her put one foot on the lower step—from the first. Q. You mean on the top step from the platform, the first step from the platform? A. Yes. Q. When she was down in that position, could you have reached her readily with your right hand, if you had seen fit to do so? A. Well, in the way I held my air, I could not. Q. Suppose you had taken your hand off of the air control, could you not have done so? A. Yes; if I had taken my hand off the air control. Q. What would have been the result if you had taken your hand off of the air control? A. Well, I would have gone past Oliver street, and I would not have a chance to stop my car."

[1] In the recent case of *Wallis v. Southern Pacific Co.*, 184 Cal. 662, 195 Pac. 408, 15 A. L. R. 117, it was held that in cases of negligence it was prejudicial error to give an instruction upon the subject of the last clear chance, where there was not sufficient evidence to justify submitting such an issue to the jury. In commenting upon that point the court said:

"This instruction may have governed the jury in arriving at a verdict for the plaintiff, and in the absence of evidence to support it, must be held fatally prejudicial. The jury may, under the evidence, have found the decedent guilty of contributory negligence. A verdict for plaintiff, after a finding of such negligence, could not be supported, excepting under the doctrine of the last clear chance."

[2] That doctrine, briefly stated, is that in order to make the defendant liable, notwithstanding contributory negligence of the plaintiff, the defendant must not only be aware of the danger in time to avert it, but must also know or have reason to believe that the plaintiff is oblivious of the danger, and is in a position where he cannot extricate himself from it, and that under such circumstances the defendant fails to exercise ordinary care and prudence to avoid the injury to plaintiff. *Read v. Pacific Electric Ry. Co.* (Cal. Sup.) 197 Pac. 791; *Wallis v. Southern Pacific Co.*, supra; *Arnold v. S. F., O. T. Rys.*, 175 Cal. 1, 164 Pac. 798; *Basham v. Southern Pacific Co.*, 176 Cal. 320, 168 Pac. 359; *Young v. Southern Pacific Co.*, 182 Cal. 369, 190 Pac. 36.

It would therefore seem, in the instant case, that the judgment cannot be sustained unless the evidence established the fact that

plaintiff placed herself in a position of danger, unknown to her, from which she could not extricate herself, and that the motorman, after perceiving her perilous position, failed to exercise ordinary care and prudence to avoid injury to her. Of course, in order to give application to the doctrine of the last clear chance, it must be assumed that plaintiff attempted to alight from the car before it came to a standstill.

After an analysis of the evidence, we are of the opinion that the facts proved do not present a case involving the doctrine above mentioned. The actual danger to plaintiff, as we take it, was not in approaching the steps of the car, nor in standing upon them while the car was moving, but in attempting to alight from the car before it had stopped. And there is no evidence to show, we think, that the motorman knew or that he could have had reason to believe, from the mere fact of plaintiff's position in standing on the steps, that she intended to step from the car before it reached a standstill. In this respect it may be stated that it is not at all unusual for passengers riding on streetcars, operated without gates, to approach the exits and stand upon the steps, while the car is being slowed down, so that they may be ready to alight as soon as the car stops. The motorman testified that he admonished plaintiff to wait until the car stopped before she attempted to alight therefrom. If that testimony shall be believed, it would not be reasonable to hold, we think, that the motorman knew, or had reason to believe, that plaintiff would ignore such admonition and persist in stepping from the car before it had stopped, particularly in view of the fact that he further testified, in effect, that he thought such admonition would be heeded. If, on the contrary, his testimony shall not be accepted as truthful, and we assume that no such admonition was given, then, as above stated, it could hardly be said that he knew or could have reasonably believed, from the fact of plaintiff's position in standing upon the steps, that she would ignore the natural precautions which she would ordinarily take for her own safety, and step from the car while it was in motion.

Moreover, under the circumstances as here shown, we are not prepared to say that merely because a passenger approaches the exit of the car and stands upon the steps, while the car is approaching a stop, that it would be prudent for a motorman, after warning said passenger not to alight until the car had stopped, to leave his post, allow his car to run uncontrolled, in possible violation of the rights of other passengers and the public using the street in the pathway of the car, in order to prevent such passenger from stepping from the car before it had stopped. For the reasons above stated we are constrained to hold

that there is not sufficient evidence to show that the motorman did know, or have reason to believe, that plaintiff was in imminent danger of being injured. Consequently the doctrine of the last clear chance did not apply.

The case of *Bisinger v. Sacramento Lodge* (Cal. Sup.) 203 Pac. 768, cited and relied upon by respondent, does not, we think, apply to the facts of this case. In that case, the application of the doctrine of the last clear chance was neither discussed nor decided. The case was decided upon the theory, as we understand it, that as a matter of law, the only negligence which proximately caused the accident was that of the defendant and that the act of the plaintiff, which appellant claimed constituted contributory negligence, was not the cause of the injury.

[3] The final contention of appellant is that the court, in giving instruction No. XI to the jury, "erroneously assumed that the car in question had come to a stop and was again started." Said instruction was as follows:

"I charge you that it was the duty of the defendant's motorman and conductor on the car to make sure by looking to see that plaintiff had alighted from the steps of the said car before they started the car, and if you find that either, or both, of them neglected to perform such duty, and that, as a consequence of such failure the plaintiff was injured without fault on her part, then your verdict must be for the plaintiff, Margaret A. Gainer."

While this instruction may be open to some criticism, a review of the same in the light of the other instructions given would indicate that the language used did not presume to predetermine the issue in this case. The clear purport of the instruction, we think, was to make clear the duty of the conductor and motorman under all such situations and then said, "if you find that either or both of them neglected to perform such duty, and that, as a consequence" thereof, the injury resulted, the finding should be for plaintiff. Not only this interpretation safeguarded the rights of appellant, but, as above stated, other instructions given were sufficiently clear to correct any assumption of a pre-determination of this issue. Several instructions were given to the effect that, if it should be the finding that the respondent stepped from the car while the same was in motion, the verdict should be for the defendant. While, as above stated, the instruction complained of may be open to some criticism, still, taking the instructions as a whole, we do not believe that defendant suffered substantial prejudice thereby.

Holding, as we do, that the giving of the instructions upon the doctrine of the last clear chance was prejudicial error, the judgment is reversed.

We concur: TYLER, P. J.; KERRIGAN, J.

58 Cal. App. 534

PEOPLE v. McCOY. (Cr. 595.)

(District Court of Appeal, Third District, California. July 17, 1922. Hearing Denied by Supreme Court Sept. 14, 1922.)

1. Criminal law §1159(4)—Truth or falsity of testimony of prosecutrix held exclusively for jury and trial court.

In a prosecution for rape, under Pen. Code, § 261, the truth or falsity of testimony of prosecutrix was exclusively for the jury and trial court.

2. Criminal law §1088(17)—Affidavits, not a part of the record, cannot be considered.

An affidavit stating that prosecutrix's testimony was false, not presented in support of any motion to the trial court, other than the request to include it in the transcript, was not properly a part of the record on appeal.

Appeal from Superior Court, Stanislaus County; J. C. Needham, Judge.

Alvin M. McCoy was convicted of rape, and from the judgment, and an order denying a new trial, he appeals. Judgment and order affirmed.

W. H. Hatton, of Modesto, for appellant.

U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

FINCH, P. J. The defendant was convicted of the crime of rape, and prosecutes this appeal from the judgment and the order denying a new trial.

The prosecutrix was 37 years old at the time of the alleged offense. She had been married twice, once in Arkansas, and once in New Mexico. Both husbands were dead. She was the mother of six children. The eldest, a son of 20 years, was married and lived in his own home. The other children lived with the prosecutrix. She and the defendant first met at Modesto in the latter part of August, 1920. They were both working in a milk condensary at that time. The prosecutrix testified that early in November the defendant proposed marriage and that she accepted; that the defendant said he desired to keep the marriage secret for business reasons, and it was therefore agreed that the marriage ceremony be performed in Berkeley; that the defendant introduced a man under the name of Williams, whom they authorized in writing to procure a marriage license for them; that on the 15th day of November, after nightfall, she and defendant motored from Modesto to a city, which the defendant said was Berkeley, where they met Williams and two other men in an office, and there went through the form of a marriage ceremony, after which she and the defendant returned to Modesto the same night; that thereafter she and the defendant maintained the relation of husband and wife, under the

belief on her part that they were legally married and that the defendant was her husband; and that she was induced to maintain such relation by the artifice of the pretended marriage which she had been induced to enter into by the defendant. A daughter and a daughter-in-law of the prosecutrix testified that the defendant stated to them, during the early part of the year 1921, that he and the prosecutrix had been married, and that he had the marriage license and certificate in his possession.

The defendant denied all of the foregoing testimony, except that as to sexual relations, which he admitted. He testified that the prosecutrix told her children and her daughter-in-law in his presence that he and the prosecutrix were married, and that he did not deny it. He testified, and the prosecutrix denied, that such relations commenced the second day after the parties became acquainted, and continued up to the middle of November, 1920. Both testified that such relations were maintained for several months after November 15th. Several witnesses testified that the defendant gave the prosecutrix checks signed by him and made payable to her as "Minnie McCoy." He denied this, but testified that he signed and gave her checks with the name of the payee left blank, knowing that she would insert the name "Minnie McCoy" as payee. In pursuance, apparently, of the plan to keep the marriage secret, the parties did not live together in the same house until February, 1921, but during that time the prosecutrix frequently spent the early part of the night with the defendant in his room, where they continued their sexual relations. In February the defendant went to live with the prosecutrix in her home with her children. He and the prosecutrix there slept in the same bed and her 3 year old girl slept with them. A few months later, after the prosecutrix had become pregnant, the defendant left her. There is other evidence tending to contradict and impeach the testimony of the prosecutrix, but the credibility and weight thereof was within the exclusive province of the jury and the trial court. Williams and the other men claimed to have been present at the pretended marriage could not be located, and the prosecutrix could not locate the office where the ceremony was performed, saying that she did not know that it was in Berkeley, but that defendant told her that it was in that city; that she had never been in Berkeley before.

The only point made by appellant, based on the record, is that the evidence is insufficient to sustain the verdict and judgment.

"Rape is an act of sexual intercourse, accomplished with a female not the wife of the perpetrator, * * * where she submits under the belief that the person committing the act

is her husband, and this belief is induced by any artifice, pretense, or concealment practiced by the accused, with intent to induce such belief." Pen. Code, § 261.

It is not contended that the facts related by the prosecutrix, if true, would not warrant defendant's conviction under this section, but that her testimony is absolutely false. Citation of authorities is not necessary to show that the truth or falsity of her testimony was exclusively for the determination of the jury and the trial court.

After judgment and notice of appeal, at the time of settlement of the transcript on appeal, counsel for appellant presented to the court the affidavit of the prosecutrix, in which she stated that all of her testimony relative to the pretended marriage was false and untrue, and asked that the affidavit be included in the transcript. The affidavit was not presented in support of any motion addressed to the trial court, other than the request to have the same included in the record on appeal. The affidavit is not properly a part of the record on appeal, and this court has no jurisdiction to consider it. If the facts therein stated are true, the remedy rests with the pardoning power. *People v. Mooney*, 176 Cal. 105, 167 Pac. 696.

The judgment and order are affirmed.

We concur: BURNETT, J.; HART, J.

(58 Cal. App. 578)

VANDERVORT v. GODFREY et al.
(Civ. 4233.)

(District Court of Appeal, First District, Division 2, California. July 19, 1922. Rehearing Denied Aug. 16, 1922. Hearing Denied by Supreme Court Sept. 14, 1922.)

1. Husband and wife ⇨131(3)—Real estate deeded to married woman deemed her separate property in absence of evidence to contrary.

Where no evidence was offered to rebut the presumption arising under Civ. Code, § 164, property conveyed to a married woman must be deemed her separate property.

2. Husband and wife ⇨119(1) — Loan by daughter to mother, with which she purchased property in her own name, held her separate property.

Where a married woman, owning as her separate property real estate in the purchase of which she had used money belonging to her daughter by a former marriage, sold the property and purchased other property, taking title in her own name in order to secure the daughter, to whom she then gave a note, the loan from the daughter, if the transaction constituted a loan, was the wife's separate property, in view of Civ. Code, § 167.

3. Husband and wife ⇨268(1)—Obligation as guardian of children by former marriage is a personal obligation.

A married woman's obligation as guardian of minor children by a former marriage for money obtained from their father's estate was a personal and not a community obligation.

4. Husband and wife ⇨118—Property held to come by descent, and hence separate property.

If a married woman, using money belonging to her children by a former marriage, was entitled to retain the share of one of the children on his death, the money came to her by descent, and was her separate property.

5. Husband and wife ⇨248½—Money acquired before coverture not community property.

Money obtained by a married woman before coverture, however obtained, was her separate property, and not community property.

6. Husband and wife ⇨131(3)—Presumption that property conveyed to wife is separate property must be overcome by convincing evidence.

The presumption, under Civ. Code, § 164, that real estate conveyed to a married woman by an instrument in writing is her separate property, prevails, unless overcome by clear and convincing proof.

7. Husband and wife ⇨249—That husband did not tell wife he was giving her property conveyed to her did not make it community property.

Where a deed was taken in the name of a wife with her husband's express consent, the fact that the husband did not tell her he was giving the property to her did not make it community property, where all the circumstances indicated an intent that the property should be her separate property.

8. Husband and wife ⇨249—Change of purpose after date of conveyance cannot affect character of property.

The character of property as separate or community property must be determined as of the date of the conveyance, and when it was then intended that it should be the wife's separate property, a subsequent change of purpose 10 years later, and when a creditor was on the point of recovering judgment against the wife, could not change its character.

Appeal from Superior Court, Riverside County; George H. Cabaniss, Judge.

Action by Clara B. Vandervort, as administratrix of J. H. Vandervort, deceased, against Emma L. Godfrey and Frank A. Godfrey, in which the first-named defendant, as administratrix of the second-named defendant, was substituted in his place. From a judgment for defendants, plaintiff appeals. Reversed.

W. T. Kendrick and J. H. Ardis, both of Los Angeles, for appellant.

Meserve & Meserve, of Los Angeles, for respondents.

NOURSE, J. Plaintiff sued in equity as a judgment creditor of the defendant Emma L. Godfrey to set aside a deed made by said defendant to her husband and codefendant herein. Plaintiff had sued the defendant Emma L. Godfrey for damages for tort resulting in the death of her husband. During the course of the trial, and on the day previous to the entry of verdict against her, the said defendant, at the request and suggestion of her counsel, and for the purpose of defeating plaintiff in the collection of the judgment which was then anticipated would be entered against her, deeded all her property over to her husband without any consideration. Plaintiff, claiming that this was a fraud upon her, as the property conveyed was all the separate property of the defendant Emma L. Godfrey, brought this action to have the deed set aside and to impress upon and enforce her lien represented by the judgment. The trial court found that the property was the community property of Emma L. Godfrey and her husband, and entered judgment in their favor.

The facts of the case material to this appeal are that prior to October 15, 1907, the defendant Emma L. Godfrey, who was then a widow, obtained from the estate of her deceased husband the sum of about \$4,500. Believing herself entitled thereto as the natural guardian of her two minor children, she thereupon appropriated and used for herself the sum of approximately \$1,500 belonging to each of said children. On the 15th of October, 1907, she married the defendant Frank A. Godfrey, and on the 10th day of December immediately following she bought in her own name the so-called Covina ranch, the purchase price of which was paid wholly from her own moneys and the moneys which she had thus appropriated as guardian of her two minor children. The title was taken in the name of the wife; it was subsequently sold, and, on January 11, 1911, with the proceeds thereof, they purchased the Corona property, which is the property in suit. For this property \$2,800 was paid as follows: \$2,000 by the delivery of a mortgage which ran to the wife alone, and which had been received by her in part payment for the Covina property; \$800 paid by check signed by the wife alone, and drawn on her individual account in bank. On January 31st immediately following this transaction the wife gave her own personal note to her daughter, acknowledging an indebtedness of \$1,500; the wife adding to the note the following:

"This money belongs to my daughter, Alice Lee Rocker, which was left her from the estate of her father, Joe Rocker, and which I have not settled with her."

Mrs. Godfrey's testimony as to these transactions is as follows:

"One-third of that belonged to my son and one-third to my daughter (\$1,500 was received

from her first husband's estate). They were minors when that estate was closed, and it went into my hands as their guardian. I never did settle with my son with reference to his share. Thinking that I had a right to, I used that money in the purchase of the Charter Oak or Covina ranch. When that ranch was sold, I took back a \$2,000 mortgage; that mortgage was used in the purchase of the Corona property. During all of that time that money was considered by me as being money which I owed to the children. *I never had settled with them at all*, and then, when I made the Corona deal, I settled with the daughter by giving her a \$1,500 note."

The daughter testified that the first time that she discussed with her mother the matter of the money due her from her father's estate was when her mother purchased the Corona property and the note was given to her. The husband testified that this money was borrowed by Mrs. Godfrey from her daughter before he and Mrs. Godfrey were married. No other witnesses were examined. So far as this testimony is concerned, the proof is that the mother appropriated to herself the funds belonging to her two minor children before she married the defendant Godfrey; that without any arrangement with either of her two children she used a portion of this money (how much does not appear) for the purchase of the Covina property, and thereafter sold this property and from the proceeds thereof, and not otherwise, purchased the property in suit; that thereafter she executed a note to her daughter, evidencing her own personal indebtedness of \$1,500, but, according to her own testimony made no settlement with her son, who was deceased some time prior to the trial of the action.

[1-4] So far as the Covina property is concerned, it appears that the title was taken in the name of the wife, and that when it was sold she took in part payment therefor a mortgage of \$2,000 in her own name. As to the Covina property, no evidence of any nature was offered to rebut the presumption arising from section 164 of the Civil Code that property conveyed to a married woman by an instrument in writing is her separate property. We must conclude, therefore, that the Covina property was the separate property of the wife. When she used the proceeds of this sale in the purchase of the Corona property, and took a deed thereto in her own name with the consent of her husband, the same presumption arose as to the title to the Corona property. To rebut this presumption the respondent relies upon the claim that the property was purchased by money borrowed by the wife during coverture; but, as we have seen, if any money was borrowed in the sense that a loan was made from the daughter, it was obtained upon the sole credit of the wife and not upon the credit of the community. As guardian

of her two minor children the wife's obligations for the money obtained from their father's estate was a personal obligation. If the minor son's share was legally retained by her after his death, it was money coming to her by descent and hence her separate property. As to the \$1,500 obtained from her daughter, it appears without any conflict that the deed and mortgage on the property were taken in the wife's name alone, for the purpose, it is said, of securing the daughter for her loan of \$1,500. Now, this can be so only upon the theory that the property was then intended to be the separate property of the wife, and that the obligation to repay her daughter was her individual obligation, and not binding upon the community. The property of the community is not liable for the contracts of the wife made after marriage, unless secured by a pledge or mortgage thereon executed by the husband. Section 167, Civ. Code. If, therefore, this property had been taken by the parties as community property, it would not have been liable for the obligation of the wife to pay to her daughter. To avoid this result, and to secure the daughter for her loan, the parties deliberately and intentionally made the property the separate property of the wife. The evidence is thus clear that the loan, if it can be called such, whereby Mrs. Godfrey obtained the money from her daughter, was made upon the mother's individual credit. The loan, therefore, became the separate property of the wife. *Flournoy v. Flournoy*, 86 Cal. 286, 293, 24 Pac. 1012, 21 Am. St. Rep. 39; *Dyment v. Nelson*, 166 Cal. 38, 40, 134 Pac. 988; *Farmers' Exch. Nat. Bank v. Drew* (Cal. App.) 192 Pac. 105, 106; *Moulton v. Moulton*, 182 Cal. 185, 189, 187 Pac. 421.

[5] This relates only to the \$1,500 obtained by Mrs. Godfrey from her daughter. As to the rest of the consideration paid for the property in suit, the case is clear. If the money of the minor son was used in its purchase, it was money obtained before coverture by Mrs. Godfrey, and did not under any line of reasoning become community property. *Lenninger v. Lenninger*, 167 Cal. 297, 305, 139 Pac. 679. In the latter case the claim was made that the wife had before her marriage entered into a business partnership with the man who subsequently became her husband; that out of said partnership she had unlawfully misappropriated funds

to her own use, which after the marriage she had employed in the purchase of a piece of property. Some time thereafter, upon the dissolution of the marriage, the husband claimed that this property was a part of the community; but the Supreme Court held that, no matter how the wife had acquired the money before marriage, it was her separate property.

[6-8] Furthermore, the presumption declared in section 164 of the Civil Code, arising from the written instrument, controls, unless overcome by clear and convincing proof. *Alferitz v. Arrivillaga*, 143 Cal. 646, 649, 77 Pac. 657. The evidence in this case is that the deed to the property in suit was taken in the name of the wife with the express consent of the husband. The only evidence offered to rebut the presumption that it was her separate property was the testimony of Mr. Godfrey to the effect that he did not tell his wife that he was giving the property to her. This may be true, and still the parties may have intended that the property should be the separate property of the wife, and all the circumstances of the case indicate that this was their intention. The property was really purchased from moneys which the wife had in hand, and the husband in fact had nothing to give. For a period of more than 10 years the deeds, the mortgages, and the bank account were all carried in the wife's name with the husband's consent. The wife had no thought of deeding the property to her husband until advised to do so by her counsel, to avoid the verdict in the action for tort. The husband had no thought that the property was anything but the separate property of the wife until counsel advised him that, because the purchase price had been borrowed after his marriage, the property belonged to the community. Thus, some 10 years after the transaction, the husband, upon advice of counsel, changed his intention as to the wife's interest in the property. The character of the property must be determined as of the date of the conveyance. If at that time the parties intended that it should be the wife's separate property, no subsequent change of purpose is material. See, generally, *Miller v. Brode*, 186 Cal. 409, 199 Pac. 531.

Judgment reversed.

We concur: LANGDON, P. J.; STURTEVANT, J.

58 Cal. App. 442

VICE et al. v. MORRIS. (Civ. 4202.)

(District Court of Appeal, First District, Division 1, California. July 3, 1922. Hearing Denied by Supreme Court Aug. 31, 1922.)

- 1. Appeal and error** ⇨193(9)—Point that complaint fails to state cause of action may be raised for first time on appeal.

Where the complaint as finally amended wholly fails to state a cause of action, this point may be raised for the first time on appeal.

- 2. Deeds** ⇨188—Complaint held to sufficiently allege lack of mental capacity.

A complaint in an action by a widow to set aside a deed made by her deceased husband, alleging that at the time of the execution of this deed grantor was possessed of insane delusions that his wife was trying to poison him and get possession of his property, and if he left his property to his minor son his widow would get it and it would be improperly managed, was sufficient, though it was not alleged that grantor was entirely without understanding.

- 3. Appeal and error** ⇨1001(1)—Verdict supported by substantial evidence not disturbed.

Where the verdict finds any substantial support in the evidence, the judgment based thereon will not be disturbed.

- 4. Deeds** ⇨211(1)—Evidence held to support verdict of lack of mental capacity.

In an action to set aside a deed on the theory of lack of mental capacity of grantor, evidence held to support a verdict setting aside the deed.

- 5. Deeds** ⇨68(1½)—To avoid, grantor need not be entirely without understanding.

To avoid a deed on the ground of insanity, the grantor need not be entirely without understanding.

- 6. Cancellation of instruments** ⇨51—Request for instruction on grantor's lack of mental capacity properly refused.

In an action to set aside a deed on the theory of grantor's lack of mental capacity, defendant's requested instruction that "prejudices, dislikes, antipathies, however ill founded, or however strongly entertained, cannot be claimed as insane delusions, nor is every delusion an insane delusion," held properly refused.

Appeal from Superior Court, Napa County; E. J. Butler, Judge.

Action by Gladys Vice, as administratrix, etc., substituted for Grace L. Clifford, deceased, and another, against Sadie L. Morris. Judgment for plaintiffs, and defendant appeals. Affirmed.

C. C. Cowgill, of Sonoma, and Percy King, Jr., of Napa, for appellant.

Wallace Rutherford, of Napa, for respondents.

KNIGHT, Justice pro tem. George B. Clifford executed two deeds, dated August 24, 1918, and November 7, 1918, respectively, purporting to convey to the defendant, Sadie L. Morris, certain real property situate in Napa county. Clifford died on June 22, 1919. This action was commenced by his surviving wife, individually and in the capacities of guardian of her son and executrix of Clifford's will, to set aside those deeds, upon the ground of the insanity of Clifford. The action was tried by the court sitting with a jury. A general verdict was rendered for the plaintiffs, and judgment entered accordingly. The defendant, Sadie L. Morris, has appealed.

Clifford, the grantor, and Grace L. Clifford, the plaintiff, were married on May 17, 1912, and there was born to them one child, Gerald B. Clifford, who, at the time of his father's death, was five years of age. Clifford and his wife lived unhappily, having separated on some five different occasions. Finally, on April 2, 1919, Mrs. Clifford, as the result of a divorce proceeding commenced by her, was granted an interlocutory judgment of divorce from Clifford, upon the ground of extreme cruelty, and was awarded the custody of the child.

Three grounds are urged by appellant for a reversal of the judgment, namely, that the amended complaint is fatally defective, insufficiency of the evidence to prove that Clifford was insane, and error in the instructions to the jury.

[1] Appellant claims that the amended complaint fails to state a cause of action, because it contains no allegation that the grantor, at the time of the execution of the deeds, was "entirely without understanding." It should be stated, however, that appellant did not demur to the complaint, and, so far as the bill of exceptions discloses, did not make any objection whatever to the admissibility of any part of the proof upon that or any other ground. It may therefore be assumed that the case was tried by the defendant upon the theory that the amended complaint was good. However, as stated by appellant, if the amended complaint wholly fails to state a cause of action, this point may be raised, even for the first time, on appeal, and we have therefore proceeded to examine the points made by appellant against the sufficiency of the amended complaint.

[2] It is alleged that for two years prior to Clifford's death he was "physically unwell and mentally incompetent; that during all of said time he brooded over his physical condition, and was possessed of many delusions." Among the delusions alleged are that his wife was untrue to him; that she was endeavoring to acquire his property and deprive him thereof; that in the event of his death his son would not be taken care of by

his wife, and that if he left his property to his son it would be improperly managed; that his wife and her family were endeavoring to poison him, in order to acquire his property. It is further alleged that, "while acting under said insane delusions hereinabove mentioned and while so mentally incompetent," etc., said deeds were executed. The above allegations, we believe, are sufficient in law to create an issue of insanity, and also to sustain the judgment as rendered, if those allegations have found support in the evidence. In the *Estate of Redfield*, 116 Cal. 637, 48 Pac. 794, it is said:

"It is commonly held that, aside from those cases of dementia where the patient has not mental power to form any conceptions, whether true or false, of the relations of things, the true test of insanity is mental delusion; that, if a person persistently believes supposed facts which have no real existence, and against all evidence and probability conducts himself upon the assumption of their existence, he is as to that belief under a morbid delusion, and delusion in that sense is insanity."

While in the *Redfield* Case, *supra*, the delusions alleged and proved were held to be insufficient to invalidate the will, because they related to subjects foreign to the testamentary act, yet it may be taken as the law of that case that, if insane delusions do relate to the persons or objects affected by the testamentary act, or if they relate to the kindred or property of the testator, or to the disposition of his property, they may be held sufficient to invalidate the testamentary act. Here the amended complaint, in effect, alleges that the deeds in question were the product of insane delusions, and it is obvious, we think, from the nature and character of the delusions alleged, relating as they do to the family and property of the grantor, that, if proved, they had a direct bearing upon the very matters and things concerning which the grantor, in the disposal of his property, should have had a sane and rational mind.

Under such circumstances, it was not essential, in our opinion, that there should have been a direct allegation that the grantor was "entirely without understanding." We do not consider any of the cases cited and relied upon by appellant (*More v. Calkins*, 85 Cal. 177, 24 Pac. 729, *Castro v. St. Geil*, 110 Cal. 292, 42 Pac. 804, 52 Am. St. Rep. 84; *Jacks v. Estee*, 139 Cal. 509, 73 Pac. 247; and *McNeese v. McNeese*, 37 Cal. App. Dec. 452¹) in point for the reason that in none of them was the question of delusory insanity involved. The distinction drawn between the two classes of cases is made apparent in *Crowther v. Rowlandson*, 27 Cal. 377.

[3] The evidence on the issue of insanity

admittedly presents a conflict, and therefore, if the verdict of the jury finds any substantial support in the evidence, the judgment based thereon will not be reversed. *Estate of Ross*, 179 Cal. 630, 178 Pac. 510.

[4] The proof offered by plaintiffs on the question of insanity extended beyond the limits of the particular delusions alleged in the complaint and tended to show general insanity. It appears from the testimony of Mrs. Clifford that Clifford's mind began to fail at the time of the birth of the child, and from that time on he seemed to grow gradually more excited and irrational. She related many incidents which occurred during their married life, which, it is claimed, tended to show insanity. In this she was corroborated by the testimony of her mother and sister. Some of those incidents were as follows: During the infancy of their child, it became necessary to have a minor operation performed upon it, and Clifford, with no apparent reason, became enraged, went out of doors, cursing the baby because it was born, packed up his things, and went away for a month; if the baby cried, he would rush into the house in a frenzy and charge his wife with attempting to kill it; that when he got angry he would tremble, his face would turn an "ashy" color, and he would pull his hair, grit his teeth, and distort his face; that he quarreled incessantly with his wife about the household affairs, including the care of the baby and its clothes, during which he would violently curse her; that on three different occasions he took a frying pan away from her in which she was frying meat and threw it into the ash can; that he would go for periods of time without speaking to her, and never wanted to see anybody else; that he would accuse her of "doping" his food, and refused to eat it; that he would very often throw away his food; that he would become angry over things which happened many years before, and would throw things from the table into the sink; that he refused to eat food which her mother had sent to her, because he said that it was poisoned, and demanded that she taste it first, and if he did not feel well he would, charge her with having made him sick and trying to get rid of him, for the purpose of trying to get his property; that on various occasions he would become enraged without any reason, and would pace up and down the floor and yell; that he said he would never leave anything to his boy, for the reason that her folks would get it, and that if he did leave property to his son that it would be improperly managed. It was further testified to by other members of the family that he would make all manner of disturbance, so that the baby could not sleep; that he would slam doors, talk as loud as he could, and walk up and down the floor; that he would "throw

¹ Rehearing granted by Supreme Court.

his lips back and show his teeth like an angry dog."

A witness named Reeves testified that at times Clifford was irrational and that he (Clifford) believed that his food was being poisoned. The notary public before whom the deeds were acknowledged testified that when Clifford acknowledged the deeds he acted in a very peculiar manner, as if he were laboring under a severe strain and did not know what he was trying to do. Four other witnesses, who were old acquaintances of Clifford, testified as to his irrationality, and in support of their opinions stated, among other things, that they had noticed a marked change in his mental condition; that he seemed to be much bothered in mind; that he failed in his physical and mental condition during the last year of his life. While all of the testimony given in support of plaintiffs' case has not, for the sake of brevity, been narrated, we believe that the foregoing statement of the evidence is sufficient to show that the verdict of the jury is amply supported.

[5] Appellant's final point concerns the instructions to the jury. In this respect it is contended that the instructions given on the question of insanity omitted the element contended for by appellant, namely, that in order "to avoid a deed on the ground of insanity the grantor must be 'entirely without understanding.'" This is substantially the same objection that was urged against the sufficiency of the amended complaint, and which, as we have already pointed out, is without merit. We, therefore, do not deem it necessary to repeat the discussion. We have examined the court's charge to the jury, and, in our opinion, the law was not only correctly stated therein, but the charge was sufficiently comprehensive to cover all of the legal points involved, including the necessary mental qualifications required by law for a person to execute a valid deed or will.

[6] The only other specific complaint made in the appellant's brief about the instructions is that the court refused to give the following instruction proposed by the appellant:

"Prejudices, dislikes, antipathies, however ill-founded, or however strongly entertained, cannot be claimed as insane delusions, nor is every delusion an insane delusion."

This is merely an excerpt from the opinion in *Estate of Kendrick*, 130 Cal. 360, 62 Pac. 605, and it omits the two sentences following said excerpt, which are essential to its meaning and understanding. In the form proposed the instruction was properly refused.

Judgment affirmed.

We concur: TYLER, P. J.; KERRIGAN, J.

PEOPLE v. HOWARD et al. (Cr. 620.)

(District Court of Appeal, Third District, California, June 28, 1922.)

1. Larceny — 68(3)—Evidence held sufficient to justify submission to the jury of guilt of garage keeper.

In a prosecution for theft of automobiles, evidence held sufficient to warrant submission to the jury of the guilt of defendant, who operated the garage where the stolen cars were found.

2. Larceny — 64(1)—Finding of stolen goods in possession of one who gives false account as to them is presumptive evidence of guilt.

Where stolen goods are, immediately or soon after being taken, found in possession of a person who gives a false account, or refuses to give any account, of the manner in which he came into possession thereof, such possession is presumptive evidence of guilt.

3. Larceny — 64(1)—Evidence held insufficient to warrant conviction of certain defendants.

In a prosecution for the theft of automobiles, evidence that certain defendants were found in the sleeping quarters over the garage where the stolen cars were found held insufficient to warrant conviction.

Appeal from Superior Court, Sacramento County; C. P. Vicini, Judge.

William Howard, Arthur Fields, Walter Corbett, and C. A. Wilkins were convicted of grand larceny, and they appeal. Affirmed as to defendant Corbett, and reversed as to the others.

William Howard, Arthur Fields, Walter Corbett, and C. A. Wilkins, (Frank C. Thomas, of Sacramento, of counsel), for appellants.

U. S. Webb, Atty. Gen., and J. Chas. Jones, Deputy Atty. Gen., for the People.

HART, J. The defendants were by information jointly charged, and thereunder tried, for the crime of grand larceny, and were convicted of the crime so charged. They and each of them appeal from the judgment of conviction and the order denying their motion for a new trial.

The defendants appeared for trial without an attorney, having previously, and at the time of their arraignment upon the charge alleged against them in the information, refused to accept the offer of the court to appoint an attorney or attorneys to conduct their defense, preferring themselves to manage the trial of their case, which they did. The ground upon which they base their claim to a reversal is that the evidence is insufficient to support the verdict, and, after a careful reading of the evidence, we have

been convinced that the point must be sustained as to three of the defendants.

The property alleged in the information to have been stolen by the defendants was a Willys-Knight touring car automobile, of the value of \$1,780, and the property of Dr. J. H. Haile, of the city of Sacramento, in which place the alleged larceny is charged to have been committed. It appears that on the night of the 16th of October, 1921, the car mentioned in the information was stolen and driven away from the garage of Dr. Haile, at 2319 N. street, in said city. The larceny was immediately, upon the discovery of the theft, reported to the police department. A few days later, the car, stripped of nearly every equipment of an automobile, except the engine, was found in a garage in the town of Florin, in the county of Sacramento. It further appears that, near the time at which the Haile car was stolen, an automobile belonging to one A. W. Clifton had been stolen from his garage at Colonial Heights, near the city of Sacramento, and that Clifton had reported the theft to the police. Clifton, on discovering his loss, proceeded to look about the immediate neighborhood for some possible clue which might lead to the discovery of the whereabouts of the car, when he found on and picked up from the street, at a distance of about 200 feet from his garage, a package of written documents, among which were some tax receipts; the latter being for the payment of taxes on the premises at 3030 First avenue, Sacramento, and in the name of "Carl Smedin." All these papers Clifton turned over to the police. The matter of the investigation of the theft was assigned to Police Officer Dill, who immediately proceeded to the premises referred to in the tax receipts. Inquiring first at a nearby corner grocery as to the identity of the owner or occupant of said premises, the officer learned that the said premises had recently been purchased by Carl Smedin, and that the latter was at that moment at or near the grocery store; the groceryman pointing him out to the officer. Smedin and a man named Boutin, then in Smedin's company, were placed under arrest, handcuffed together, and taken to the premises by the officer. Leaving Smedin and his companion, still handcuffed as indicated, on the outside of the house, the officer entered the building, went to the second story thereof, and there found the defendants asleep in one room; Wilkins and Howard lying on the floor, and Fields and Corbett together in a bed. He awoke and placed the four under arrest.

The first or ground floor of the building was used as a garage and the upper story as a sleeping room. On the first floor or the garage part of the building the officer found the Clifton car, and in the second story, in different places therein, found certain missing parts of Dr. Haile's car. These parts consisted of the battery, dashboard, four tires,

tubes, rims, carburetor, choke wire, headlights, and a new license plate, the latter bearing the number 589,319, being the number assigned to Haile's car by the state motor vehicle department. All these parts were of a Willys-Knight car, and were sufficiently identified by Dr. Haile and others well acquainted with his car as parts belonging to the automobile stolen from the doctor as above explained. Smedin was not charged with the larceny of the car or any participation therein, but testified for the people, stating that, a short time before the date of the arrest of the defendants, he rented the premises at 3030 First avenue, where the Clifton car and the automobile parts belonging to the car of Dr. Haile were found by the officer, to the defendant Corbett; that the latter stated that he desired to use the lower floor as an auto repair shop and the upper floor as a sleeping apartment. Smedin testified that Corbett said to him, at the time he leased the premises, that he (Corbett) might permit his "partners" to live "up stairs" with him, to which suggestion Smedin replied that that would make no difference to him—that Corbett might allow any person he desired to occupy the sleeping apartment with him. Smedin further stated that he knew nothing about the Clifton car, or the parts taken from the Haile car, or how or by whom they were brought to the garage.

Corbett, the only one of the defendants testifying in the case, declared that he and Smedin, a few days prior to the time that he and the other defendants were arrested, entered into a partnership for the purpose of conducting at the premises in question an auto repair shop; that Smedin was to finance the enterprise, while Corbett, who is an auto repairer by occupation, was to do the mechanical work. He testified that Smedin brought the mechanical equipments taken from the Haile car to the premises at 3030 First avenue in a truck on the Saturday preceding the arrest of the defendants, but that he did not know where or under what circumstances Smedin obtained the parts. On his cross-examination, however, it was shown, and, indeed, Corbett admitted, that at the preliminary hearing of the charge he swore that he had no connection with the premises where he and his codefendants were arrested, that he had never leased said premises, that he was stopping there only temporarily with the consent of Smedin, and most of the time while there was engaged with the latter in carrying on the nefarious business of "bootlegging," and also in seeing how much liquor he could drink. At the trial he admitted that the testimony so given by him at the preliminary examination of the charge was false, but explained that thus he told a falsehood about his connection or want of authoritative connection with the premises, because he was in fear that, if he admitted his true connection therewith, he would be

arrested and prosecuted for "bootlegging."

[1] The above involves, substantially, a statement of all the important testimony received at the trial. As to the defendant Corbett, we think the evidence sufficient to make the case one for the jury. The verdict implies that the jury found that he was, as Smedin testified, the lessee of the building in question, and as such had sole possession of it and the contents at and prior to the time at which the parts of the Haile car referred to were found in the upper story thereof.

[2] It is well settled that, while "evidence of the recent unexplained possession of stolen property, standing alone, is not sufficient to justify a verdict of guilty of larceny" (People v. Boxer, 137 Cal. 563, 564, 70 Pac. 671, 672; People v. Nichols, 39 Cal. App. 29, 34, 177 Pac. 861), yet it is equally settled that where goods have been feloniously taken, and they are immediately or soon thereafter found in the possession of a person, who gives a false account, or refuses to give any account, of the manner in which he came into possession thereof, "proof of such possession and guilty conduct is presumptive evidence * * * that he stole the goods," and, we may add, if, as perhaps was true in this case, the goods had been feloniously taken by means of a burglary such proof would also be presumptive evidence that "he made use of the means by which access to them was obtained" (People v. Lang, 142 Cal. 482, 76 Pac. 232; Davis v. People, 1 Park C. R. [N. Y.] 447; Knickerbocker v. People, 57 Barb. [N. Y.] 365; Regina v. Exall, 4 Fost. & F. 923; Walker v. Commonwealth, 28 Grat. [Va.] 969; Methard v. State, 19 Ohio St. 363; Wharton's Criminal Law, § 763 et seq.; People v. Flynn, 73 Cal. 511, 15 Pac. 102; People v. Smith, 86 Cal. 238, 24 Pac. 988). In the last-named case the court said:

"The evidence of the recent possession of the stolen property, together with the defendant's statement and the circumstances surrounding the transaction, were sufficient to warrant the jury in their verdict" of guilty.

The case made against Corbett comes squarely within the rule stated above.

[3] As to the defendants other than Corbett, we cannot find in the evidence sufficient reason for holding that they were in any measure or sense responsible for or connected with the commission of the crime charged in the information. There is absolutely no proof disclosed by the record that Fields, Howard, and Wilkins, or either of them, took any part in the stealing of the Haile car, or that they had any hand in taking the parts of the stolen car found at the premises in question. All that was shown as to those three defendants was that they were found asleep at the premises in the room in which Corbett was also at the same time found asleep, and in which the mechan-

ical equipments of the Haile car were found. This circumstance may be considered to be sufficient to justify a suspicion that they were mixed up with Corbett in the larceny of the car, but it is obviously wanting in sufficient probative effect to justify their conviction of the crime charged. They were not shown to have any interest in the premises other than as mere guests of Corbett. There is not a particle of evidence, other than the mere circumstance of their presence at the premises where parts of the stolen car were found at the time of the arrest, that they were in a prearranged criminal league with Corbett to steal automobiles or the Haile car. It certainly would involve a proposition quite perilous to the liberty of many decent and law-respecting citizens if it were true that the mere circumstance that a person may be found in the company of a person known to have committed a larceny was to be regarded as legally sufficient to establish his complicity in the commission of such crime. But that circumstance alone is not sufficient to establish guilt, and, as that is all that was shown against the three defendants we are now referring to, it is very clear that nothing approaching a legal case of guilt was made against them.

Accordingly, as to the defendant Corbett, the judgment and the order are affirmed, but, as to the defendants Fields, Howard, and Wilkins, the judgment and the order are reversed.

We concur: FINCH, P. J.; BURNETT, J.

PEOPLE v. FONG. (Cr. 621.)

(District Court of Appeal, Third District, California. Aug. 4, 1922. Hearing Denied by Supreme Court Oct. 2, 1922.)

1. Criminal law § 572—Defendant not required to establish alibi beyond reasonable doubt or by preponderance of evidence.

No burden is cast on defendant to establish his alibi beyond a reasonable doubt, or by the preponderance of the evidence, and it is sufficient to demand an acquittal if the jurors have a reasonable doubt whether at the time the offense was committed he was at some other place.

2. Criminal law § 572—Jury not confined to defendant's evidence in passing an alibi.

The jury are not confined to the consideration of the evidence for defendant in determining whether a reasonable doubt exists as to his alibi, but are in duty bound to weigh all the evidence in the case.

3. Criminal law § 1172(6)—Instruction intimating that reasonable doubt as to alibi must arise from defendant's testimony held harmless.

An instruction, intimating that a reasonable doubt as to alibi must arise from defendant's evidence, was harmless, where none of the testimony received on behalf of the people in the slightest degree supported the claim of alibi.

4. Criminal law § 1186(4)—Instruction that it was sufficient to establish alibi by preponderance of evidence, or sufficient to raise reasonable doubt, not reversible error.

Where the court charged that if the evidence to establish an alibi was sufficient to create a reasonable doubt of defendant's presence at the place where the crime was committed, or at some other place where he could not have committed it, the jury should acquit, a further instruction that defendant was not required to prove his defense of alibi beyond a reasonable doubt, but that it was sufficient if he proved it by a preponderance of the evidence or sufficiently proved it to create a reasonable doubt, though it might better have been omitted, was not reversible error in view of its alternative form and the fact that the jury was repeatedly told to acquit if there was any reasonable doubt of defendant's guilt, in view of Const. art. 6, § 4½, prohibiting new trials except where there has been a miscarriage of justice.

Appeal from Superior Court, Solano County; W. T. O'Donnell, Judge.

George Fong was convicted of an offense, and he appeals from the judgment and order denying a new trial. Affirmed.

Joseph M. Raines, of Fairfield, and Thomas J. Horan, of Vallejo, for appellant.

U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

BURNETT, J. Defendant was convicted of committing "an act of sexual intercourse with one Clara Tom, a female person under the age of eighteen years and not the wife of said George Fong," and he has appealed from the judgment and order denying his motion for a new trial.

Appellant contends for a reversal for one reason only, and that is that the court misdirected the jury as follows:

"The defendant pleads that he is guilty of the offense charged and then interposes a defense that is known in law as an alibi, that is, that he was not at the place where the crime charged is alleged to have been committed, but at another place, and I instruct you that such a defense is as proper and legitimate if proved as any other, and all the evidence bearing upon that defense should be carefully considered by the jury.

"I further instruct you that if this evidence which is for the purpose of establishing an alibi is sufficient in your minds to create a reasonable doubt whether defendant was present at the place where the crime charged is alleged to have been committed, or at some other place where he could not have committed it, then you should give the defendant the benefit of such doubt and acquit him.

"I instruct you that the defendant is not required to prove his defense of alibi beyond a reasonable doubt to entitle him to an acquittal; *it is sufficient if he prove it by a preponderance of evidence or to sufficiently prove it to create a reasonable doubt in the minds of the jury* as to his presence at the time and place when and where the crime is alleged to have been committed."

[1] Appellant objects only to the italicized portion of the instruction, and manifestly, it should have been omitted. There was, of course, no necessity for saying anything about proof "beyond a reasonable doubt" or "by preponderance of evidence," as no such burden is cast upon the defendant in his efforts to establish an "alibi." The law is well settled—and we need cite no authorities thereon—that it is sufficient to demand an acquittal if the jurors have a reasonable doubt whether the defendant at the time the offense was committed was at some other place where he could not have committed it, but it is to be observed that in this very instruction the trial court very clearly so instructed the jury. The trouble is, of course, that the concluding portion is erroneous and renders the whole instruction somewhat obscure and confusing; but we are satisfied that the error should not be considered prejudicial to defendant and fatal to the judgment.

[2, 3] As far as the intimation that the reasonable doubt as to the alibi must arise from the defendant's evidence is concerned, the error could do no harm. Manifestly, the jury were not confined to the consideration of the evidence for the defendant in determining whether a reasonable doubt existed as to the alibi, but were in duty bound to

weigh all the evidence in the case. However, there can be no pretense that any of the testimony received on behalf of the people could in the slightest degree support this claim of appellant; so that if any doubt did exist as to the alibi it would necessarily be the result of the testimony offered by appellant.

[4] But whatever criticism may be justly leveled at said instruction, it at least presents an alternative condition the existence of either of which demanded an acquittal. That is, the jury were instructed to acquit if the defendant established his defense by a preponderance of the evidence or if he created a reasonable doubt as to the alibi. Hence it would follow that if the jury had a reasonable doubt upon the subject the instruction demanded an acquittal. This is the true doctrine and what appellant contends for, and it really matters not that the instruction set forth an additional condition that would also demand an acquittal.

Moreover, if it may be said that the instruction standing alone might be considered uncertain and confusing, when the whole charge to the jury is regarded it seems apparent that there could have been no misunderstanding as to the true doctrine. The jurors were specifically, clearly, and repeatedly instructed that if there existed any reasonable doubt of the defendant's guilt it was their duty to acquit him. This was equivalent necessarily to an instruction that if they had a reasonable doubt of the alibi they must acquit, since he could not be guilty if he were at another place when the crime was committed. Among the instructions along this line given by the court was the following:

"I instruct you that the law raises no presumption whatever against the defendant, but, on the contrary, every presumption of the law is in favor of his innocence; and in order to convict him of the crime alleged in the information or any lesser offense which may be included in it, every material fact necessary to constitute such crime must be proved beyond a reasonable doubt; and if you entertain any reasonable doubt upon any single fact or element necessary to constitute the crime, it is your duty to give the defendant the benefit of such doubt and acquit him.

"A defendant in a criminal action is presumed to be innocent until the contrary is proved, and in case of a reasonable doubt whether his guilt is satisfactorily shown, he is entitled to an acquittal.

"The fact that the defendant has been arrested and charged with an offense, and an information having been filed against him, creates no presumption whatever of his guilt. It is incumbent upon the prosecution not only to overcome the presumption of the defendant's innocence, but also the defendant's guilt must be established by evidence sufficiently conclusive to exclude any reasonable supposition of his innocence. The testimony must establish affirmatively his guilt to a moral certainty and beyond a reasonable doubt; and unless the ev-

idence introduced in this case is such that it proves to your entire satisfaction and beyond a reasonable doubt that the defendant is guilty, he is entitled to an acquittal by your verdict."

Again, if we concede that the instruction was erroneous, there is no apparent reason why the case does not call for the application of section 4½, art. 6, of the Constitution. Appellant does not contend that the verdict was unjust or not supported by the evidence, nor is it at all probable that the result would have been different if the criticized instruction had not been given.

Appellant does not, indeed, set out any of the evidence in his brief, but contents himself with a somewhat fragmentary synopsis of the testimony in his behalf on the asserted alibi without even referring to the page of the transcript where the testimony might be found. We have, however, carefully examined the entire record and discovered therein abundant reason for believing that the verdict is just and should not be disturbed.

We are not unmindful of the cases cited by appellant, particularly *People v. Morris*, 3 Cal. App. 1, 84 Pac. 463, wherein a similar instruction to the one herein was condemned; but we may add that it does not appear that the cause was reversed on that ground, and, besides, it was decided before the adoption of said section 4½ of article 6 of the Constitution.

The judgment and order are affirmed.

We concur: FINCH, P. J.; HART, J.



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